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MILLER v. McKENZIE et al.

Sac. 4595.

Supreme Court of California.
Feb. 9, 1933.

1. **Bankruptcy 🔑262(3).**
On notice to lienholders, bankruptcy court may order sale of realty free from liens.

2. **Bankruptcy 🔑270.**
Collateral attack on bankruptcy trustee's sale must fail unless asserted invalidity or want of jurisdiction appears from record in bankruptcy proceeding.

3. **Quieting title 🔑44(4).**
Stipulation showing bankruptcy trustee's appointment and certified copies of trustee's deed, etc., established prima facie case in quiet title action by trustee's vendee.

4. **Bankruptcy 🔑270.**
On collateral attack on bankruptcy trustee's sale, all presumptions will be indulged favoring validity.

> Any condition of facts consistent with validity of bankruptcy proceeding will be presumed to have existed, rather than one which would defeat it.

5. **Bankruptcy 🔑270.**
Where order confirming bankruptcy trustee's sale declared that sale was regular and free from incumbrances, presumption is, on collateral attack, that creditors received due notice of sale.

6. **Bankruptcy 🔑261.**
Bankruptcy referee's notice to creditors of hearing on petition to sell realty free from incumbrances *held* not insufficient because in nature of show cause order, or because not specifically mentioning particular lien.

> Order to show cause why certain act should not be done, or certain cause pursued, is regular and approved method of giving notice of contemplated action to parties to proceedings in bankruptcy, and is the most appropriate form of notice in marshaling of liens and sale of land.

7. **Bankruptcy 🔑264.**
That order confirming bankruptcy trustee's sale omitted provision for transferring judgment lien to proceeds *held* harmless to judgment lienholder; proceeds being insufficient to pay prior liens.

8. **Bankruptcy 🔑270.**
Judgment lienholder not objecting in bankruptcy proceeding to sale of realty could not challenge validity thereof on collateral attack.

In Bank.

Appeal from Superior Court, Sierra County; J. B. Landis, Judge.

Action by W. E. Miller against Lizzie McKenzie and others. Decree for plaintiff, and defendant named appeals.

Affirmed.

E. Hendricksen, C. N. S. Bidwell, and P. H. Johnson, all of Sacramento, for appellant.

Fred P. Tuttle, Jr., of Auburn, J. M. McMahon, of Downieville, and Evan J. Hughes and Albert D. Smith, both of Sacramento, for respondent.

WASTE, Chief Justice.

[1-3] Defendant McKenzie appeals from a decree quieting plaintiff's title to certain real property. Plaintiff claims through a deed issued by the duly appointed trustee in bankruptcy of the Fred Blinman Company, which company was adjudicated a bankrupt upon its voluntary petition. The property was sold to plaintiff "free and clear" of liens and incumbrances. That a bankruptcy court, upon due notice to creditors, whose liens will be affected thereby, may so dispose of property of a bankrupt, is well established. In re Union Trust Co. (C. C. A.) 122 F. 937, 939; McRaney v. Riley, 128 Miss. 665, 91 So. 399, 400–402, 22 A. L. R. 685; Id., 260 U. S. 727, 43 S. Ct. 90, 67 L. Ed. 484; 2 Remington on Bankruptcy, §§ 1965, 1980. Appellant, a judgment lienor of the bankrupt, contends that she was not given due or proper notice of the proposed sale, and that respondent therefore took title subject to her lien. This

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🔑For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

assault upon the bankruptcy proceeding, coming as a defense to a quiet title action, is collateral in character and must therefore fail unless the asserted invalidity or want of jurisdiction is apparent upon an examination of the record in that proceeding. City of Salinas v. Lee (Cal. Sup.) 18 P.(2d) 335; Gray v. Hall, 203 Cal. 306, 313, 265 P. 246; 1 Freeman on Judgments (5th Ed.) §§ 305, 399. Such portions of the bankruptcy record as are now before us fail to disclose any such defect. Upon the trial of the present cause, the appellant stipulated to the filing of the petition in bankruptcy and to the due appointment of the trustee through whom respondent derived title. In supplement thereof, and in order to establish his unincumbered title to the property, respondent introduced in evidence certified copies of the trustee's return of sale, the petition for and confirmation of such sale, and the trustee's deed. Each of these several documents indicates that the property was sold to respondent "free and clear" of all incumbrances. Appellant failed upon the trial of the cause to overcome the prima facie case thus made out by the respondent. The defense consisted solely of appellant's testimony covering certain matters neither competent nor sufficient upon collateral attack to show any invalidity in the bankruptcy proceeding through which respondent derived an unincumbered title to the property here involved.

[4, 5] Moreover, upon collateral attack, all presumptions will be indulged in favor of the validity of the bankruptcy proceeding, and any condition of facts consistent with its validity will be presumed to have existed rather than one which will defeat it. Canadian, etc., Trust Co. v. Clarita Land & Inv. Co., 140 Cal. 672, 674, 74 P. 301. The order confirming sale declares that the property was sold to respondent "free and clear of all encumbrances * * * and that said sale *was in all respects regular and in accordance with said order of court.*" In view of this jurisdictional recital, it will be presumed upon collateral attack that due and proper notice of sale was given to lienholders and other creditors. City of Salinas v. Lee, supra; Sacramento Bank v. Montgomery, 146 Cal. 745, 750–754, 81 P. 138.

[6] However, disregarding the collateral character of the attack upon the bankrupty proceeding, and considering appellant's contentions solely on their merit, we are still of the view that judgment was properly entered quieting respondent's title. We cannot agree with the contention that appellant received no due or proper notice of the proposed sale of the bankrupt's property. When on the stand in the court below, appellant admitted having attended a meeting in the referee's office at which the property was offered for sale "free and clear" of incumbrances. Appellant testified that she attended such meeting in response to written notice given by the referee to all creditors of the bankrupt in substantially the following form: "W. A. Brandenburger, as trustee of the estate of said bankrupt, having filed herein his petition for an order of sale, *free and clear of liens and encumbrances,* of all that certain real property [describing same], You Are Hereby Notified that [at a designated time and place] I will hear the said petition to sell said property free and clear of liens and encumbrances or subject to liens or encumbrances, as may seem meet and proper, and for the best interest of the said bankrupt, and you may appear and show cause, if any you have, why such action should not be taken."

It is appellant's position that the foregoing notice, being in the nature of an order to show cause, was insufficient to authorize a sale of the property, free and clear of her judgment lien. The point is without merit. There is no established form for such a notice. An "order to show cause" why a certain act should not be done, or a certain course pursued, is the regular and approved method of giving notice of contemplated action to parties to proceedings in bankruptcy. Kuntz v. Young (C. C. A.) 131 F. 719, 722. It is the most appropriate form of notice in the marshaling of liens and the sale of land. 2 Remington on Bankruptcy, § 1982.

Nor was it essential that the notice of sale single out appellant's lien and specifically declare that the sale was to be made "free and clear" of such lien. Appellant's authorities do not require a notice in such form. As phrased, the notice here given was sufficiently comprehensive to cover all liens and incumbrances against the property, including appellant's.

[7] The asserted failure of the order confirming sale to provide for a transfer of appellant's lien to the proceeds of the sale, assuming the necessity for such a provision, worked no hardship on the appellant for the reason that the proceeds of the sale were insufficient to pay off and discharge two liens admittedly prior in time and superior in right to the appellant's lien.

[8] In conclusion, it should be added that the evidence now before us clearly shows that at no time during the meeting in the referee's office, at which meeting appellant was personally present and at which the property was offered for sale "free and clear" of liens and incumbrances, did the appellant urge any objection to a sale in that form. Having been duly notified that the sale was to be "free and clear" of incumbrances, and thus having been afforded due opportunity to protect her interests, but having failed to take any steps in the bankruptcy proceeding to forestall or preclude such sale, it is now too

late for the appellant, upon collateral attack, to successfully challenge the validity thereof.

We have examined the authorities cited by appellant. They contain nothing opposed to the conclusion herein reached.

For the foregoing reasons, the judgment is affirmed.

We concur: PRESTON, J.; CURTIS, J.; LANGDON, J.; SHENK, J.; SEAWELL, J.; THOMPSON, J.

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217 Cal. 406

REITZ v. WOLLWERT et ux.

Sac. 4596.

Supreme Court of California.

Feb. 14, 1933.

1. Injunction ⚷46.

Injunction against defendants' interference with plaintiff's rights of ownership in apartment building and against defendants' occupancy thereof *held* proper under circumstances, there being no adequate remedy at law.

> Facts disclosed that defendants, one of whom was daughter of plaintiff's sister and the other such daughter's husband, claimed to be occupying the mother's rooms in apartment house, title to which had been adjudged to be in plaintiff in another action, and they refused to pay any rent for premises and collected rent from tenants. Under circumstances, injunction was warranted, notwithstanding complaint did not designate defendants as trespassers, since it showed clearly that such was their status, and notwithstanding they committed no injury nor waste in view of their continued interference with all rights of ownership of plaintiff which could not be remedied by future monetary award.

2. Abatement and revival ⚷9.

Pendency of action against plaintiff by grantor's guardian ad litem to secure cancellation of deed did not preclude plaintiff from suing such guardian individually and her husband for injunction and damages, since they were not parties to other action.

In Bank.

Appeal from Superior Court, Glenn County; R. M. Rankin, Judge.

Action by John Reitz against Cornelius Wollwert and wife. Judgment for plaintiff, and defendants appeal.

Affirmed.

W. T. Belieu, of Willows, and A. C. Huston, of Woodland, for appellants.

George R. Freeman, of Willows, for respondent.

PRESTON, Justice.

This appeal by defendant from judgment for plaintiff is without merit, and may be disposed of with brevity.

Plaintiff, John Reitz, and one Mary Wilmes, both in the neighborhood of eighty years of age, are brother and sister. Defendant Katharine Wollwert is the daughter of Mary Wilmes, and her husband is codefendant. This cause arises from a family dispute respecting certain apartment house property at Willows, title to which has been thoroughly litigated in the recent case of Wilmes v. Reitz wherein the judgment for defendant (plaintiff here) has now been affirmed by this court, Wilmes v. Reitz (Cal. Sup.) 11 P.(2d) 379.

On February 9, 1931, plaintiff instituted this action, alleging that he owned said property; that in 1922 he brought his sister from the East to reside with him; that thereafter he cared for her, and she assisted him in the operation of said apartment house, and he placed the title thereto in her name to be held in trust for him; that their relations were happy; that, however, in 1930 defendants visited Willows, and soon thereafter defendant daughter attempted to obtain the title to said property, whereupon, at the request of plaintiff, his sister reconveyed it to him, despite all efforts on the part of defendants to dissuade her from so doing; that thereafter defendant daughter, having secured the appointment of herself as guardian ad litem because of the alleged incompetency of her mother, brought the action above referred to (Wilmes v. Reitz, supra), for the purpose of having said reconveyance set aside upon grounds of fraud; that judgment in said action was rendered for defendant (plaintiff here); that, from the time of commencement thereof, these defendants, without plaintiff's consent and against his will, resided in said apartment house, paying no rent, and prevented him from having any social intercourse with his sister; that defendant daughter interfered with the tenants and collected rentals from them, and otherwise obstructed the free use of his property by plaintiff; that he demanded that defendants leave and account for rentals so collected by them, but they refused to do so; that plaintiff is a frail man, now eighty years of age, and unable to use insufficient force to eject defendants; that he feared the publicity and annoyance which would attend a breach of the peace, and had no plain, speedy, or adequate remedy at law; that defendants' operations were willful, malicious, and with evil motive, causing plaintiff great anguish, to his damage in the sum of $1,000, and their continuance of occupation would cause him further damage which would be irreparable, wherefore plaintiff prayed for $1,000 damages; for exemplary damages; for an injunction restraining defendants from occupying any of the rooms of said building; and for other and further relief.

On February 9, 1931, the court issued a temporary restraining order, enjoining defendants from interfering with plaintiff's occupancy and full and unobstructed use of the property. Thereafter a general demurrer to the complaint was overruled, and further proceedings had, and defendants filed their answer, wherein they denied numerous allegations of the complaint, and affirmatively alleged the facts of the previous action and pendency of the appeal therein, to be in good faith prosecuted to final judgment, and that defendant daughter was occupying and possessing said property peaceably and was committing no waste or other damage thereto. The cause later came to trial, and the court made findings which declare that substantially all of the allegations of the complaint are true. Judgment accordingly went for plaintiff, making permanent said temporary injunction, and further awarding him $500 damages. Defendants appealed.

The several contentions made by appellants all relate to the main issue of whether the complaint stated facts sufficient to constitute a cause of action for equitable relief or whether respondent had an ample remedy at law. Unquestionably the evidence adduced supports the findings in every particular and shows that defendants collected many dollars in rentals and otherwise interfered with respondent's ownership of the property as alleged in his complaint.

[1, 2] We fail to see why injunctive relief was not warranted. It is true that the complaint did not designate appellants in so many words as trespassers upon the property, but it showed clearly that such was their status. The fact that they committed no injury or waste to the land is immaterial, in view of their continued interference with all of the rights of ownership of respondent, which could not be remedied by a future monetary award. Neither could respondent have secured adequate relief through ejectment proceedings as appellants were at no time in possession of the property. They claimed merely to be occupying the rooms of the mother, and respondent had no desire to remove her from the building. Appellants were not tenants against whom respondent could have invoked forcible or unlawful detainer statutes. The pendency of the prior action (Wilmes v. Reitz, supra) and the appeal therein did not preclude respondent from seeking the relief here afforded him, as appellants here were not parties to that action. Appellant Katharine Wollwert appeared therein, not in her individual capacity, but merely as guardian ad litem of her mother.

In short, we have reviewed all of the several claims advanced by appellants, and see no reason whatsoever for disturbing the action of the court below.

The judgment is affirmed.

We concur: WASTE, C. J.; TYLER, Justice pro tem.; LANGDON, J.; CURTIS, J.; SHENK, J.; SEAWELL, J.

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217 Cal. 400

In re HERRON.

Misc. 1197.

Supreme Court of California.

Feb. 14, 1933.

1. Attorney and client 🔑39.

Supreme Court must disbar attorney convicted of misdemeanor involving moral turpitude, if conviction has become final and has not been set aside (Code Civ. Proc. §§ 287, 299).

2. Criminal law 🔑1001.

Probation statute applies to municipal courts (Pen. Code, § 1203).

3. Criminal law 🔑1001.

Petit theft is offense conferring discretion on trial court as to extent of punishment within probation statute (Pen. Code, §§ 490, 1203).

4. Criminal law 🔑1001.

Municipal court order, suspending sentence for petit theft without time limitation, *held* equivalent of order granting probation for maximum period of punishment (Pen. Code, §§ 490, 1203).

5. Criminal law 🔑1001.

Court's failure to direct that one whose sentence is suspended be placed under probation officer's control and supervision does not invalidate order suspending sentence (Pen. Code, § 1203, subd. 1).

6. Criminal law 🔑998.

Municipal court may set aside conviction at any time within six months after expiration of maximum period of punishment (Pen. Code, § 1203, subd. 4).

7. Criminal law 🔑998.

Order vacating order setting aside conviction within six months after expiration of maximum period of punishment *held* void, especially in absence of notice to person convicted (Pen. Code, § 1203, subd. 4).

8. Attorney and client 🔑39.

Proceeding to disbar attorney after his conviction of misdemeanor involving moral turpitude was set aside by municipal court must be dismissed (Code Civ. Proc. §§ 287, 299).

In Bank.

In the matter of the disbarment of William F. Herron, an attorney at law.

Order to show cause why respondent should not be disbarred discharged, and proceeding dismissed.

See, also, 212 Cal. 196, 298 P. 474.

Edwin V. McKenzie and Harry A. McKenzie, both of San Francisco, for respondent.

WASTE, Chief Justice.

William F. Herron is an attorney at law, duly admitted to practice in all the courts of this state. The State Bar of California, through its board of governors, filed in this court a certified copy of a judgment of the municipal court of the city and county of San Francisco, from which it appeared that said William F. Herron was, on the 20th day of July, 1931, convicted in that court of the crime of petit theft, a misdemeanor involving moral turpitude. By the terms of this judgment, it was ordered "that as a punishment therefor the said defendant be imprisoned in the county jail of the City and County of San Francisco, State of California, for the period of thirty days. Sentence suspended."

No appeal was taken from this judgment, but, on February 25, 1932, more than seven months thereafter, an ex parte order was made by the same judge that had imposed sentence, to the effect that the judgment be "vacated and set aside, and the above entitled action is hereby dismissed." Subsequently, and on March 22, 1932, another order was made by the same judge, in which, after reciting the judgment of conviction against the defendant, and after reciting that the sentence and suspension had expired on the 19th day of August, 1931, and after referring to the making of the order of February 25, 1932, setting aside, vacating, and dismissing the judgment of conviction, it is stated:

"That the same was inadvertently made after the court had lost jurisdiction thereof, and good cause otherwise appearing therefor,

"It Is Hereby Ordered that the order setting aside said judgment of conviction be, and the same is hereby recalled, vacated and set aside."

[1] If the conviction has become final and has not been set aside, this court, under sections 287 and 299 of the Code of Civil Procedure, has no election, but must disbar respondent. See, generally, In re Jacobsen, 202 Cal. 289, 260 P. 294.

On the record thus presented, this court issued its order directing the respondent to show cause why his name should not be stricken from the roll of attorneys and counselors at law of this court, and he be precluded from practicing in this state; and, at the same time, there were submitted to the respondent and to the state bar the following questions: What effect, if any, had the original order suspending sentence of the municipal court; what effect, if any, had the second order setting aside the purported conviction and dismissing the action, made after the expiration of six months; and what was the effect, if any, of the final order made in the lower court purporting to vacate and set aside the previous order setting aside the conviction and dismissing the action?

Briefly, it is the contention of the respondent that the order suspending sentence in his case must be regarded as a probationary order. While it is outside the record in this case, it is stated by the respondent in his points and authorities, and not denied by the state bar, that the money involved in the transaction, upon which the prosecution was based, was actually paid by him to the probation officer. Respondent further contends that the order suspending sentence, being unlimited as to time, must be construed, under section 1203 of the Penal Code as an order suspending sentence (or placing him on probation), for the maximum possible term of sentence for the crime committed, which, in the instant case, was six months. He therefore argues that the probationary period expired on or about January 19, 1932. Based on this premise, it is contended that, having fulfilled the conditions of his probation, the trial court, under section 1203, supra, had the power to set the verdict aside and dismiss the action at any time within six months after the termination of the probationary period, which it did on February 25, 1932. It is further contended that the order of March 22, 1932, purporting to reinstate the conviction, was null and void.

We are of the opinion that the contentions of respondent must be sustained.

[2] The state bar contends that the original order of July 20, 1931, suspending sentence (which had the effect, as will later be shown, of placing respondent on probation) was ineffectual, for the reason that the municipal court has no power to grant probation. The probation statute in this state is found in section 1203 of the Penal Code. The language used is so broad as to leave no doubt of its applicability to municipal courts. So far as pertinent here, it provides: "After the conviction by plea or verdict of guilty of a public offense in cases where discretion is conferred on the court or any board or commission or other authority as to the extent of the punishment the court, upon application of the de-

fendant or of the people or upon its own motion, may summarily deny probation, or at a time fixed may hear and determine in the presence of the defendant the matter of probation of the defendant and the conditions of such probation, if granted."

[3] In the instant case, there can be no doubt that the offense of which respondent was convicted (petit theft) is one conferring discretion on the trial court as to the extent of the punishment. (See section 490 of the Penal Code.) The expression "court" and the expression "or other authority" used in the section very clearly evidence the legislative intent to have the provisions of the section apply to all courts, including municipal courts. Any other construction would result in the anomaly that the Superior Courts could grant probation in crimes where the punishment might be life imprisonment, while the municipal courts, with their enlarged jurisdiction, could not grant probation in any case. Such a result is utterly at variance with the obvious intention of the Legislature.

[4, 5] Turning to the main point involved, that is, the legal effect of the order of July 20, 1931, suspending sentence, it is our opinion that such order was the equivalent of an order granting probation for the maximum period of punishment, that is, for six months. It is true that, under the provisions of section 1203, subdivision 1, of the Penal Code, the trial court should have formally directed that respondent be placed under the control and supervision of the probation officer, and that that was not done in this case, but it is now well settled law that failure so to provide in no way invalidates the order suspending sentence. It is equally well settled that such an order is the equivalent of a formal order placing the defendant on probation.

The leading case is In re Giannini, 18 Cal. App. 166, 122 P. 831, a case involving several of the points here presented. In that case, Giannini pleaded guilty to a misdemeanor carrying a maximum punishment of six months in the county jail. The trial court ordered him imprisoned for ninety days, and then provided that "this latter sentence is suspended during the good behavior of defendant." The appellate court held that, although the trial court had failed to direct that defendant be placed under the supervision of the probation officer, as provided in section 1203, supra, the order suspending sentence was not void, but was tantamount to placing the defendant on probation. The court further held that, although the sentence was fixed at ninety days, the order suspending sentence, being unlimited as to time, as in the instant case, was the equivalent of placing defendant on probation for the maximum possible sentence for the offense; namely, six months. See, also, In re Young, 121 Cal. App. 711, 10 P.(2d) 154; Ex parte Slattery, 163 Cal. 176, 124 P. 856.

Applying the principles enunciated in the above cases to the case now under consideration, the order of July 20, 1931, suspending sentence, must be interpreted as an order placing respondent on probation for six months. The probationary period expired January 19, 1932.

[6] The next question presented is the legal effect of the order of February 25, 1932, setting aside the conviction and dismissing the action. It is to be noted that this order was made about one month after the probationary period of six months had expired. This presents the question: Can the trial court, after the maximum period fixed by law for the punishment of a public offense has expired, set aside the conviction and dismiss the action?

The proper answer to this question is found in subdivision 4 of section 1203, which expressly confers that power on the trial court. So far as pertinent here, it provides: "Every defendant who has fulfilled the conditions of his probation for the entire period thereof, or who shall have been discharged from probation prior to the termination of the period thereof, shall at any time prior to the expiration of the maximum period of punishment for the offense of which he has been convicted, dating from said discharge from probation of [or?] said termination of said period of probation, be permitted by the court to withdraw his plea of guilty and enter a plea of not guilty; or if he has been convicted after a plea of not guilty, the court shall set aside the verdict of guilty; and in either case the court shall thereupon dismiss the accusation or information against such defendant, who shall thereafter be released from all penalties and disabilities resulting from the offense or crime of which he has been convicted."

Under this provision, the trial court had the power at any time within six months from January 19, 1932, to set aside the conviction and dismiss the action, thereby releasing the defendant from all penalties and disabilities resulting from the conviction. This the trial court did on February 25, 1932. That order was clearly within the power and jurisdiction of the trial court.

[7] The order of March 22, 1932, purporting to vacate the order of February 25, 1932, was of no legal effect, because it was based on the false premise that the order of February 25, 1932, was without the court's jurisdiction. The state bar concedes that the March 22d order "was unnecessary and ineffectual except in so far as it corrected the record." The March 22, 1932, order was likewise null and void, for the reason that it was admittedly made without notice to respondent. A substantial right of the respondent being involved, he was entitled to notice and hearing.

[8] For the foregoing reasons, it is apparent

that all the disabilities resulting from the conviction of respondent of a misdemeanor involving moral turpitude have been duly and properly removed.

It is therefore ordered that the order to show cause heretofore issued be discharged, and this proceeding dismissed.

We concur: LANGDON, J.; PRESTON, J.; CURTIS, J.; SHENK, J.; SEAWELL, J.

129 Cal.App. 644

Mae J. McGUIRE, Plaintiff and Appellant, v. Frank H. McGUIRE, Defendant and Respondent.

Frank H. McGUIRE, Cross-Complainant and Respondent, v. Mae J. McGUIRE, Cross-Defendant and Appellant.

Civ. 8884.

District Court of Appeal, Second District, Division 1, California.

Feb. 16, 1933.

Motion to dismiss appeal by plaintiff from a judgment of the Superior Court of Los Angeles County; O. K. Morton, Judge, in an action for divorce. Motion granted; appeal dismissed.

Roy Maggart, Allen Miller, and Alfred Jay Luke, all of Los Angeles, for appellant.

Bailie, Turner & Lake and Richard A. Turner, all of Los Angeles, for respondent.

HOUSER, Justice.

On presentation of a motion by respondent to dismiss the appeal from the judgment, because of the failure of appellant to file transcript within the time prescribed by statute and the rules of this court, as well for the reason that appellant heretofore has accepted payment of a portion of the benefits awarded to her by the judgment—it appearing to the satisfaction of this court that the said ultimate facts are fully supported by affidavits on behalf of respondent, and which facts are not controverted by affidavit or otherwise by appellant, it is ordered that said motion be, and it is, granted; and, in accordance therewith, that said appeal be, and it is, dismissed. See rules I, V, VI, and XI of this court; sections 650, 659, 939 and 953a, Code Civ. Proc.; People v. Lambert, 96 Cal. App. 381, 382, 274 P. 401; Coats v. Coats, 146 Cal. 443, 444, 80 P. 694. Also, Storke v. Storke, 132 Cal. 349, 353, 64 P. 578; People v. Burns, 78 Cal. 645, 646, 21 P. 540; In re Baby, 87 Cal. 200, 202, 25 P. 405, 22 Am. St. Rep. 239; Estate of Shaver, 131 Cal. 219, 63 P. 340.

We concur: CONREY, P. J.; YORK, J.

129 Cal.App. 579

BERNHARDY v. MARIAN REALTY CO., Limited.

Civ. 8515.

District Court of Appeal, First District, Division 2, California.

Feb. 11, 1933.

Hearing Denied by Supreme Court April 11, 1933.

1. Landlord and tenant 🔑169(3).

In action by tenant of furnished apartment for personal injuries sustained when rug slipped on polished floor, causing her to fall, complaint *held* demurrable.

2. Landlord and tenant 🔑164(7).

Tenant alleging concealed defect in furnished apartment was bound to make ordinary examination of apartment and furnishings.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Myrtle Bernhardy against the Marian Realty Company, Limited. From a judgment in favor of defendant, plaintiff appeals.

Affirmed.

Ford & Johnson, of San Francisco, for appellant.

Hadsell, Sweet & Ingalls, of San Francisco, for respondent.

STURTEVANT, Justice.

To the plaintiff's second amended complaint, the demurrer of the defendants was sustained. The plaintiff failed to amend, and a judgment was entered against her, from which she has appealed and has brought up a transcript containing the judgment roll.

[1] She contends that the demurrer should not have been sustained. The defendants reply that the demurrer was properly sustained on at least two grounds. In the demurrer it was alleged that the second amended complaint failed to state a cause of action; and that by appropriate averments the demurrer alleged that the second amended complaint was uncertain, ambiguous, and unintelligible because it could not be ascertained therefrom how or in what manner the defendants retain-

ed sole control and management of the apartment and of furnishings therein if the apartment was rented to the plaintiff, nor could it be ascertained therefrom how or in what manner the alleged defect or unsafe condition was concealed from the plaintiff. In the first paragraph the corporate capacity of the defendants is alleged. In the third paragraph it is alleged as follows:

"That on the 8th day of January, 1930, and for some time prior thereto, defendants herein and each of them owned, operated and controlled a certain building located at and known and designated as 501 Taylor Street in the City and County of San Francisco, which said building contained several furnished dwelling apartments, which said defendants herein rented and leased to the public; that on or about the 1st day of January, 1930, plaintiff herein entered into an oral agreement with defendants herein, and each of them, whereby she rented and leased a furnished apartment, known and designated as Apartment 210, as a monthly tenant; that at all said times herein mentioned said Apartment 210, together with its furnishings, was under the sole control and management of defendants herein, and each of them; that at all of the times herein mentioned said defendants herein, and each of them, represented to this plaintiff that said premises and appurtenances thereto were in the state of good repair and condition and free from any defect, and that the rugs therein were equipped and maintained in a manner to prevent the same from slipping on the polished floor, whereas in truth and in fact during all of the time herein mentioned, and for some time prior thereto said premises were in a defective and unsafe condition, all of which at said times was known to the defendants, and each of them, and concealed by them from the plaintiff; that relying upon said representations plaintiff herein entered into the tenancy and occupation of said premises as aforesaid.

"That on the 8th day of January, 1930, during the term of said tenancy while plaintiff herein was walking over and along a certain carpet and/or rug which was part of the furnishings provided by these defendants, and each of them, and which was located on the highly polished floor in the entrance hall of said Apartment 210, said rug slipped and/or slid over and along said floor, thereby causing this plaintiff to fall upon said floor; that the direct proximate cause of the slipping and/or sliding of said rug was the carelessness and negligence of defendants herein, and each of them, in the management and control of said apartment and its furnishings, in that said defendants carelessly and negligently failed and neglected to equip and maintain said rug in such a manner as to prevent its slipping and sliding upon said highly polished floor * * *."

[2] It is not alleged that in the ordinary care and management of apartment houses rugs are equipped or maintained in such a manner as to prevent them slipping and/or sliding upon highly polished floors; nor is there any allegation that it is customary and usual to so equip such rugs. No other attack is made showing or tending to show that apartment 210 was not in good repair and condition, nor that any other alleged defect existed therein. In no place is it alleged that if the rugs were not so equipped the plaintiff did not know the fact. While there is an attempt to allege that the defendants concealed the fact that the rugs were not equipped and maintained in a manner to prevent them from slipping, no fact or facts are stated showing how or in what manner the defendants concealed the fact. 12 R. C. L. 306; Bell v. Ellis, 33 Cal. 620, 630. There is no allegation that the plaintiff made an ordinary examination of the apartment or of its furnishings although she was bound to do so. 12 Cal. Jur. 756; Toner v. Meussdorffer, 123 Cal. 462, 465, 56 P. 39.

The plaintiff relies on Daley v. Quick, 99 Cal. 179, 33 P. 859. She quotes from pages 182 and 183 of 99 Cal., 33 P. 859, 861: "A lessor of such property would be liable for injuries resulting from *defects* in the premises *known to him* and *unknown to the lessee*, because arising from some cause *not extraneous*, if he allowed the lessee to occupy the premises in ignorance of the risks." The defendants do not question the soundness of the doctrine so stated which has become a part of the jurisprudence of this state. 15 Cal. Jur. 705. But, applying the rule to the pleading before us, it will be noted that the complaint does not allege a defect; it does not allege that the plaintiff did not know the conditions; and it does not allege any facts showing that the make-up of the rugs was "not extraneous."

It follows that the demurrer was properly sustained.

The judgment is affirmed.

We concur: **SPENCE**, Acting P. J.; **GOODELL**, Justice pro tem.

129 Cal.App. 438

BURTON v. UNION OIL CO. OF CALIFORNIA.

Civ. 7306.

District Court of Appeal, Second District, Division 2, California.

Feb. 3, 1933.

Master and servant 🔑396.

Court was without jurisdiction of employee's action for injuries sustained by breaking of emery wheel while employee in line of his duty was sharpening tools, since Industrial Accident Commission had exclusive jurisdiction of employee's claim (St. 1917, p. 831, as amended).

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action by W. H. Burton against Union Oil Company of California. From judgment dismissing plaintiff's complaint on demurrer without leave to amend, plaintiff appeals.

Affirmed.

H. M. Mayes, of North Hollywood, for appellant.

Paul M. Gregg, Jerry H. Powell, and Hubert C. Ferry, all of Los Angeles, for respondent.

WORKS, Presiding Justice.

This is an action for damages for personal injuries. Demurrer to the complaint was sustained without leave to amend and judgment accordingly went for defendant. Plaintiff appeals.

The complaint alleged, in effect, that appellant was an employee of respondent, charged with the duty of operating an emery wheel for the purpose of sharpening tools; that while appellant was engaged in the performance of this duty the revolving wheel, then being defective and unsafe, "flew into pieces and parts"; the pieces striking appellant in the face and inflicting certain specified injuries, whereby appellant was damaged in a specified amount. The demurrer was interposed upon the ground, among others, that the court had no jurisdiction of the subject-matter of the action. It was properly sustained without leave to amend. It is well settled that pursuant to the terms of the Workmen's Compensation Act (St. 1917, p. 831, as amended) the Industrial Accident Commission has exclusive jurisdiction of such claims as that presented by the complaint. It is plain that appellant, an employee, was injured as the result of an accident arising out of and in the course of his employment.

Judgment affirmed.

We concur: CRAIG, J.; STEPHENS, J.

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129 Cal.App. 613

In re CALDWELL'S ESTATE.

BROWN v. ALLEN.

Civ. 8630.

District Court of Appeal, Second District, Division 2, California.

Feb. 15, 1933.

Husband and wife 🔑279(4).

Contract of spouses settling property interests, whereby husband agreed to pay wife monthly sum for benefit of child during minority or until earlier marriage, did not abate upon death of subsequently divorced husband.

Appeal from Superior Court, Los Angeles County; Walter J. Desmond, Judge.

In the matter of the estate of John Caldwell, deceased. Suit by Theresa M. Caldwell Allen against H. T. Brown, executor, on a rejected claim. From judgment for claimant, the executor appeals.

Affirmed.

F. D. Catlin, of Los Angeles, for appellant.

Frank G. Howe, of Los Angeles, for respondent.

STEPHENS, Justice.

John and Theresa M. Caldwell were husband and wife and the parents of Gladys Anna Caldwell. While divorce proceedings were pending the spouses entered into a property agreement purporting to settle all matters between them but the legal knot of matrimony. The agreement provided that $100 per month should be paid Theresa for the benefit of Gladys Anna during her minority, but in any case not after Gladys Anna's marriage. The agreement contained the following provision: "Said agreement is executed in triplicate, one thereof to be filed in said action now pending for the approval of the Court, and it is agreed that the provisions hereof be incorporated in whatever decree is rendered in said action and the same enforced by said decree." The divorce was granted, but this agreement was never presented to the court and no order respecting property or support of the child was made. The agreement, however, has been executed in every respect and the $100 per month paid up to and including March 1, 1931. John died fourteen days thereafter, leaving a will in which all of his property was willed to his then wife, he having remarried. He mentioned the daughter, leaving her one dollar.

Theresa, as a party to the said agreement, filed a claim for $5,800 against the estate, that being the sum the $100 monthly payments would amount to up to Gladys Anna's majority. The claim was rejected and upon suit therefor this claim was approved. That is, the total for the unpaid and accrued monthly payments was ordered paid and the $100 payments to continue according to the terms of agreement.

The only serious contention of the executor of the will, who is appealing, is that the referred-to agreement abated with the death of John Caldwell.

We do not agree with appellant. This agreement was a binding executed contract between the parties. They settled their property interests upon a basis agreeable to both. It was right and proper that their minor daughter should have their consideration, and it was determined that the mother should care for her and the father assume an obligation to furnish the mother $100 per month for the child's maintenance and support until she married or became of age, not until he died. This bears no relation to alimony and is to be construed according to the ordinary rules of contracts. In our opinion it continued to be a legal charge against the estate the same as any other unfulfilled contractual obligation of decedent's at the time of death. The matter of having the agreement incorporated in the divorce decree would affect the manner of enforcement only. It certainly could not be maintained that this obligation would cease upon a dismissal of the divorce case after the property readjustment had been made. The effectiveness of this contract would not be changed in any manner by any action relating to the divorce unless the court should have ordered a greater protection for the child's care and maintenance. But this point is not in the case. The opinion in Newman v. Burwell (Cal. Sup.) 15 P.(2d) 511, cites pertinent authorities and covers the basic principles involved in this case.

Judgment affirmed.

We concur: WORKS, P. J.; ARCHBALD, Justice pro tem.

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129 Cal.App. 273

BOBO v. NORTHWESTERN PAC. R. CO.

Civ. 8209.

District Court of Appeal, First District, Division 1, California.

Jan. 27, 1933.

Rehearing Denied Feb. 25, 1933.

Hearing Denied by Supreme Court March 27, 1933.

1. Commerce 🔑8(6).
Courts 🔑97(5).

State laws regarding employers' liability to employees in interstate transportation were superseded by Federal Employers' Liability Act, and decisions of federal Supreme Court control in determining issue of negligence where act governs (Federal Employers' Liability Act, 45 USCA §§ 51–59).

2. Master and servant 🔑204(1).

Under federal act, defense of assumption of risk remains as at common law, except where common carrier's violation of statute enacted for employees' safety contributed to employee's injury or death (Federal Employers' Liability Act, 45 USCA §§ 51–59).

3. Courts 🔑97(5).

Decisions of federal Supreme Court control on question whether employee assumed risk (Federal Employers' Liability Act, 45 USCA §§ 51–59).

4. Pleading 🔑427.

Where question of employee's assumption of risk was presented to jury by plaintiff's instruction, objection that issue was not within pleadings was waived (Federal Employers' Liability Act, 45 USCA §§ 51–59).

5. Master and servant 🔑276(2).

Evidence in suits under federal act must reasonably support conclusion that injury was proximately caused by employer's negligence, and, whenever circumstantial evidence is relied upon to prove the fact, circumstances must be proved and not themselves presumed (Federal Employers' Liability Act, 45 USCA §§ 51–59).

6. Master and servant 🔑286(1).

Whether uncertainty regarding existence of negligence under Federal Act arises from conflicting testimony or because, facts being undisputed, fair-minded men might honestly draw different conclusions, question is for jury (Federal Employers' Liability Act, 45 USCA §§ 51–59).

7. Master and servant 🔑286(3).

Whether railroad's maintaining of worn metal stairway guarded with inadequate railings, resulting in drawbridge tender's falling into water during nighttime causing death, constituted negligence *held* for jury (Federal Employers' Liability Act, 45 USCA §§ 51–59).

8. Master and servant 🔑276(3).

Evidence sustained finding that drawbridge tender fell on slippery metal stairway and body passed underneath stair railing into water causing death (Federal Employers' Liability Act, 45 USCA §§ 51–59).

9. Master and servant 🔑204(1).

Drawbridge tender never ascending stairway during daytime and unaware of conditions making structure dangerous did not assume risk of falling through railing, which caused his death (Federal Employers' Liability Act, 45 USCA §§ 51–59).

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Action by Josephine Bobo, as administratrix of the estate of Perry E. Bobo, deceased, against the Northwestern Pacific Railroad Company. From a judgment for plaintiff, defendant appeals.

Affirmed.

Orrick, Palmer & Dahlquist, of San Francisco, for appellant.

Robert D. Duke and Laurence A. Cowen, both of San Francisco, for respondent.

PER CURIAM.

An action by Josephine Bobo, as administratrix of the estate of Perry E. Bobo, deceased, to recover damages from defendant corporation on account of the death of decedent. At the time of his death decedent was employed by defendant as a bridge tender on a drawbridge operated by it over and across Petaluma creek in Marin county.

Plaintiff alleged that decedent, in the performance of his duties, slipped and fell from the steps leading to the top of the drawbridge, and was precipitated into the waters of the creek, causing his death; that defendant negligently failed to provide decedent with a safe place to work, in that the steps were constructed and maintained in a manner which rendered them unsafe, namely, that it failed to install proper guard rails thereon and on the approaches thereto, and "permitted said steps to become uneven so that they sloped and permitted water to collect in depressions on said steps, on which said deceased slipped and fell."

Decedent had been employed as a bridge tender for about six months; his working hours being between 9 p. m. and 5 a. m. It is admitted that he was engaged in interstate commerce. He came to work as usual on the night of November 3, 1930, and his wife accompanied him to the bridge. She left at about 11 p. m., and decedent was not seen alive thereafter. It was his duty as bridge tender, when vessels signaled for the opening of the bridge, to go to the center thereof, ascend a stairway to a small room on the top of the structure, where the engine and controls used in operating the bridge were maintained. Upon reaching the control room it was his duty to set the signals so that trains would stop before reaching the bridge, and then open the bridge, which turns upon an axis. After the vessel had passed it was his duty to close the bridge, examine the rail connections at the ends thereof in order to ascertain if the same were properly aligned, and then to set the signals so that trains could proceed across the bridge. There was kept in the control room a log book wherein was customarily entered the fact of the passage of vessels; and in this appeared an entry in decedent's handwriting to the effect that a steamer had passed through at 1:20 a. m. on February 4, 1930. On the night of his disappearance the weather was clear, but it was shown that in winter dew gathered on the stairway, making it slippery. Two weeks later decedent's body was found in the creek at a point about a mile from the bridge. The stairway contained 35 steps, and pitched at an angle of 48½ degrees to the horizontal. It was on the outside of the bridge uprights and over the water. On each side of the stairway and on the platform at the foot there was a single handrail 3 feet 1 inch above the steps and platform. Decedent was wearing a coat with a sheepskin collar and, according to the testimony, there was observed on the morning of February 4 along the outer edge of the platform hairs similar to wool, and a spot which had the appearance of blood. The testimony also shows that the body was bruised in several places, one appearing on the back of the head; further, that the metal steps were worn smooth, and that the same was true of the buttons inserted in the footplates to prevent slipping. According to an engineer, who was shown to be familiar with safety devices used in different industries, the stairway was defective, in that it is customary to provide a railing 42 inches in height, with either a mesh or a second rail, to prevent a falling body from passing under the upper rail, and also a toe board on the edge of the platform.

A motion for a nonsuit was denied, and the jury having returned a verdict for the plaintiff, defendant has appealed from the judgment entered thereon.

As grounds therefor it is claimed that the evidence was insufficient to sustain a finding that defendant was negligent; that decedent assumed the risks incident to his employment, one of which was the condition of the stairway; and that the complaint failed to state a cause of action. As stated, plaintiff specifically alleged and now contends that decedent slipped from the stairway or platform and was drowned; the defects mentioned being the cause of his fall.

[1-5] State laws on the subject of employers' liability to employees in interstate transportation were superseded by the Federal Employers' Liability Act, 45 USCA §§ 51-59 (Second Employers' Liability Cases, 223 U. S. 1, 55, 32 S. Ct. 169, 56 L. Ed. 327, 38 L. R. A. [N. S.] 44; Chicago, Milwaukee & St. Paul Ry. Co. v. Coogan, 271 U. S. 472, 46 S. Ct. 564, 70 L. Ed. 1041), and the decisions of the federal Supreme Court control in determining the issue of negligence where the act governs. Smithson v. A., T. & S. F. Ry. Co., 174 Cal. 148, 162 P. 111; Hines v. Ind. Acc. Comm., 184 Cal. 1, 192 P. 859, 14 A. L. R. 720. Thereunder the defense of assumption of risk remains as at common law, with the exception, as therein provided, of "any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such em-

ployee" (Atchison, T. & S. F. Ry. Co. v. Swearingen, 239 U. S. 339, 36 S. Ct. 121, 60 L. Ed. 317; Southern Ry. Co. v. Crockett, 234 U. S. 725, 34 S. Ct. 897, 58 L. Ed. 1564; Seaboard Air Line v. Horton, 233 U. S. 492, 34 S. Ct. 635, 58 L. Ed. 1062, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475); but this exception has been held not to include state statutes. See cases last cited. The decisions of the federal Supreme Court also control the question whether there was an assumption of risk by an employee (Pryor v. Williams, 254 U. S. 43, 41 S. Ct. 36, 65 L. Ed. 120); and while this is an affirmative defense and must be pleaded (Thomas v. Southern Pacific Co., 116 Cal. App. 126, 2 P.(2d) 544), where as here the question was presented for the jury's determination by an instruction proposed by plaintiff, any objection that the issue was not within the pleadings was waived. 2 Cal. Jur., Appeal and Error, § 73, p. 246. The evidence in such cases must reasonably support the conclusion that the injury was proximately caused by the negligence of the employer (Atchison, T. & S. F. Ry. Co. v. Toops, 281 U. S. 351, 50 S. Ct. 281, 74 L. Ed. 896); and whenever circumstantial evidence is relied upon to prove the fact, the circumstances must be proved and not themselves presumed. Chicago, Milwaukee & St. Paul Ry. Co. v. Coogan, supra.

[6] In the following federal cases cited by defendant, where the cause of the injury was not directly shown, the court said that the evidence was such as to leave the question of defendant's negligence in the realm of surmise and conjecture, and denied a recovery: Patton v. Texas & Pacific Ry. Co., 179 U. S. 658, 21 S. Ct. 275, 45 L. Ed. 361; Chicago, Milwaukee & St. Paul Ry. Co. v. Coogan, supra; New York Central R. R. Co. v. Ambrose, 280 U. S. 486, 50 S. Ct. 198, 74 L. Ed. 562. Nevertheless, as held by the same court, where there is uncertainty as to the existence of negligence, whether such uncertainty arises from a conflict of testimony, or because, the facts being undisputed, fair-minded men might honestly draw different conclusions therefrom, the question is one of fact for the jury. Richmond & Danville R. R. Co. v. Powers, 149 U. S. 43, 13 S. Ct. 748, 37 L. Ed. 642; Texas & P. R. Co. v. Harvey, 228 U. S. 319, 33 S. Ct. 518, 57 L. Ed. 852. To the same effect are the following California decisions: Mah See v. North American Accident Ins. Co., 190 Cal. 421, 213 P. 42, 26 A. L. R. 123; Hotaling v. Hotaling, 193 Cal. 368, 224 P. 455, 56 A. L. R. 734; Michener v. Hutton, 203 Cal. 604, 265 P. 238, 59 A. L. R. 480.

[7, 8] Here the evidence was reasonably sufficient to show that the condition of the stairway and platform rendered their use unsafe at night, and the physical facts fairly support the conclusion that decedent fell therefrom, and that his body passed under the railing into the water.

[9] While it is the rule under the statute that an experienced employee who knows the material conditions must be considered as appreciating the danger and assuming the risk, although at the time he may have forgotten the existence of the danger and the employer was negligent in allowing the danger to remain (Jacobs v. Southern Ry. Co., 241 U. S. 229, 36 S. Ct. 588, 60 L. Ed. 970), here, so far as shown, decedent had never ascended the stairway during the daytime; nor was he aware of the conditions which made the structure dangerous. The complaint described the defects which were alleged to have caused the injury; and defendant contends that these allegations show that the cause of death was a risk assumed by decedent, and that consequently no cause of action was stated, citing Bresette v. E. B. & A. L. Stone Co., 162 Cal. 74, 121 P. 312; but, as pointed out, the evidence was insufficient to show that decedent knew of the defects described, or that the conditions under which he was employed were such that he must have known them.

We are satisfied that the facts reasonably presented a case for the jury, and that its conclusions are fairly supported by the evidence.

The judgment is affirmed.

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129 Cal.App. 441

DEWING v. CHOW et al.

Civ. 7522.

District Court of Appeal, Second District,
Division 2, California.
Feb. 3, 1933.

Hearing Denied by Supreme Court April 3, 1933.

1. Courts 🔑113.

Requirement that court reporter certify record transcribed *held* inapplicable to daily transcript rendered during trial (Code Civ. Proc. § 269).

2. Estoppel 🔑90(1).

Parties who for considerable period paid for daily uncertified transcripts rendered by reporter and received additional uncertified transcripts without objection *held* estopped to deny liability to reporter for compensation (Code Civ. Proc. § 269).

3. Attorney and client 🔑81.

Liability of parties whose counsel ordered daily transcripts of evidence *held* several, as well as joint (Civ. Code, §§ 1431, 1659).

4. Attorney and client 🔑81.

Parties to litigation whose attorney ordered daily transcripts of evidence *held* liable to reporter for compensation, notwithstanding agreement of third person, unknown to reporter, to finance litigation.

Appeal from Superior Court, Santa Barbara County; Pat R. Parker, Judge.

Action by Henry A. Dewing against Gin S. Chow and others. Judgment for plaintiff, and defendants appeal.

Affirmed.

H. H. McPike, of San Francisco, for appellants.

Butcher & Haines, of Santa Barbara, for respondent.

WORKS, Presiding Justice.

This is an action to recover fees for services rendered by an official reporter of the superior court. Judgment went for plaintiff, and defendants appeal.

Early in the brief of appellants six certain points are stated as those made for a reversal of the judgment. Each of these points is circumstantially couched and was evidently drawn with care. They are inserted at the close of the portion of the brief devoted to a statement of the facts of the case. In the remaining portion of the brief, that devoted to argument, not one of these six points is inserted, in terms, as a heading to any portion of the printed discussion. One or two of them do not appear, even in briefer style, as headings. One or two are set down as headings in a much curtailed and abbreviated form. In disposing of the appeal we shall pay no attention to the six points, unargued as they are, but shall consider only the arguments advanced, all being put forth, as we have said, under "points" otherwise stated. Such a course is proper under the well-known rule that questions suggested in a brief but not argued are not to be considered. The points which are discussed in the brief are four in number.

The first point is thus stated: "Full performance a condition precedent to right to fees." This cryptic and unenlightening group of words is made intelligible by the argument which follows it. The service rendered to appellants by respondent consisted in the delivery to their counsel, daily, of transcripts showing the testimony taken on the day preceding each delivery and while the trial of an action in which appellants were parties was in progress. There was also a daily copy delivered to the judge, for which appellants were to pay one-half the charge. These daily transcripts were rendered as the trial proceeded, during practically all of the trial days over a period of five months, or thereabouts. The installments were paid for daily for some time, but payment was never made for those delivered during the latter portion of the period. This action was commenced to recover the balance thus left due. We now come to the specific point made by appellants. The daily transcripts were not certified by respondent as correct. Section 269 of the Code of Civil Procedure reads, in part: "If directed by the court, or requested by either party [the phonographic reporter], must, within such reasonable time after the trial of such case as the court may designate, write out the same [the record], or such specific portions thereof as may be requested, in plain and legible longhand, or by typewriter, or other printing-machine, and certify to the same as being correctly reported and transcribed, and when directed by the court, file the same with the clerk of the court." Appellants insist that under this section it was the duty of respondent to certify to the correctness of the daily transcripts, and that they are not required to compensate the labors of respondent, aided by his transcribers, in the absence of such certificates.

[1] There are several answers to this contention. In the first place, section 269 has no reference to daily transcripts rendered during a trial, but only to complete transcripts of all the evidence taken, or transcripts of desired portions thereof, to be written after a trial is concluded. This is plain from the face of the enactment. The reporter (italics being ours), "within such reasonable time *after the trial* of such case as the court may designate," is "to write out the same"—the record. It is, of course, only to such a transcript, made at such a time, that the stenographer is to append his certificate.

[2] Further, these transcripts were received throughout the unusually long trial, both by counsel and by the court, without objection and without remark as to the absence of certification. Not only so, but the daily copies were paid for during a considerable portion of the trial, as we have already observed. Under these circumstances we think appellants cannot now be heard to urge a nonliability to compensate for labors unremittingly and substantially performed, the fruits of which they have enjoyed. We think appellants are estopped to deny liability to respondent.

[3] A somewhat fuller statement of the facts is necessary to an understanding of the second point made by appellants. The tremendous trial during which respondent acted as stenographic reporter was really the hearing on the merits of three consolidated cases. The counsel who ordered the daily transcripts with which we are concerned on this appeal represented appellants, who were plaintiffs in one of the cases, and also all but one of the plaintiffs in the other two cases, that single plaintiff having been represented by other counsel. The counsel who appeared for all these plaintiffs but one was James F. Peck. The counsel representing the single remaining plaintiff was Charles Blackstock. Before the trial of the consolidated cases was begun Peck ordered a daily transcript of the

evidence. Blackstock stated that he required no transcript. A daily transcript was also ordered for the defendants in the cases and one was ordered for the judge. The present action was commenced against the plaintiffs in but one of the consolidated cases, and the cause was dismissed as to one of these. In view of the fact that the plaintiffs represented by Peck in the other two actions are not parties defendant here, and in view of the dismissal just mentioned, appellants contend that any liability to respondent for the daily transcripts was joint as to all the plaintiffs represented by Peck, and that therefore an action against less than all must fail. Appellants support this contention by mere assertion, not by substantial argument, as it appears to us. Nor can we see how the liability can be joint. Respondent insists that it is joint and several, and under the law there is a presumption that it is of that nature. Section 1659 of the Civil Code reads: "Where all the parties who unite in a promise receive some benefit from the consideration, whether past or present, their promise is presumed to be joint and several." The language of this section, under the facts of the present case, completely meets the terms of section 1431 of the same Code, which runs in part: "An obligation imposed upon several persons * * * is presumed to be joint, and not several, except in the special cases mentioned in the title on the interpretation of contracts." Section 1659 is under a title of the Code headed "Interpretation of Contracts." Indeed, despite the apparent general character of section 1431, a joint contractual liability is quite an unusual creature under the law. The section is robbed of much of its apparent import by the language of section 1659. Another despoiler of its effect is section 1660 of the same Code, the nature of which is not of direct importance here. As to the effect of these various sections, see Gummer v. Mairs, 140 Cal. 535, 74 P. 26; Wood v. Longyear, 197 Cal. 723, 242 P. 932; Webb v. Casassa, 82 Cal. App. 307, 255 P. 541.

The next point made is that, "The dismissal of one of the joint defendants was a dismissal of the liability as to all of them." This point falls with the determination that there was no joint liability.

[4] The last point urged for a reversal is thus stated: "The contract made between Mr. Henderson and each of the plaintiffs made him an original contractor for the services the plaintiff Dewing rendered, in connection with the record, and the defendants in the Dewing suit were not liable for the services of the reporter." This point is utterly devoid of merit, but as counsel are evidently serious in its presentation we shall briefly answer it. H. H. Henderson had agreed in writing with the plaintiffs in the three consolidated cases to "finance" the litigation. After Peck had ordered his daily transcript and when the first payment for respondent's services had become due, Peck told respondent to go to Henderson for his money, and Henderson thereafter paid to respondent all he received in compensation for his labor. There was no contractual relationship between respondent and Henderson, and respondent never even knew of the agreement between Henderson and the various plaintiffs until after the consolidated cases had been on trial for more than three months. Whether appellants may hereafter find it expedient to pursue Henderson through the halls of justice is a matter of no present concern. Certainly respondent can have no such interest in him, as he has no cause of action against him.

Judgment affirmed.

We concur: STEPHENS, J.; ARCHBALD, Justice pro tem.

In re THURNELL'S ESTATE.

BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N v. THURNELL.

Civ. 973.

District Court of Appeal, Fourth District, California.

Feb. 4, 1933.

Hearing Granted by Supreme Court April 3, 1933.

1. Mortgages ⚿8.

Deed absolute and declaration of trust, reciting that grantee received property conveyed in trust to secure payment of grantor's obligations to grantee and pay taxes and other liens thereon, *held* not to constitute mortgage or impose lien on property (Code Civ. Proc. §§ 1475, 1500; Civ. Code, § 2872).

2. Mortgages ⚿8.

Instrument conveying legal title to property on declared trusts and authorizing grantee, in execution thereof, to sell property and transmit such title, is trust deed, not mortgage, though one trust is to provide security for grantor's indebtedness to grantee.

3. Mortgages ⚿334.

Death of one of two grantors of property, conveyed in trust to bank empowered to sell it on default in payment of notes secured, did not revoke such power nor limit effect of instrument as trust deed.

4. Executors and administrators 🔑224.
Presentation of claim against estate by bank, to which decedent and another conveyed property in trust, with power to sell it on default in payment of notes secured, *held* not prerequisite to exercise of such power (Code Civ. Proc. §§ 1493, 1500).

5. Mortgages 🔑378.
Exhaustion of security for note by trustee's sale under trust deed does not satisfy balance still due thereon after proper application of proceeds.

6. Executors and administrators 🔑513(9).
Court's order, approving administratrix' current account and report, was conclusive adjudication of validity of claims reported as against all interested persons not under legal disability, where its validity was not questioned within time for appeal (Code Civ. Proc. § 1637).

7. Mortgages 🔑329.
Bank, to which property was conveyed in trust, with power of sale on default in payment of note secured, had right to sell property at trustee's sale, without judicial foreclosure, on trustor's default.

8. Mortgages 🔑382.
Judicial proceedings to foreclose trust deed, authorizing sale of property on trustor's default in payment of note secured, are proper only under extraordinary circumstances.

9. Executors and administrators 🔑513(1).
Court's order approving administratrix' account, report, and petition for payment of claims and adjudging satisfaction of claims, secured by declaration of trust in property conveyed to claimant by decedent and administratrix, *held* enforceable against parties, in absence of appeal therefrom, unless void on its face.

10. Judgment 🔑117.
Relief granted on defendant's default cannot exceed demand (Code Civ. Proc. § 580).

11. Judgment 🔑719.
Judgment is conclusive only on issues tendered by pleading, though cause is contested.

12. Judgment 🔑640, 645.
Rule that judgment is conclusive only on issues tendered by pleadings applies to probate proceedings, as well as actions at law and in equity.

13. Executors and administrators 🔑471.
Allegations of administratrix' petition for payment of claims *held* insufficient to support finding that decedent's notes, secured by declaration of trust in property conveyed to payee, were paid.

The petition merely alleged that no claim had been made for deficiency after realizing on collateral security for notes, or for payment from assets of estate if proceeds from sale of such securities were insufficient to pay claims and that they were not valid subsisting claims against estate.

14. Executors and administrators 🔑469(1).
Probate court had no jurisdiction to adjudge, on administratrix' petition for payment of claims, that trustee's sale of realty, covered by declaration of trust securing decedent's indebtedness to trustee, satisfied latter's claims, in absence of contention that proceeds of sale equalled amount due.

15. Courts 🔑198.
Jurisdiction of superior court, sitting as probate court, is special and limited.

16. Courts 🔑23.
Superior court's act, exceeding its special and limited jurisdiction while sitting in probate, is void, though consented to by all parties concerned.

17. Courts 🔑200¼.
Superior court, sitting in probate, has no general equity jurisdiction.

18. Executors and administrators 🔑469(1).
Probate court has no jurisdiction to determine whether estate is indebted to creditor whose claim has been rejected wholly or partly by decedent's representative (Code Civ. Proc. § 1498; Probate Code, § 714).

19. Executors and administrators 🔑469(1).
Probate court's jurisdiction is confined to passing summarily on presented creditors' claims and allowing only those clearly proper.

20. Courts 🔑200½.
Probate court has no jurisdiction to adjudicate title to realty disputed between decedent's estate and third persons.

21. Executors and administrators 🔑513(1).
Probate court order, adjudging that claims of trustee, selling property under trust deed securing deceased's indebtedness to trustee, were satisfied thereby, was void and decree settling administratrix' final account and ordering distribution as if such claims were paid erroneous.

22. Executors and administrators 🔑315(6).
Administratrix' payment of sum to distributee, pursuant to void order, did not require that such order be sustained.

23. Appeal and error 🔑790(2).
Appeal from order, overruling objections to administratrix' final account and petition for distribution, dismissed as presenting questions properly before court on appeal from order and decree settling account and ordering distribution (Code Civ. Proc. § 963; Probate Code, § 1240).

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

In the matter of the estate of David Nathaniel Thurnell, deceased. From an order and decree, settling the final account of Ida B. Thurnell, as administratrix of the estate and distributing it, and an order overruling and denying the objections of the Bank of America National Trust & Savings Association to the final account and petition for distribution, the bank appeals.

Appeal from order overruling objections dismissed, and order and decree settling the account and ordering distribution reversed.

Gray, Cary, Ames & Driscoll, of San Diego, for appellant.

J. L. Hofflund, of San Diego, for respondent.

HARDEN, Justice pro tem.

This is an appeal by the Bank of America National Trust & Savings Association from the order and decree settling the final account of Ida B. Thurnell, the administratrix of the estate of D. N. Thurnell, deceased, and distributing his estate and from an order overruling and denying the objections of said bank to the final account of said administratrix and petition for distribution.

On or about August 13, 1924, decedent and his wife (the present administratrix) made and delivered to appellant's predecessor, Southern Trust & Commerce Bank, their promissory note bearing said date, in the principal sum of $5,500, payable three years after date, which note was secured by a mortgage upon certain real property. On or about April 15, 1929, said persons made and delivered to said bank their second promissory note, bearing said date, in the principal sum of $5,500, payable on July 15, 1929; and on or about June 25, 1929, said persons made and delivered to said bank their third promissory note, bearing said date, in the principal sum of $350, payable on August 24, 1929. It is recited in the second and third notes that the makers assign and transfer to and deposit with said bank as collateral security for the payment thereof, and of any other present or future indebtedness of the makers to said bank, the following described property, to wit: Declaration of trust No. 700.

The makers of said notes, on or about October 26, 1925, conveyed by deed, absolute in form, to said bank certain real property in the city of San Diego. On said date said bank issued said declaration of trust No. 700. It is recited therein that said grantors are trustors; that said bank is trustee; that said property was conveyed to the bank without consideration; that the trustee has received said property in trust under the terms and conditions therein set forth for the following uses and purposes (among others):

"First: To secure the payment of all obligations of the trustors or either of them to said (bank), with interest thereon, whether or not evidenced by a promissory note or notes;

"Second: The payment of all sums, accounts and charges of every nature whatever, which may become due from the trustors, or either of them, to the said bank, for any reason, or for any cause, or arising out of any transaction whatever."

Therein the trustee acknowledges that it holds said property on the express trusts (among others), to-wit:

"First:

"(a) To pay before delinquency all taxes and assessments upon said property * * *

"(b) To pay when due all other claims, liens and incumbrances affecting * * * the title to said property * * *

"(d) To appear and defend in any action or proceeding affecting * * * said property

"(e) To protect, preserve and defend said property and the title thereto and to keep said property in good condition and repair * * *

"Second: Should the trustors fail or refuse to make any of the payments, or do any of the acts in the manner and at the time mentioned, the trustee may without notice to the trustors make or do the same * * *

"Third: Upon payment of all sums secured thereby * * * the trustee shall reconvey the estate then held by it to the trustors * * *."

It is provided therein that in case of breach or default in the performance of any obligation to said bank, or in the fulfillment of any covenant thereof, the trustee may declare all sums secured thereby immediately due and payable. Provision is made for declaration of default, for sale of said property at trustee's sale, for conveyance thereof by the trustee to the purchaser, and for distribution of the proceeds of sale. Said declaration of trust bears the written approval of the trustors.

Within the time allowed therefor appellant presented three separate claims against the estate, based upon said promissory notes. Attached to the claim based upon the note secured by the mortgage was a copy of said note and of the mortgage. Attached to each of the other claims was a copy of the note on which it was based. Each of the second and third notes contained the statement that it was secured by declaration of trust No. 700. No copy of said declaration of trust was attached to either claim, nor was there any further description of said security nor any reference to recordation. All of said claims were regularly approved by the administratrix and by the court and were filed as allowed claims. Said claims were reported in a current account and report filed by the administratrix on August 25, 1930, which said account and report were regularly approved by order of court filed September 5, 1930.

On April 6, 1931, the administratrix filed an account, report, and petition for payment of claims, wherein reference is made to said claims of the bank. Therein it is alleged that the claim secured by mortgage was paid in full on September 17, 1930, and the mortgage released and fully satisfied.

As to said claims of the bank it is further alleged therein as follows: "When presented and allowed as above set forth, said three claims were secured by a certain deed of real property, outside of this estate * * * and by declaration of trust made and entered into by and between said bank and said Ida B. Thurnell and D. N. Thurnell."

And as to said notes secured by declaration of trust it is further alleged therein: "No claim is or has been made for any deficiency after realizing upon said collateral security, and no claim is or has been made for payment from the assets of said estate in the contingency that the proceeds from the sale of said security are insufficient to pay the said claims. None of said three claims are now valid and subsisting claims against this estate, contingent or otherwise."

A plan is set forth in said petition for the settlement of said estate and the distribution of its assets to Algot Thurnell, one of the creditors of the estate.

On April 7, 1931, said account, report and petition were served on the bank in San Diego; and on said day notice that a hearing thereon would be had on April 17, 1931, was posted in the manner and for the time prescribed by law for giving notice of the settlement of a current account. No objection to said account, report, and petition was filed by the bank.

On April 18, 1931, an order dated April 17, 1931, was filed approving said account, report, and petition and adjudging that all of said claims had been fully paid and satisfied and were no longer valid and subsisting claims against said estate.

On April 29, 1931, the bank moved the court to vacate said order of April 17, 1931, and asked for relief from default for failure to oppose said account, report, and petition of April 6, 1931, under the provisions of section 473, Code of Civil Procedure. Proposed objections thereto were offered. The principal grounds thereof were nonpayment of the claims secured by the declaration of trust and neglect and inadvertence excusing the failure of the bank to contest the same. Affidavits in support thereof were filed. By said affidavits it was also disclosed that the real estate covered by said declaration of trust had been sold by the bank at trustee's sale for nonpayment of said notes and the proceeds received therefrom applied toward the payment of the notes secured thereby and of the claims based thereon; that after said proceeds had been credited there remained unpaid on said claims the sum of $5,979.16, together with interest from September 3, 1930. No showing to the contrary was made by the administratrix; and it is admitted by counsel for respondent that said notes were not paid unless the proceedings taken in connection with the sale of the property had that effect as a matter of law. Said motion of the bank was denied.

On July 10, 1931, the final account, report, and petition of administratrix came up for hearing. The bank objected to the approval thereof upon the grounds it had urged in support of its motion to set aside the order of April 17, 1931. The administratrix opposed the consideration of said objections of the bank upon the ground that said objections had theretofore been overruled and that the court had adjudged that all of said claims of the bank had been paid in full, and that said previous adjudication was conclusive. The court sustained the objections of said administratrix, refused to hear objections of the bank to the final account on the merits, overruled said objections, held said order of April 17, 1931, to be a final adjudication of all matters set forth in the bank's objections to said final account, report, and petition, and made an order settling the final account and report and ordering distribution.

In view of the conclusions we have reached on other points raised on the appeal, we need not consider at length appellant's contention that the court erred in denying its application for relief under section 473, Code of Civil Procedure. It will suffice to say that we find no error therein.

[1, 2] The respondent takes the position that the deed absolute and declaration of trust constituted a mortgage, or, at least, that said instruments imposed a lien within the meaning of that term as used in section 1500, Code of Civil Procedure (now section 716, Probate Code), upon the real property; that, in the making and filing of the claims based on the second and third notes, the bank failed to comply with the requirements of sections 1493 and 1497, Code of Civil Procedure (now sections 706 and 707, Probate Code), in that no copy of said declaration of trust accompanied the claim, nor was there any reference therein to recordation thereof; that by virtue of the application of said Code sections and of the cases of Bank of Sonoma County v. Charles, 86 Cal. 322, 24 P. 1019, and Estate of Turner, 128 Cal. 388, 60 P. 967, the "foreclosure" proceedings under said declaration of trust operated to satisfy said notes and claims, relieving the estate from all liability to pay any "deficiency" remaining unpaid aft-

er the application of the proceeds of sale to the notes.

We think that said declaration of trust and said deed absolute do not amount to a mortgage as recognized in this state. The title to the property passed to the trustee to hold subject to the trusts imposed and accepted. An instrument which conveys to a grantee named therein the legal title to property described, upon certain trusts which it declares, and which confers upon him the power in execution thereof to sell the property thus conveyed and transmit the legal title to his grantee, is a trust deed. Volume XII, Cal. Law Review, p. 307; More v. Calkins, 95 Cal. 435, 30 P. 583, 29 Am. St. Rep. 128. That one of the trusts and purposes of the declaration of trust was to provide security to the bank for the indebtedness due it from the trustors did not make the instruments any the less a trust deed in effect. More v. Calkins, supra, at page 438 of 95 Cal., 30 P. 583; Tyler v. Mayre, 95 Cal. 160, 27 P. 160, 30 P. 196; Nellis v. Rickard, 133 Cal. 617, 66 P. 32, 85 Am. St. Rep. 227; Kinard v. Kaelin, 22 Cal. App. 383, 391, 134 P. 370.

Neither did the bank by virtue of said instruments acquire a lien of any description upon said property.

Section 2872, Civ. Code, provides: "A lien is a charge imposed in some mode other than by a transfer in trust upon specific property by which it is made security for the performance of an act."

That a trust deed does not come within the meaning of the term "lien" found in section 1475, Code of Civil Procedure, is held in Weber v. McCleverty, 149 Cal. 316, 86 P. 706, 708. In the opinion prepared by Justice Shaw in said case it is stated: "In legal effect a deed of trust does not create a lien or incumbrance on the land, but conveys the legal title to the trustee. In order to execute the trust he must be by the deed so far invested with the absolute title to the land as is necessary to enable him to convey it to the purchaser at the trustees' sale free of all right, title, interest, or estate of the trustor, or of any one claiming under or through the trustor by virtue of any transaction occurring after the making of the trust deed. The deed of trust, therefore, vests in the trustee, for the purposes of the trust, the absolute legal title to the entire estate held by the trustor, immediately prior to its execution, and that estate must remain in the trustee for that purpose until the trust is either executed or ceases to exist by reason of payment of the debt. It is consequently legally impossible for the trustee in his fiduciary capacity to hold a lien or incumbrance on the land which is the subject of his trust. The existence of a lien or incumbrance vested in one person necessarily implies that the title to the property, interest, or estate covered by the lien or incumbrance is vested in some other person. One cannot at the same time hold an estate in real property and a lien or incumbrance upon that particular estate. The trustee holds title to the entire estate for the purpose of conveying it when required in execution of the trust, and he cannot at the same time hold as trustee a lien on the same estate, for that would necessarily imply that the title to the estate was not vested in him. The estate of the trustee in the land is consequently not a lien thereon, even as that term is defined in section 1180 of the Code of Civil Procedure, conceding it to be in force. It is not a charge on the land, but the very land itself."

[3-8] The declaration of trust having granted to the bank the power of sale of the property upon default in the payment of the notes, the death of one of the grantors did not operate as a revocation of that power of sale nor in any manner limit the effect of the instrument. There was no necessity to present any claim against the estate as a prerequisite to the exercise of said power of sale. The provisions of section 1493 of the Code of Civil Procedure, requiring the filing of claims against the estate of a deceased person, and of section 1500 of the Code of Civil Procedure, prescribing the conditions under which actions may be maintained to foreclose mortgages or liens upon the property of estates, have no application to the right of a trustee to sell property under a power of sale contained in a trust deed. More v. Calkins, supra. Neither statute nor judicial authority has been called to our attention holding that the exhaustion of such security for a promissory note by trustee's sale under a trust deed will operate to satisfy an unpaid balance remaining due thereon after proper application of the proceeds of the sale; and we are certain there is none. The allowance of the claims in the full amount was as if said notes had been unsecured by any lien, which was the case. The time for appeal from the order of September 5, 1930, expired without the raising of any question as to its validity. Said order was, therefore, a conclusive adjudication of the validity of said claims against all persons interested in the estate, except persons under legal disability. Section 1637, Code Civ. Proc.; Kingsley v. Miller, 45 Cal. 95; Estate of Grant, 131 Cal. 426, 63 P. 731; Kowalsky v. Superior Court, 13 Cal. App. 218, 109 P. 158; Harter Co. v. Geisel, 18 Cal. App. 282, 122 P. 1094; Kohn v. Rupley, 54 Cal. App. 565, 202 P. 163. Upon default of the trustors, the trustee had the right to sell the property at trustee's sale without judicial foreclosure. Indeed, it is only under extraordinary circumstances that resort may be had to judicial proceedings to foreclose. Bayer v. Hoagland, 95 Cal. App. 403, 273 P. 58; Bayer v. Barrett (Cal. App.) 15 P.(2d) 801. The sale of the property at

trustee's sale and the application of the proceeds thereof to the satisfaction of the debt was a partial payment—nothing more.

[9] No appeal having been taken from said order of April 17, 1931, whereby it was adjudged that said claims had been satisfied, it will nevertheless be enforceable against the parties unless it is void on its face.

[10-13] It will be noted that the petition of April 6, 1931, upon which the order of April 17, 1931, was based, did not allege payment in fact of the claims secured by the declaration of trust. It did allege payment of the note secured by the mortgage. As to the other claims, it alleged merely that: "No claim is or has been made for a deficiency after realizing upon said collateral security, and no claim is or has been made for payment from the assets of said estate in the contingency that the proceeds from the sale of said security are insufficient to pay the said claims. None of said three claims * * * are now valid and subsisting claims against said estate, contingent or otherwise."

Upon the point now under consideration no allegation of fact appears therein. Said allegations were not the equivalent of allegations that said claims had been paid. They were merely erroneous conclusions of law as to the validity of claims already allowed and which had already acquired the character of a judgment.

Upon the default of the defendant, the relief granted cannot exceed the demand. Section 580, Code Civ. Proc.; Lang v. Lang, 182 Cal. 765, 190 P. 181; Metropolitan Life Ins. Co. v. Welch, 202 Cal. 312, 260 P. 545. A judgment is conclusive only upon issues tendered by the pleadings, even where the cause is contested. Hobson v. King, 94 Cal. App. 330, 332, 271 P. 206; Hutchison v. Reclamation District, 81 Cal. App. 427, 437, 254 P. 606; Baar v. Smith, 201 Cal. 87, 99, 255 P. 827. Such rule applies not only to actions at law and in equity, but also to proceedings in probate. Estate of McKinley, 49 Cal. 152, 154; Estate of Mallory, 99 Cal. App. 96, 102, 278 P. 488; Estate of Boyes, 151 Cal. 143, 147, 90 P. 454; Estate of Vance, 141 Cal. 624, 75 P. 323. We are not unmindful of the fact that if said petition had alleged actual payment of said claims, and the court had found in accordance therewith, though erroneously, appellant could not properly assert that the court lacked jurisdiction to make the finding. Benning v. Superior Court, 34 Cal. App. 296, 167 P. 291. The allegations of said petition were insufficient to support the finding that said second and third notes had been paid.

[14] Though a probate court has jurisdiction, upon proper allegations in an account to that effect, to adjudge actual payment of allowed claims, such fact is not to be confused with the other question of whether the probate court had jurisdiction to adjudge upon the petition filed that the sale of the real property covered by the declaration of trust operated to satisfy the bank's claims, where there was no contention that the proceeds of sale equaled the amount due. The mere statement of the question suggests at first blush a negative answer. One straightway thinks that said question is one for the determination of a court of equity; that to try it would require the institution of a suit and the summoning of defendant by the regular issuance and service of process.

It is undoubtedly true that within its jurisdiction the probate court often applies equitable principles and that, in the determination of any question arising in the administration of an estate which it is authorized to decide, it may bring to its aid the full equitable and legal powers with which, as a superior court, it is invested. Many cases to that effect are cited in Estate of Barreiro (Cal. App.) 14 P.(2d) 786. None of said cases, however, is authority to the effect that in the instance under consideration the probate court possessed the jurisdiction it assumed to exercise.

[15] Although the superior court is a court of general original jurisdiction, when it sits as a court of probate its jurisdiction is special and limited. Estate of Davis, 136 Cal. 590, 69 P. 412; Curtis v. Schell, 129 Cal. 208, 61 P. 951, 79 Am. St. Rep. 107; Estate of Polito, 51 Cal. App. 752, 197 P. 976; Buckley v. Superior Court, 102 Cal. 6, 36 P. 360, 41 Am. St. Rep. 135; Smith v. Westerfield, 88 Cal. 374, 26 P. 206; Estate of Strong, 119 Cal. 663, 51 P. 1078; In re Bundy, 44 Cal. App. 466, 468, 186 P. 811.

In the case of Estate of Polito, supra, at page 754, of 51 Cal. App., 197 P. 976, 978, it is said: "* * * It would seem to be well settled that, while the superior court is a court of general jurisdiction, the powers which it exercises in proceedings in probate are entirely statutory, and that in the administration and distribution of estates it exercises a special limited jurisdiction, and that in the exercise of such jurisdiction it is not authorized, in the absence of express statutory authority, to determine controversies which do not strictly arise within the course of its probate procedure. * * *"

[16] Any act of the superior court sitting in probate which exceeds its special and limited jurisdiction is void, even where consented to by all parties concerned. In Smith v. Westerfield, supra, at pages 378, 379 of 88 Cal., 26 P. 206, 207, the court said: "* * * The superior court, while sitting as a court of probate, has only such powers as are given it by statute, and such incidental powers as pertain to all courts for the purpose of enabling them to exercise the jurisdiction which is conferred upon them. Although it is a court of general jurisdiction, yet in the exercise of these powers its jurisdiction is limited and special; and whenever its acts are

shown to have been in excess of the power conferred upon it, or without the limits of this special jurisdiction, such acts are nugatory, and have no binding effect, even upon those who have invoked its authority, or submitted to its decision."

[17] A superior court sitting in probate does not have power to exercise general equity jurisdiction. Estate of Davis, 136 Cal. 590, 597, 69 P. 412; Curtis v. Schell, 129 Cal. 208, 61 P. 951, 79 Am. St. Rep. 107.

In Estate of Davis, supra, at page 597 of 136 Cal., 69 P. 412, 414, the court said: "Under the fundamental law there is a probate jurisdiction vested in the superior court. It may be said that the probate court is gone, but that the probate jurisdiction remains. And that jurisdiction is now vested in the same court that exercises jurisdiction in cases of law and equity. Yet the probate jurisdiction of the superior court is different from its law and equity jurisdiction, in this: it is essentially a jurisdiction under the control of the state legislature. That lawmaking power may enlarge it or may restrict it. The character and extent of the jurisdiction is not only a matter under legislative control alone, but the procedure by which that jurisdiction may be invoked, and rights thereunder adjudicated, is expressly laid down by statute; and that procedure must be followed, or relief under that jurisdiction cannot be secured. While the superior court in this state exercises both equity and probate jurisdiction, still the procedure to be followed in seeking relief within those two jurisdictions is widely varied. And if the probate procedure laid down by the Code is followed, then only relief under probate jurisdiction can be granted. In such a case general equity relief cannot be secured."

[18, 19] The jurisdiction of the probate court does not extend to determining whether an estate is indebted to a creditor whose claim has been rejected in whole or in part by the representative. Section 1498, Code Civ. Proc.; section 714, Probate Code; Haberly v. Haberly, 27 Cal. App. 139, 145, 149 P. 53; Haub v. Leggett, 160 Cal. 491, 117 P. 556; Jones v. Walden, 145 Cal. 523, 78 P. 1046; Gallivan v. Jones (C. C. A.) 102 F. 423; Gallagher v. McGraw, 132 Cal. 601, 64 P. 1080. The reason for this rule is that the jurisdiction of the probate court is confined to passing summarily upon presented creditors' claims, and to allowing only those appearing clearly proper. In Thompson v. Koeller, 183 Cal. 476, at page 485, 191 P. 927, 931, the court said: "* * * The object, indeed, of requiring the presentation of claims is very different from the object of a pleading in a contested matter. As stated in Preston v. Knapp, 85 Cal. 559, 561, 24 P. 811, 812, it is 'to save to estates of deceased persons the costs and expenses of useless suits, suits to recover what would have been allowed and paid by the executor or administrator without suit.' * * *"

To the same effect are: Pico v. De La Guerra, 18 Cal. 422, at page 431, and Wilkins v. Wilkins, 1 Wash. 87, 23 P. 411.

[20] The probate court has no jurisdiction to adjudicate title to real property disputed between an estate and a third person. Bath v. Valdez, 70 Cal. 350, 11 P. 724; Barnard v. Wilson, 74 Cal. 512, 517, 16 P. 307; Estate of Klumpke, 167 Cal. 415, 418, 139 P. 1062; McCarthy v. McCarthy, 205 Cal. 184, 185, 270 P. 211. In Bath v. Valdez, supra, at pages 360 and 361 of 70 Cal., 11 P. 724, 727, the court said: "Had the plaintiff appeared in the probate proceedings, and set up his title adverse to the estate acquired by him under the statute of limitations, the court had no authority to hear and determine the question thus raised. * * * The title of plaintiff under the statute of limitations was not, and could not be, litigated and determined in the probate court; hence the judgment of that court distributing the property did not affect that title, and plaintiff is not estopped by the decree."

In Estate of Haas, 97 Cal. 232, 31 P. 893, 32 P. 327, is said: "* * * There are many matters relating to the estates of deceased persons of which the probate court has no jurisdiction, and the determination of the question of title to property is essentially one of them."

To the same effect are: Shaw v. Palmer, 65 Cal. App. 441, 224 P. 106, and Estate of Rowland, 74 Cal. 523, 526, 16 P. 315, 5 Am. St. Rep. 464.

The probate court has no jurisdiction to adjudicate disputes between the representative and persons employed by the representative to assist him in the administration of the estate. Tomsky v. Superior Court, 131 Cal. 620, 623, 63 P. 1020; Estate of Carter, 132 Cal. 113, 114, 64 P. 123, 484; Estate of Kruger, 143 Cal. 141, 76 P. 891. Nor has such court jurisdiction to partition property as between an estate and a stranger who has an interest therein (Buckley v. Superior Court, 102 Cal. 6, 36 P. 360, 41 Am. St. Rep. 135); nor to determine heirship except in cases coming squarely within the Code provisions providing therefor. Smith v. Westerfield, 88 Cal. 374, 380, 26 P. 206. A probate court administering the estate of a decedent who was the last surviving member of a partnership has no jurisdiction to determine the rights of those claiming an interest in the partnership estate (Theller v. Such, 57 Cal. 447, 459); nor has such court jurisdiction to apply the distributive share of a legatee to the payment of a debt owed the estate of the deceased father of the legatee (Estate of Polito, 51 Cal. App. 752, 197 P. 976); nor to adjudicate a controversy between adverse claimants to a trust fund which has vested in a testamentary trustee by a final decree of distribution, though it may settle the accounts of such trustee. Johnson v. Superior Court, 77 Cal. App. 599, 247 P. 249. The probate court has no jurisdiction to determine whether property is held by an executor or heir subject to any trust, other than one expressly created by the will of his testator. Estate of Vance, 141 Cal. 624, 628, 75 P. 323; In re Sharp, 17 Cal. App. 634, 120 P. 1079.

[21] The reasons which actuated the courts in holding in the many instances cited that the probate court, as such, lacked jurisdiction in the several matters under consideration are equally applicable here. The question of whether or not the proceedings taken by the bank as trustee, in selling the property held by it by virtue of instruments in effect a trust deed, as security for the payment of the indebtedness due it, operated in the face of the judgment of the probate court as evidenced by its order of September 5, 1930, to satisfy the bank's said claims, was strictly of equitable cognizance and was one of which, by the procedure taken by the probate court in posting notice of a hearing of said petition as upon the hearing of a petition to settle an account, the probate court acquired no jurisdiction. The order of April 17, 1931, in so far as it adjudged that said claims secured by the declaration of trust were no longer valid and subsisting claims against said estate, is void. Said unpaid claims were not disposed of by said order, and therefore the question of their payment remained for the consideration of the court upon the hearing of the final account, report and petition for distribution (Walls v. Walker, 37 Cal. 424, 99 Am. Dec. 290; Estate of Adams, 131 Cal. 417, 63 P. 838); and the decree settling the final account and ordering distribution, wherein said claims were treated as having been paid, was therefore erroneous.

[22] Respondent also contends that since, pursuant to said order of April 17, 1931, she has paid over to Algot Thurnell the sum of $500, said order ought not to be disturbed. Said order being void in the respects stated, there is no merit in the contention.

[23] The appeal from the order overruling the objections of appellant to the final account and petition for distribution is dismissed. Section 963, Code Civ. Proc.; section 1240, Probate Code. The questions considered herein are properly before us on the appeal from the order and decree settling the final account and ordering distribution.

It is ordered that said order and decree settling the final account and ordering distribution be reversed.

We concur: BARNARD, P. J.; MARKS, J.

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129 Cal.App. 541

BOARD OF HOME MISSIONS AND CHURCH EXTENSION OF METHODIST EPISCOPAL CHURCH v. MANLEY.

Civ. 8477.

District Court of Appeal, First District, Division 1, California.

Feb. 10, 1933.

Rehearing Denied March 11, 1933.

Hearing Denied by Supreme Court April 11, 1933.

1. Subscriptions 🔑1, 18.

Generally, promise to pay subscription is mere offer which, in absence of consideration, may be withdrawn at any time before acceptance, and is revoked by promisor's death.

2. Subscriptions 🔑4.

Generally, to constitute acceptance of subscription, promisee must incur legal liability or expend money on faith of promise.

3. Subscriptions 🔑5.

Mutual promise by persons interested in charitable, religious, or educational institution to contribute to aggregate sum for its benefit ordinarily supports adequate consideration.

4. Evidence 🔑419(11).
Subscriptions 🔑21(5).

Subscription being written, consideration is presumed, but true consideration or want of consideration may be shown by extrinsic evidence (Code Civ. Proc. § 1962, subd. 2).

> Although consideration is presumed when subscription is in writing, presumption is disputable, and true consideration or want of consideration may always be shown by extrinsic evidence for purpose of impeaching contract, even though it states facts to show valuable consideration.

Appeal from Superior Court, Alameda County; E. C. Robinson, Judge.

Action by the Board of Home Missions and Church Extension of the Methodist Episcopal Church, a corporation, against Louisa I. Manley, executrix of the will of Martha D. Sanders, deceased. Judgment for defendant, and plaintiff appeals.

Affirmed.

Clark, Nichols & Eltse, of Berkeley, for appellant.

M. A. Ross, of San Francisco (Eloise B. Cushing, of Oakland, of counsel), for respondent.

JAMISON, Justice pro tem.

This action is upon a rejected claim against the estate of Martha D. Sanders, deceased. The claim is for a subscription or pledge by deceased for the benefit of plaintiff. The executrix of said estate by her answer set forth two defenses to said action. One of them was want of consideration, and the other was the exercise of undue influence over the mind of said deceased in procuring her signature to the said subscription. The case was tried by the court, which found against defendant upon the ground of undue influence, but in her favor upon the defense of want of consideration. Judgment was thereupon rendered for defendant, and from this judgment plaintiff appeals.

The question to be determined upon this appeal is whether or not the said claim is supported by a sufficient consideration. On October 30, 1929, the said deceased executed and delivered to appellant the following subscription or pledge: "Estate Pledge. To the Board of Home Missions and Church Extension of the Methodist Episcopal Church. In consideration of my interest in Christian Missions and of the securing by the above named Board of other pledges for its work, and for value received, I hereby promise and agree to pay to The Board of Home Missions and Church Extension of the Methodist Episcopal Church, at 1701 Arch Street, Philadelphia, Pa., the sum of Five Thousand Dollars ($5000.00) which shall become due and payable one day after my death out of my estate. If any or all of the above sum be paid before its due date, the said Board will, if requested by me, issue its Annuity Bond or Agreement on the basis published by it, at the time of such payment or payments. [Signed] Mrs. Martha D. Sanders."

At the time this estate pledge was executed, a pamphlet had been issued by appellant containing the terms of its annuity bonds. A copy of said pamphlet was delivered to deceased at the time she signed the estate pledge. This pamphlet provided for an annuity of from $4 to $8, dependent on the age of the bondholder, upon each $100 paid to appellant by the subscriber. Martha D. Sanders was 73 years old at the time she signed this estate pledge, and therefore, according to the said pamphlet, would have been entitled to an annuity of $7.30 on each $100 paid to appellant by her. She died on the 11th of June, 1930. Prior to her death she had made no payments on said estate pledge, and consequently no annuity bond had been issued to her by appellant. It was admitted that no money or property of any kind was received by deceased in exchange for said estate pledge at the time she signed same and delivered it to appellant or at any other time or at all.

[1-3] The general rule is that the promise to pay a subscription is ordinarily a mere offer which in the absence of a consideration therefor may be withdrawn at any time before acceptance. Under such circumstances, the death of the promisor revokes the pledge. Grand Lodge I. O. G. T. v. Farnham, 70 Cal. 158, 11 P. 592; University of Southern California v. Bryson, 103 Cal. App. 39, 283 P. 949. A subscription is considered as a mere offer until the beneficiary has accepted it, or has acted on the faith thereof so that his conduct implies an acceptance, and until such acceptance the promisor generally has the right to revoke the subscription. The death of the subscriber before the acceptance of the subscription constitutes a revocation of the offer, and the estate of the subscriber will not be liable on the subscription. 25 R. C. L. 1408; 60 Cor. Jur. 968. An acceptance can only be shown by some act on the part of the promisee whereby some legal liability is incurred or money expended on the faith of the promise. Grand Lodge I. O. G. T. v. Farnham, supra. However, there is an exception to this rule, and that is that, where there is a mutual promise by several individuals to contribute to the payment of an aggregate sum for the benefit of a charitable, religious, or educational institution in which they are all interested, such mutual promise is generally held to support an adequate consideration authorizing its enforcement by the promisee. University of Southern California v. Bryson, supra; Grand Lodge I. O. G. T. v. Farnham, supra; 6 R. C. L. 676; 38 A. L. R. 906, note VI.

There is no evidence in the case at bar indicating that appellant performed any acts or incurred any obligations or expense in reliance upon the payment of the said subscription of deceased prior to her death, or that other individuals concurred with her in contributing to the payment of an aggregate sum for the benefit of appellant. In its effort to show concurrence of other subscribers with deceased's subscription, appellant introduced in evidence the subscriptions of three individuals. Two of these were subscribed before the subscription of deceased was executed and the other one after her death. However, as these subscriptions were not for the payment of an aggregate sum to be used for a specified purpose upon which appellant had incurred any obligation or expense prior to the death of deceased, they cannot be said to be mutual promises sufficient to constitute a consideration for her subscription.

On December 19, 1929, deceased executed her will devising and bequeathing the property owned by her at the time of her death to her four children. The appraised value of her estate is $6,892.67.

[4] Appellant contends that, as the pledge was in writing, it is presumed to be supported by a consideration. While this is true, this presumption is disputable, and the true consideration or the want of consideration may always be shown by extrinsic evidence for the purpose of impeaching the contract, notwithstanding that it states facts to show a valuable consideration. Richardson v. Lamp, 209 Cal. 668, 290 P. 14; Wurdeman v. Waller, 88 Cal. App. 393, 263 P. 558; Code

Civ. Proc. § 1962, subd. 2. The trial court found that deceased's pledge was not one of several reciprocal promises to contribute to an aggregate sum to be raised for the benefit of appellant, but was for contribution to a general fund of indefinite amount extending from more than forty years past to an indefinite future over a wide extent of territory.

There is no showing that between the date of deceased's pledge and the date of her death, that is to say, between October 30, 1929, and June 11, 1930, appellant performed any act or incurred any obligation or expense in reliance upon the payment of the said pledge by deceased. Therefore, we are of the opinion that the said estate pledge was without consideration and was revoked by the death of the said deceased.

Some additional points have been raised by respondent, but we deem it unnecessary to consider them.

The judgment is affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

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129 Cal.App. 558

PEOPLE of the State of California, Plaintiff and Respondent, v. Ray GREVE and Leo Greve, Defendants and Appellants.

Cr. 2314.

District Court of Appeal, Second District, Division 2, California.

Feb. 10, 1933.

Motion to dismiss appeal by defendants from a judgment of the Superior Court of Los Angeles County, Thomas P. White, Judge, of conviction of robbery and from an order denying motion for new trial.

Appeal dismissed.

Donald MacKay, of Los Angeles, for appellants.

U. S. Webb, Atty. Gen., and John L. Flynn, Deputy Atty. Gen., for the People.

WORKS, Presiding Justice.

Appellants were found guilty of robbery and on October 11, 1932, the trial court denied a motion made by them for a new trial. At the same time they gave oral notice of appeal. On October 21st, ten days thereafter, they filed request for a transcript of the official court reporter's notes of the trial, and in connection with the request they stated the grounds of their appeal. It is provided in section 7 of rule II of the Rules of the Supreme Court and of the District Courts of Appeal that such a request and statement of grounds of appeal must be made "within five days after giving notice of appeal." The rule further provides: "If such application is not filed within said time, the appeal shall be dismissed." See, also, People v. Schroeder, 112 Cal. App. 550, 297 P. 105.

Appeal dismissed.

We concur: STEPHENS, J.; ARCHBALD, Justice pro tem.

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129 Cal.App. 320

PEOPLE v. SINCLAIR.

Cr. 1663.

District Court of Appeal, First District, Division 1, California.

Jan. 28, 1933.

1. Poisons 🔑**9.**

In prosecution for unlawful "possession" of morphine, it was necessary to prove possession was immediate and exclusive and under defendant's dominion and control (Deering's Gen. Laws Supp. 1925–1927, Act 5994, § 8).

> The word "possession," as used in Deering's Gen. Laws Supp. 1925–1927, Act 5994, § 8, means not only an immediate and exclusive possession on the part of the defendant, but also that such possession must be under his dominion and control.
>
> [Ed. Note.—For other definitions of "Possession," see Words and Phrases.]

2. Poisons 🔑**9.**

Evidence *held* sufficient to sustain conviction of unlawful possession of morphine.

3. Poisons 🔑**9.**

It is not essential to conviction of unlawfully possessing illegal article, as morphine, to show defendant had illegal article on his person.

4. Criminal law 🔑**829(3).**

In prosecution for unlawfully possessing morphine, instruction on possession, if erroneous, *held* not to require reversal, where evidence established all elements of possession as defined in correct instruction (Deering's Gen. Laws Supp. 1925–1927, Act 5994, § 8; Const. art. 6, § 4½).

> The alleged erroneous instruction was to the effect that defendant was guilty of unlawfully possessing morphine if he aided and abetted in commission of the offense, or, not being present, advised and encouraged its commission.

Appeal from Superior Court, City and County of San Francisco; Lile T. Jacks, Judge.

William Sinclair and another were jointly convicted of unlawful possession of morphine, and defendant Sinclair appeals.

Affirmed.

Prior opinion, 13 P.(2d) 545.

Walter H. Duane, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, of San Francisco, for the People.

KNIGHT, J.

The appellant, Sinclair, and one Harry Stauch were charged jointly with having had in their possession unlawfully a quantity of morphine. They were tried together and found guilty; and each was sentenced to imprisonment in the county jail for ninety days. Sinclair appealed, and as grounds for reversal urges that the evidence as to him is insufficient to sustain the conviction, and that the trial court erroneously instructed the jury.

There is no dispute about the facts. It appears therefrom that, pursuant to a prearranged plan, an inspector of the state narcotic division named Nelson and an informer were standing on the corner of Hyde and McAllister streets in San Francisco about 6 o'clock in the evening, and in a few minutes an automobile driven by appellant approached the corner and stopped. The informer introduced Nelson to appellant, whereupon Nelson and the informer entered the automobile and occupied the rear seat. Nelson then told appellant that he wanted to buy some morphine for his "old lady." Appellant inquired whether he "wanted to make a regular meet with him every day," and Nelson replied that he did. Nelson and the informer then paid appellant $2.50 each in marked money for the purchase of the morphine, and appellant proceeded to drive up McAllister street. Upon reaching the corner of Polk and McAllister streets, appellant stopped the automobile and picked up his codefendant Stauch. The automobile then turned up and proceeded along Polk street, but traveled only a few yards when it was crowded to the curb and stopped by an automobile driven by another state narcotic inspector named Conley. When appellant observed the Conley car closing in on him, he directed Stauch to "drop the window and throw that out," and, complying with such directions, Stauch immediately threw a match box out of the window into the street; and, as soon as the car was stopped, Nelson alighted, picked up the match box, and it was found to contain two cubes of morphine.

[1-3] Where, as here, possession as distinguished from sale is charged, in order to establish guilt it is essential to prove that the possession was immediate and exclusive and under the dominion and control of the person charged with such possession. People v. Herbert, 59 Cal. App. 158, 210 P. 276. The jury in the present case was so instructed, and the foregoing facts are amply sufficient to establish all of the elements of the crime. As will be noted therefrom, appellant was in the exclusive control of the automobile; he bargained for the sale of the morphine, and accepted the money therefor; he picked up the person having physical possession of the morphine; and the morphine was subject to and under appellant's dominion and control because it was thrown out of the automobile when appellant so directed. Appellant argues that it is necessary to show that the person accused has the unlawful article on his person, but he has called our attention to no case so holding; and manifestly such is not the law, because, if it were, it would exclude entirely from the operation of the statute (Deering's Gen. Laws Supp. 1925–1927, Act 5994, § 8) cases of joint possession or possession by carrying the illegal article in an automobile or other conveyance, or keeping it in some place under the immediate and exclusive control of the accused.

[4] The court also gave the following instruction: "* * * All persons concerned in the commission of a crime, whether they directly commit the act constituting the offense or aid and abet in its commission, or not being present have advised and encouraged its commission, are principals in any crime so committed. So that in the case before you, if you are satisfied beyond all reasonable doubt that the defendants, or either of them, directly committed the crime charged, or that they, or either of them, aided and abetted in its commission, or not being present advised and encouraged its commission, you are justified in finding them guilty as principals."

Appellant does not question the correctness of the statement of the legal principle embodied in the foregoing instruction, but, relying on the decision in People v. Herbert, supra, holding in effect that in cases such as this, charging possession, such possession must be immediate and exclusive and under the dominion and control of the person accused of having such possession, he contends both in his opening and closing briefs that the legal principle embodied in said instruction has no application to cases charging only possession; and in support of such contention he has cited two cases from other jurisdictions which apparently hold to that view, one of which involved the possession of narcotics. Willsman v. U. S. (C. C. A.) 286 F. 852. Conceding that there is much force in the argument upon which such view is based there are a number of cases, also from foreign jurisdictions, involving charges of possession of intoxicating liquors and stills, which evidently hold to the opposite view, namely, that one may be guilty as a principal under the theory of aiding and abetting another to obtain and have such possession; and one of those cases has been cited approvingly by the Supreme Court of this state in People v. Borrego, 211 Cal. 759, 297 P. 17. However, section 4½ of article 6 of the Constitution declares that no judgment shall be set aside, or new trial granted, in any case on the ground of misdirection of the jury, etc., unless, after an examination of the entire cause, including the evidence, the court should be of the opinion that the error complained of has resulted in a miscarriage of justice; and, as heretofore pointed out, the evidence in the present case is amply sufficient to establish against appellant all of the elements of possession as that term is defined by the decision in People v. Herbert, supra, and in the previous instruction given in conformity therewith. Therefore, even assuming that the instruction complained of should not have been given, the situation does not demand a reversal.

The judgment is therefore affirmed.

We concur: TYLER, P. J.; CASHIN, J.

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129 Cal.App. 642

BELT CASUALTY CO. v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al.

Civ. 8863.

District Court of Appeal, First District, Division 2, California.

Feb. 16, 1933.

Certiorari 🔑5(1).

Order directing that execution issue is "special order" made after judgment, and hence, being appealable, is not reviewable by writ of review (Code Civ. Proc. § 963).

[Ed. Note.—For other definitions of "Special Order," see Words and Phrases.]

Application by the Belt Casualty Company for a writ of review to the Superior Court in and for the City and County of San Francisco, and Franklin A. Griffin, a Judge thereof, to review an order granting a motion for the issuance of execution.

Proceeding dismissed.

Hugh K. McKevitt and Milton H. Silverberg, both of San Francisco, for petitioner.

James F. Brennan, of San Francisco, Gumpert & Mazzera, of Stockton, and George F. Buck, Jr., of San Francisco, for respondents.

STURTEVANT, Justice.

This is an application for a writ of review. In due time the respondents filed a return. On the record so made up the application has been submitted.

Heretofore Belt Casualty Company commenced an action against William Furman. Sadie Narins and Gertie Miller severally intervened and filed complaints in intervention against Belt Casualty Company. Sadie Narins was awarded a judgment against Belt Casualty Company in the sum of $5,530. From that judgment the defendant in intervention appealed, and to stay the judgment pending the appeal on October 19, 1932, it filed an appeal bond in the sum of $11,060 executed by the Benjamin Franklin Bond & Indemnity Corporation, hereinafter called the corporation, on September 28, 1932. Gertie Miller was awarded a judgment against Belt Casualty Company in the sum of $3,158.92 and $14 costs of suit. From that judgment the defendant in intervention appealed, and to stay the judgment pending the appeal on October 19, 1932, it filed an appeal bond in the sum of $6,318.12, executed by the corporation September 29, 1932. Thereafter, on November 1, 1932, the interveners served a notice that on November 14, 1932, they would move the court for an order striking from the files the said bonds and for an order directing that execution should issue. On November 14, 1932, there were filed in the court two bonds executed by the same corporation on September 29, 1932, which are, with two exceptions, copies of the first two. In the case of Gertie Miller the second bond is in the sum of $6,345.84 instead of $6,318.12, the amount stated in the first one. The first two bonds recited that the appeals were taken to the District Court of Appeal, whereas the last two bonds named the Supreme Court. On November 21, 1932, the court caused a minute order to be entered that the motion for issuance be granted, unless within ten days from the date of the order a good and valid bond be executed and filed. There is in the record a copy of an order by the insurance commissioner dated October 18, 1932, suspending the certificate of authority of the corporation; there is also an order by the insurance commissioner dated October 19, 1932, certifying that the corporation has again been authorized to transact business; and then there is another order by the insurance commissioner dated November 10, 1932, stating that the certificate of authority of the corporation has been suspended.

Resisting the application, the respondents assert that an order directing that execution issue is a special order made after judgment, and is therefore appealable (Code Civ. Proc. § 963) and, that being so, an application for a writ of review will not be granted to review such an order. The assertion must be sus-

tained. Southern Cal. Ry. Co. v. Superior Court, 127 Cal. 417, 59 P. 789; Martin v. Miller, 65 Cal. App. 581, 583, 224 P. 783; Los Angeles Surety Co., Inc., v. Municipal Court, 111 Cal. App. 133, 135, 295 P. 591.

The proceeding is dismissed.

We concur: SPENCE, Acting P. J.; GOODELL, Justice pro tem.

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129 Cal.App. 615

HURLEY v. LAKE COUNTY et al.

Civ. 4838.

District Court of Appeal, Third District, California.

Feb. 15, 1933.

1. Appeal and error 🔑78(3).

Order denying motion to file amended complaint, being interlocutory, is not appealable, but reviewable on appeal from judgment (Code Civ. Proc. § 963).

2. Appeal and error 🔑959(1).

Refusal to permit filing of amended complaint in accordance with appellate court's opinion reversing judgment of dismissal raised proper question on appeal as to abuse of discretion.

Appeal from Superior Court, Lake County; M. H. Iversen, Judge.

Action by Abbie F. Hurley against Lake County and others. From a judgment of dismissal and an order denying plaintiff's motion for leave to file an amended complaint, plaintiff appeals. On respondents' motion to dismiss the appeal.

Motion denied, and respondents allowed 20 days to file a reply to appellant's points and authorities.

Francis L. Ashe, William R. Lowery, and Sylvester Andriano, all of San Francisco, for appellant.

Burt W. Busch, Dist. Atty., of Lakeport, and Charles Kasch, of Ukiah, for respondents.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

Plaintiff brought an action to recover for personal injuries. A demurrer to her complaint was interposed by defendants and by the court overruled. Thereupon defendants answered and in due time the cause was set for trial. Upon the day so set, plaintiff failed to appear either in person or by counsel, and the court entered its judgment of dismissal. Upon appeal the judgment of dismissal was reversed on the ground that plaintiff had not received proper notice of the date of trial.

In its opinion, this court, speaking through Mr. Justice Plummer, said: "As the case must go back for retrial, it seems to us proper to call attention to the case of Benton v. City of Santa Monica, 106 Cal. App. 339, 289 P. 203, and the authorities there cited, where this court had occasion to consider the sufficiency of a complaint against a municipality on account of negligence. While the clerk's transcript shows that the demurrer to the plaintiff's complaint was overruled, it appears from the case which we have cited that the complaint is manifestly insufficient, and should be amended, if the facts warrant such action." 113 Cal. App. 291, 298 P. 123, 125.

In accordance with this opinion, plaintiff at the proper time moved for leave to file an amended complaint, but permission so to do was by the court denied.

After an interval of approximately a year from the receipt of the remittitur in the above-entitled matter, no judgment upon the original complaint having been entered in favor of defendants, plaintiff caused the case to be again placed upon the trial calendar, and the same was set for trial on the original complaint for September 6, 1932. On September 4th, two days prior to the trial date, a telegram was transmitted to the clerk of the court stating that one of counsel for plaintiff was ill and unable to be present and requested a continuance.

Upon the day of the trial counsel for defendants were present, but no appearance, either in person or by counsel, was made on the part of plaintiff. Defendants insisted upon the matter proceeding, and thereupon the trial court dismissed the action under the provisions of subdivision 3 of section 581 of the Code of Civil Procedure.

Plaintiff appealed from the judgment so entered in favor of defendant, and also from the order of the court denying the motion of plaintiff for leave to file an amended complaint, which appeal respondents now move to dismiss upon the ground that the memorandum of points and authorities on file by appellant do not comply with the requirements of section 953e of the Code of Civil Procedure, nor with section 3, rule VIII, of this court, and that the questions submitted are unsubstantial.

[1] An order denying a motion to file an amended complaint being an interlocutory order is not appealable (section 963, Code Civ. Proc.; Harper v. Hildreth, 99 Cal. 265, 33 P. 1103; Cornic v. Stewart, 179 Cal. 242, 176 P. 164); but may be reviewed on appeal from the judgment itself.

[2] We believe the refusal of the court to permit appellant to file its proposed amended complaint raises a grave question as to an abuse of discretion, and constitutes a proper question on appeal. We find no merit in the second objection urged by respondents that the memorandum of points and authorities do not conform to the rules of the court.

Motion to dismiss is denied, and respondents allowed twenty days to file their reply to appellant's points and authorities.

We concur: R. L. THOMPSON, J.; PLUMMER, J.

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129 Cal.App. 618

Ex parte GARBARINI.

Cr. 1245.

District Court of Appeal, Third District, California.

Feb. 15, 1933.

Rehearing Denied Mar. 2, 1933.

Hearing Denied by Supreme Court March 17, 1933.

1. Game 🔑**9.**

Complaint, filed in justice's court, for killing "doe," not designated as female deer, *held* insufficient to support conviction (Pen. Code, § 626e).

2. Habeas corpus 🔑**29.**

One found guilty by justice's court in his absence on insufficient complaint *held* entitled to discharge from custody in habeas corpus proceeding (Pen. Code, §§ 1016, 1429, 1449, 1450, 1452).

> Penal Code contains no provision for demurrer to complaint in criminal case in justice's court, section 1429 thereof merely authorizing same plea as on indictment under section 1016, which simply provides for plea of guilty or not guilty and certain special pleas, and defendant was deprived of opportunity to move for new trial or in arrest of judgment under sections 1450, 1452, by justice's action in finding him guilty and imposing sentence in his absence without notice required by section 1449.

3. Criminal law 🔑**252(3).**

Complaint in criminal case must not only be consistent with accused's guilt, but inconsistent with his innocence.

Application by John S. Garbarini for a writ of habeas corpus to the Sheriff of Calaveras County.

Petitioner's discharge from custody ordered.

Snyder & Snyder, of San Andreas, for petitioner.

Virgil M. Airola, Dist. Atty., of San Andreas, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This is a proceeding on habeas corpus.

Petitioner was arrested and convicted upon a complaint filed in a justice court which designated the offense as "crime of killing a doe, a misdemeanor"; it being therein charged that defendant at a certain time and place within the jurisdiction of the court "did wilfully and unlawfully kill a doe."

The defendant was by the court tried and found guilty and a judgment was rendered finding the defendant "guilty as charged."

[1] Petitioner now urges that the complaint as filed did not state a public offense and that the judgment does not state any offense of which petitioner was found guilty.

It is obvious that the complaint was intended to charge a violation of that part of section 626e of the Penal Code, which provides that "every person who hunts, pursues, takes or destroys * * * any female deer * * * is guilty of a misdemeanor." Petitioner contends that a "doe" may be—and the word is so defined in all of the recognized dictionaries—either a female deer, female antelope, female hare, female rabbit, or a female kangaroo, and inasmuch as the allegation of the complaint is consistent with the innocence of the defendant it cannot support the conviction and the defendant should be discharged on habeas corpus.

We are of the opinion that this contention must be held to be well founded. It must first be noted that the complaint was filed in a justice court, a tribunal of limited jurisdiction as distinguished from a court of general jurisdiction. Robertson v. Langford, 95 Cal. App. 414, 273 P. 150. A distinction was first drawn between these two classes of courts in Ex parte Kearny, 55 Cal. 212, wherein the Supreme Court held a police court to be a court "of limited jurisdiction, whose powers are conferred, and whose duties and mode of procedure are prescribed, by statute, and to which the rule applies that the evidence of its proceedings must affirmatively show jurisdiction of the person of the defendant, and over the subject-matter."

In Ex parte Greenall, 153 Cal. 767, 96 P. 804, 806, after conviction and affirmance thereof in the superior court, the Supreme Court, through Mr. Justice Angellotti, discharged the petitioner upon the ground the complaint in the justice court did not state facts required to constitute a violation of the act attempted to be set forth, and that the allegations of the complaint were consistent with the innocence of the accused.

In that case petitioner was charged with the violation of an act (Stats. 1907, p. 252), which made it a misdemeanor for any person to practice medicine without having at the time a valid certificate. The complaint in question failed to show that petitioner was engaged in the treating of the sick as a business or calling, and inasmuch as the allegations of the complaint in the justice court were consistent with the innocence of the defendant, it failed to show a public offense and the petitioner was discharged.

Our attention is called to the case of Ex parte Ruef, 150 Cal. 665, 89 P. 605, where the court held, without distinguishing between courts of general and limited jurisdiction, that on habeas corpus it would not inquire into the sufficiency of an indictment if it appeared or purported to show an offense of a kind of which the court has jurisdiction, but in the Greenall Case, supra, the court commenting upon the Ruef Case, said: "The rule of the Ruef Case has never been applied by this court to proceedings in courts of inferior, as distinguished from courts of general, jurisdiction."

In Re Avdalas, 10 Cal. App. 507, 102 P. 674, 676, Mr. Justice Hart applied the rule of the Ruef Case to a court of limited jurisdiction, and in support thereof cited the case of Ex parte Maier, 103 Cal. 476, 37 P. 402, 42 Am. St. Rep. 129, and Ex parte Williams, 121 Cal. 328, 53 P. 706, and criticized, on the ground of logic, the rule as laid down in Ex parte Greenall, supra, saying:

> "I frankly confess that I am unable to perceive any logical ground for drawing a distinction between felony and misdemeanor cases, where, in either case, the accusatory document fails to state facts sufficient to show the commission of a public offense known to the law, unless it is intended to arbitrarily declare that, because the law furnishes no method by which misdemeanor cases may be carried to the higher courts for the correction of errors, the writ of habeas corpus may be extended in its scope, in such cases, and made to perform practically the office of a writ of error. I see no serious objection to thus enlarging the scope of the writ, in which event there would then appear a valid reason for the distinction which appears to have been established in the Greenall Case.
>
> "Of course, it is only a trite declaration to say that the sole purpose of the writ of habeas corpus is to try and determine questions of jurisdiction in the class of cases to which it is applicable, and, obviously, if either a complaint in a justice's court, or an indictment, absolutely fails to state any public offense known to the law, the court in which such accusatory pleading is filed is manifestly without jurisdiction to restrain the liberty of the person so charged, or to put him upon trial under such pretended complaint or indictment.
>
> "It does not definitely appear from the opinion in the Greenall Case, supra, that the court intends to hold that the writ of habeas corpus, as to misdemeanors of which justices' and police courts have jurisdiction, shall serve the purpose of a writ or proceeding for the correction of errors, and therefore I agree with the court, in the case of Ex parte Williams [121 Cal. 328, 53 P. 706], supra, that the writ is not to be made to subserve the office of a demurrer."

Shortly after this case the Supreme Court, in the case of Ah Sing, 156 Cal. 349, 104 P. 448, took occasion to reaffirm the rule as expressed in Ex parte Greenall, saying: "In view of the statement in the petition for the writ to the effect that a difference of opinion exists among the courts of this state as to the right of a court on habeas corpus to determine the question whether a complaint in a court of limited or inferior jurisdiction states facts sufficient to constitute a public offense, it appears proper to say that the rule in this state in that regard is correctly stated in Ex parte Greenall, 153 Cal. 767, 770, 96 P. 804, in which case it is plainly pointed out that the rule is different from the one applied to courts of general jurisdiction, as in Ex parte Ruef, 150 Cal. 665, 89 P. 605. An examination of the opinion in the case of Tobias Watkins, 3 Pet. [U. S.] 193, 7 L. Ed. 650, cited in the Greenall Case, will disclose grounds for this distinction."

In the case of Hogan v. Superior Court, 16 Cal. App. 783, 117 P. 947, 951, Mr. Justice Hart, the author of the opinion in the case In re Avdalas, supra, said: "It has been held that a complaint which purports to charge a misdemeanor of which justices' courts have jurisdiction, but which fails to state any offense known to the law, may, upon the conviction of the accused under the averments of such pretended pleading, be declared void on habeas corpus, and the accused discharged from custody. Ex parte Greenall, 153 Cal. 767, 96 P. 804. Since unlawful restraint of one's liberty, from which restraint he may be released through the writ of habeas corpus, involves, essentially, the question of jurisdiction, it follows, of course, that where, as here, the relief sought is to prevent the performance of an act which, it is alleged, would be in excess of the jurisdiction of the court, or where, as in the Shortridge Case [99 Cal. 526, 34 P. 227, 21 L. R. A. 755, 37 Am. St. Rep. 78], supra, such act has already been performed, the writ of prohibition, in the first-mentioned case, and the writ of certiorari, in the last-mentioned case, may be invoked to prevent the doing of or to annul, as the case may be, the act, the validity of which is thus challenged."

The same jurist, in the case of Matter of Goldsworthy, 22 Cal. App. 354, 134 P. 352, 355, in a proceeding in the juvenile court, adopted the rule announced in the Greenall Case, and said: "In the examination of the sufficiency of complaints in ordinary misdemeanor cases, cognizable in justices' courts, the rule applied in the Ruef Case, supra, cannot be invoked in this state. Ex parte Greenall, 153 Cal. 767, 770, 96 P. 804; Ex parte Kearny, 55 Cal. 212. The reason for this distinction seems to be, stated generally, that the presumptions favorable to the regularity of the proceedings and judgments or to the jurisdiction of courts of general jurisdiction are not extended or accorded to courts of inferior jurisdiction, * * * and that, therefore, the validity or legality of the proceedings and judgments of the latter courts must be proved or made to affirmatively appear by their own records."

In the foregoing cases there was a failure to state any offense known to the law; there are others in which the complaint attempts to state a public offense, but by reason of uncertainty, duplicity, or ambiguity it is subject to correction by motion as is illustrated by the following:

In re Stambaugh, 117 Cal. App. 659, 4 P. (2d) 270, 271, petitioner was convicted of the offense of selling gasoline which he falsely represented to be gasoline of a manufacturer other than the true manufacturer, a misdemeanor.

The provisions of the section within which it is sought to bring the alleged act made it a misdemeanor to sell any gasoline for internal combustion engines, and willfully and falsely represent the same to be gasoline of a manufacturer other than the true manufacturer thereof.

Petitioner therein contended the complaint under which he was convicted failed to state a public offense, in that it failed to allege the gasoline sold was for internal combustion engines, and fails to allege he willfully and falsely represented that the gasoline so sold was the product of a manufacturer other than the true manufacturer.

This defect was clearly one of uncertainty and could have been reached by motion, as the court said: "But though the complaint be defective in the respect stated, it is obvious that it attempts to charge an offense; it at least squints at an offense of which the court wherein petitioner was tried had jurisdiction, and it is not therefore subject to successful attack in this proceeding." In re Stambaugh, supra.

In re Bergen, 61 Cal. App. 226, 214 P. 521, 522, a complaint in the justice court accused the defendant "of the crime of misdemeanor, to wit, carrying concealed weapon, committed as follows: That said * * * did then and there willfully and unlawfully conceal upon his person * * * pistol, without a license to carry such firearm." The statute provides, "Every person who carries * * * any pistol, * * * concealed upon his person without having a license to carry * * * shall be guilty of a misdemeanor. * * *"

It was held the complaint did not state a public offense, and that the jurisdiction of the court must appear from the charging part of the complaint and if the crime intended to be charged is not distinctly alleged in that part thereof it cannot be helped by the designation of the offense in the introductory part of the complaint.

"But it is said that, from the fact that the complaint alleges that petitioner was without a license 'to carry' such firearm, it might be understood that the pleader intended to charge the defendant with having carried as well as concealed the pistol. This would be overstraining even the 'squint' doctrine announced in Re Avdalas, 10 Cal. App. 507, 102 P. 674 [supra]." In re Bergen, supra.

The Bergen complaint in the introductory clause does inform the defendant that he is being accused of having committed the crime of "carrying a concealed weapon"; but in the instant case it is nowhere pointed out that defendant was accused of the violation of section 626e of the Penal Code, or with having killed a female deer.

In the case of Reineger, 184 Cal. 97, 193 P. 81, 84, it is claimed that the complaint charged two crimes under the Statutes of 1919, p. 89, relating to the sale of imitation milk. No claim was made in that case, however, the complaint stated no offense, wherein it is to be distinguished from the case at bar where the contention is here made that no offense is stated.

"Where a complaint in a court of inferior jurisdiction states facts showing that the defendant has committed a public offense, but is subject to attack by demurrer on the ground that it is uncertain as to the particular offense committed, the inferior court has jurisdiction, and the defect will not be ground for his release on habeas corpus. Ex parte McNulty, 77 Cal. 166, 11 Am. St. Rep. 257, 19 P. 237. There is nothing in Ex parte Kearny, 55 Cal. 212, or Ex parte Greenall, 153 Cal. 767, 96 P. 804, that is contrary to this rule. The complaints there considered failed to show that the defendant had committed any offense whatever." In re Reineger, supra.

In re Hayward, 62 Cal. App. 177, 216 P. 414, the defendant was charged in the justice court with having violated a city ordinance prohibiting the sale of intoxicating liquor. The defendant pleaded guilty and after conviction appealed to the superior court, which court affirmed the judgment. Defendant then asked for her discharge upon habeas corpus upon the ground that the complaint "utterly and wholly failed to constitute a public offense known to the law," for the reason that the complaint fails to allege that the intoxicating liquor was sold "for beverage purposes."

The court holds (syllabus): "Where the complaint in a prosecution before a justice's court for a violation of a municipal liquor ordinance does not wholly fail to state a cause of action, but at most is merely defective, in that it does not specifically allege that the intoxicating liquor was sold for beverage purposes, such defect might be remedied by demurrer or by motion in arrest of judgment; but where such objection is not raised in the justice's court, or in the superior court on appeal from the judgment of conviction, and such judgment is affirmed, the defendant is not entitled to her release upon habeas corpus."

The decision criticizes the Greenall Case, and states that the rule therein announced "has been whittled down by judicial construction until it has become a mere shadow line of authority," and cites as authority for such statement In re Avdalas, 10 Cal. App. 507, 102 P. 674; Ex parte Williams, 121 Cal. 328, 53 P. 706; In re Turck, 37 Cal. App. 601, 174 P. 100; In re Reineger, 184 Cal. 97, 193 P. 81; In re Culver, 187 Cal. 437, 202 P. 661; In re Kaster, 52 Cal. App. 454, 198 P. 1029; In re Von Perhacs, 190 Cal. 364, 212 P. 689. An examination of these cases, however, shows that they do not go as far as the court interprets them. The court in Ex parte Williams, 121 Cal. 331, 53 P. 706, 707, said: "We are nevertheless satisfied that the complaint contains sufficient, in substance, when picked out, to constitute an offense under the first clause of the section. * * * The fact that it contains allegations * * * calculated to bring it within another feature of the statute—cannot, as suggested, affect the sufficiency of the facts to state an offense. * * * It is only necessary that the complaint should state an offense within the jurisdiction of the court trying it, to meet the objection here."

Also, In re Von Perhacs, 190 Cal. 364, 212 P. 689, 690. In this case "practically the only deviation from the words of the statute is the substitution of the words 'in a reckless manner' in place of the words 'not careful.' The only distinction is that the one is stated in a negative and the other in a positive manner."

Upon a motion for rehearing, in denying the same, the court said: "Habeas corpus may not be resorted to in lieu of a demurrer to a complaint in a misdemeanor case upon a ground of uncertainty, etc. The defect, if any, in the complaint in the instant case, for failure to specify the particulars of the offense charged, might have been remedied by demurrer, and, if not by demurrer, then by motion in arrest of judgment as provided under section 1452, Penal Code."

[2] It is to be noted that in the instant case petitioner was deprived of his right to move in arrest of judgment as provided in section 1452 of the Penal Code, by the action of the justice of the peace, who, in the absence of the defendant, found him guilty and imposed sentence, contrary to section 1449 of the Penal Code.

The rule as laid down in the Greenall Case is announced and applied in the case of In re Williams, 73 Cal. App. 485, 238 P. 1044; In re Wilson, 196 Cal. 515, 238 P. 359; In re People v. Stanich, 94 Cal. App. 738, 271 P. 920.

It is sometimes said that habeas corpus may not be made to subserve the office of a demurrer, but there seems to be no procedure provided in the Penal Code for a demurrer to a complaint in a criminal case in a justice's court. Section 1429 of the Penal Code provides that the defendant may make the same plea as upon an indictment as provided in section 1016 of the Penal Code, which latter section simply provides for a plea of guilty or not guilty, and certain special pleas. The Penal Code by section 1450 provides for a motion for a new trial or in arrest of judgment, but as stated in the case now before us, the defendant was deprived of the opportunity to so move for the reason that the decision and judgment were both made and entered at the same time and without notice to and in the absence of the defendant.

We find no fault with the rule of law as contended for by respondent that if the facts alleged "squint" at a substantial statement of the offense no matter how defectively or inartificially they may be stated, or however confused or beclouded they may be rendered through intermingling therein with immaterial or unnecessary averments, the writ will not lie; but here we have more than a charge defectively or inartificially stated; it is more than a mere defect, it fails to state any offense known to the law.

[3] Counsel for petitioner clearly indicate the vice of the complaint by stating that the complaint as filed charges that petitioner "did wilfully and unlawfully kill a doe." In view of the definition of "doe," that allegation is equivalent to charging that defendant "did wilfully and unlawfully kill a female deer, or a female antelope, or a female hare, or a female rabbit, or a female kangaroo," and reduced to its ultimate absurdity the charge is that defendant "did wilfully and unlawfully kill an animal." We cannot say that such a complaint would charge a public offense. Such construction would violate the rule that a complaint must not only be consistent with the theory of guilt of the accused but must be inconsistent with the theory

of his innocence. People v. Eppinger, 105 Cal. 39, 38 P. 538; People v. Lamanuzzi, 77 Cal. App. 301, 246 P. 557; In re Capanna, 45 Cal. App. 501, 187 P. 1077.

Following the rule enunciated and applied by the foregoing cases, we must hold that the petitioner herein was not charged with any offense and is therefore entitled to be released.

It is ordered that petitioner be discharged from custody.

We concur: THOMPSON, J.; PLUMMER, J.

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129 Cal.App. 285

HOLCOMB et al. v. LONG BEACH INV. CO. et al.

Civ. 4724.

District Court of Appeal, Third District, California.

Jan. 28, 1933.

1. Fraud 🔑58(1).

Evidence sustained finding that defendants committed fraud in inducing exchange of realty.

> Evidence disclosed that plaintiffs' ranch was worth $65,000, and subject to $25,000 mortgage; that defendants represented their apartment, which was subject to mortgages totaling $33,000, as worth $78,000, and as producing income of $500 a month, but which was worth only $30,000 and produced income of not exceeding $400 a month; that plaintiffs were elderly sisters possessing small business experience and having no knowledge of realty values where defendants' realty was located; that husband of one of the plaintiffs acted as plaintiffs' agent; and that one of the defendants was intimate with one of the plaintiffs and her husband, who were members of same fraternal lodge for many years.

2. Release 🔑17(1).

Plaintiffs' release of defendants from liability for fraudulently inducing exchange of realty, executed to loan association to obtain loan, *held* void for fraud, where association conspired with defendants to obtain release and gave worthless bonds and notes therefor (Civ. Code, § 1550).

3. Fraud 🔑35.

Defrauded party acting with knowledge of fraud may, by stipulation or conduct, waive claim for damages therefor.

4. Release 🔑17(1).

Release of defendants from liability for fraud, obtained by fraud and without consideration, *held* no defense to subsequent suit for defendants' fraud (Civ. Code, § 1550).

5. Appeal and error 🔑1056(1).

In action for fraud inducing exchange of realty, excluding evidence of what defendants resold plaintiffs' property for *held* harmless, since measure of damages was difference between actual and represented values of realty conveyed to plaintiffs at time of exchange.

6. Fraud 🔑59(2).

Measure of damages for fraud in exchange of realty is difference between actual value of property received by person defrauded and what value of property would have been if alleged fraudulent representations had been true.

7. Fraud 🔑60.

In action for fraud inducing exchange of realty, neither value of realty conveyed to defendants, nor sum realized from resale thereof, was element of damage.

8. Pleading 🔑126.

Answer denying in language of plaintiffs' allegations that realty conveyed to plaintiffs was not worth more than $30,000 *held* "negative pregnant" which admitted realty was not worth more than $30,000, justifying instruction to that effect.

[Ed. Note.—For other definitions of "Negative Pregnant," see Words and Phrases.]

9. Trial 🔑252(2).

Evidence in conflict with defendants' admissions in answer *held* properly disregarded in giving instructions.

10. Appeal and error 🔑1033(5).

Appellant may not complain of instructions more favorable than he deserved.

11. Pleading 🔑409(4).

Rule resulting in waiver of defective pleading by admission of evidence without objection does not extend to absolute admissions of pleadings, but is confined to mere defective pleadings, construction of which may be open to doubt respecting meaning thereof.

12. Release 🔑24(2).

Instruction that if plaintiffs' release of defendants for fraud was obtained by fraud and that consideration therefor had no value at time plaintiffs discovered fraud inducing release, plaintiffs could repudiate release without tendering consideration, *held* proper (Civ. Code, § 1691).

13. Release 🔑13(6).

Where notes and bonds given for release were worthless, release was void for "failure of consideration" (Civ. Code, § 1550).

> "Failure of consideration" means that sufficient consideration was contemplated by the parties at the time the contract was entered into, but either on account of some innate defect in the thing to be given or nonperformance in whole or in part of that which the promisee agreed to do or forbear nothing of value can be or is received by the promisee.
>
> [Ed. Note.—For other definitions of "Failure of Consideration," see Words and Phrases.]

14. Release 🔑24(2).

Where plaintiffs' release of defendants from liability for fraudulently inducing exchange of realty was based on worthless bonds and notes given by defendants, restoration of notes and bonds *held* unnecessary as prerequisite to repudiation of release (Civ. Code, § 1691).

15. Cancellation of Instruments 🔑22.

Notice of rescission is not necessary prerequisite to action to cancel instrument where there is total failure of consideration therefor (Civ. Code, § 1550).

16. Appeal and error 🔑1064(1).

Instruction that one can without investigation rely upon positive statements of absolute facts, truth or falsity of which is known to one relating them and which is unknown to injured party, *held* not prejudicial.

> Instruction was not prejudicial as to appealing defendants in action for damages for fraud in inducing exchange of realty because applying to plaintiffs' relinquishment of defendants' fraud in procuring the original exchange of property, and because plaintiffs' subsequent effort constituted waiver of defendants' fraud, where purported compromise of plaintiffs' claim for fraud was made with stranger to original exchange of properties, and which compromise failed for lack of consideration.

17. Trial 🔑260(1).

Appellants could not complain of challenged instruction, where principle of law involved was given in instruction offered by appellants.

Appeal from Superior Court, Los Angeles County; Percy Hight, Judge.

Action by Minnie Holcomb and another against the Long Beach Investment Company and others. From the judgment for plaintiffs, defendants appeal.

Affirmed.

W. I. Gilbert, Kenneth Keeper, and Burton Briggs Crane, all of Los Angeles, for appellants.

Fredericks, Hanna & Morton and Byron F. Story, all of Los Angeles, for respondents.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

The respondents recovered judgment for damages in accordance with the verdict of a jury for fraud exercised by the appellants in an exchange of properties. It is conceded there is a conflict of evidence respecting the proof of fraud. The appellants seek a reversal of the judgment on the grounds of alleged error in the reception and exclusion of evidence at the trial, and in the giving and refusing of instructions to the jury. The appellants also contend the conduct of the respondents subsequent to the discovery of the alleged misrepresentations accomplished a waiver of the fraud and a ratification of the terms of the exchange.

The Long Beach Investment Company, a corporation, was the owner of Alta Vista Court apartments situated at Long Beach, including the furniture with which it was equipped. There is evidence indicating this property was worth approximately $30,000. It was subject to a first mortgage of $23,000 and a second trust deed of $10,000. The defendant Henderson was a stockholder and president of the corporation. The defendant Jasper was a stockholder and vice president of the corporation. The plaintiffs were owners of one hundred acres of land in San Bernardino county called the Chino ranch, which was valued at the sum of $65,000 and was subject to a mortgage of $25,000. C. E. Holcomb is the husband of the plaintiff Minnie Holcomb. The plaintiffs are sisters. Holcomb acted as their agent. The defendant Henderson and Mr. and Mrs. Holcomb had been intimate acquaintances and members of the same fraternal lodge for many years. The respondents were elderly ladies possessing small business experience and no knowledge of real estate values at Long Beach. In February, 1925, the defendant Henderson had dinner with the respondents at their home in Anaheim. He was familiar with the Chino ranch, having previously negotiated a loan of $25,000 for them, secured by a mortgage on the ranch. He then suggested an exchange of this ranch for the Alta Vista Court apartments which he told them belonged to C. J. Jasper of Oakland and was worth $78,000. He declared that the income from the apartments amounted to $500 a month. The respondents were then told the apartments were subject to a first mortgage of $23,000 and an additional indebtedness of $10,000 represented by an unrecorded trust deed. There is evidence indicating that the apartments cost the defendant corporation only $30,000 a short time before the exchange was negotiated. The income from the property did not exceed three or four hundred dollars a month. The existence of the $10,000 trust deed is questionable.

Henderson subsequently sent his associate Jasper to negotiate the exchange. Jasper acted as the agent for the respondents. A written agreement of exchange of properties was signed by the respondents and by Jasper, the purported owner of the apartments, on February 27, 1925. The exchange was consummated the following month, and the respondents took possession of the apartments in April. The Alta Vista Court apartments were acquired by the respondents subject to the first mortgage of $23,000 and the unrecorded trust deed purporting to secure an indebtedness of $10,000. A new trust deed for this sum of $10,000 was executed to the defendants.

A few months after the exchange of properties was consummated, Henderson began to urge the respondents to pay this $10,000 indebtedness. Regarding this demand, Mr. Holcomb testified: "Mr. Henderson * * * told me that they were very hard pressed for money and asked me if I couldn't arrange to take up the trust deed of ten thousand dollars." He suggested that the respondents arrange to refinance their mortgage indebtedness and secure a new loan. In the effort to do this the respondents first discovered the fraud which had been practiced upon them in procuring the exchange. They made an application to the Farm & Home Loan Association, of which corporation R. N. Burgess was president and manager, for the money with which to refinance the encumbrance on their property. An officer from the State Building & Loan Association appraised the property and informed them it was greatly overvalued and that it had cost the defendant corporation only $30,000. In the investigation which followed, the respondents discovered the fraud with which they had been victimized. They first consulted the district attorney with the purpose of instigating criminal prosecution against the individual defendants. This suit for damages was subsequently instituted. The cause was tried with a jury. A verdict of $45,000 damages was rendered against each of the defendants. A judgment for that amount was accordingly entered. From that judgment the defendants have appealed.

[1] The appellants concede that a conflict of evidence exists regarding the amount of damages and the exercise of fraud in procuring the exchange of properties. In their opening brief it is said: "Appellants are not insisting that there was not a conflict of evidence upon the question of the alleged fraud and misrepresentations chargeable to appellants. * * * On the contrary, we assert that there was a conflict of evidence upon the questions, which reflected upon the alleged misrepresented value of the Alta Vista Apartments, as well as upon the question of the amount of respondents' damages." This concession is in accordance with the record. The court is therefore bound to hold under the well-established rule on appeal, that the judgment is adequately supported by evidence of the alleged fraud, and that the amount of the judgment is not excessive.

[2] The appellants assert that the respondents waived their claim for damages for fraud and ratified the exchange of properties by signing a written agreement to that effect after they had discovered the fraud and were fully informed concerning the entire transaction. This waiver is alleged in the answer as a special defense.

We are of the opinion the agreement to waive defendants' liability for fraud is nudum pactum and void for failure of consideration and fraud which was exercised in procuring its execution. It is therefore not a valid defense to this action. It appears that Burgess, the president of the Farm & Home Loan Association, from which respondents sought to procure the loan, conspired with the defendant Henderson to procure the release. Burgess knew of the terms of exchange of properties between the defendants and respondents. He knew of the alleged fraud and the threatened prosecution therefor. In negotiating the proposed loan to the respondents, Burgess was in consultation with Henderson regarding the terms thereof. This was in the fall of 1925. The respondents endeavored to borrow $41,000. This was necessary to cover the entire indebtedness on the apartments, including the first mortgage of $23,000, the sum of $10,000 secured by the trust deed, and a subsequent third mortgage securing the further loan of $5,200, together with accumulated interest on these sums and $1,600 commissions demanded by Burgess. After conferring with Henderson, Mr. Burgess offered to purchase the Alta Vista Court property for $56,000. He agreed to pay this purchase price by assuming the entire indebtedness of $41,000 and issuing to the respondents "gold bonds" of the Farm & Home Loan Association for the further sum of $15,000. Burgess represented that these bonds were worth their face value and that they were secured by property worth three times their value. There is evidence indicating that Henderson was interested in this repurchase of the apartments. The respondents relied upon the representations of Burgess regarding the value of these bonds. As a condition to the repurchase of the Alta Vista Court property, Burgess required the respondents to sign a written release of all claims of damages against the defendants for fraud in procuring the original exchange of properties. That instrument was dated April, 1926, and reads in part: "The undersigned * * * having sold said (Alta Vista) Court to the Farm and Home Loan Association of Los Angeles, receiving therefor in full payment by the assuming of certain indebtedness and payment of cash and notes * * * hereby acknowledge the entire transaction of exchange and sale to be satisfactory in every detail; and in consideration thereof we hereby agree to release and do hereby release H. O. Henderson and the Long Beach Investment Co. and the Farm and Home Loan Association or any person connected therewith from all claim whatsoever, which we, the undersigned, or any of us may have against the said Henderson, Long Beach Investment Co. or Farm and Home Loan Association or any person connected therewith, to date, and particularly release any claim against the above in connection with the exchange of said ranch property for the Alta Vista Court at Long Beach, and hereby state our satisfaction in above transaction."

Relying upon the terms of purchase above expressed and the value of the bonds as represented by Burgess, the Alta Vista Court property was sold and the foregoing release was signed. The chief consideration for the execution of this release was the $15,000 in gold bonds. This consideration failed. Burgess never did deliver bonds of the face value of more than $7,000. In lieu of the remaining bonds he delivered four several promissory notes signed by him of the aggregate face value of $6,950. Nothing further was ever received on the purchase price of the property. Both the notes and the bonds were worthless. Henderson testified that the bonds were worthless. The Farm & Home Loan Association was soon thereafter declared to be a bankrupt corporation. The respondents were unable to collect any sum whatever from the notes or bonds. There was therefore a total failure of consideration for the execution of the release. It became nudum pactum and void for want of consideration.

Moreover, the record indicates that Burgess and Henderson conspired to fraudulently procure this release of liability. They conferred regarding the terms of the proposed purchase of the property. As president of the Farm & Home Loan Association, Burgess must have known the bonds of his corporation were worthless when he agreed to transfer them to the respondents as an inducement for the execution of the release. Henderson testified that they were worthless. Evidently the respondents were the victims of a double fraud. The very language of the release indicates the conspiracy of Burgess and Henderson to procure the document. It not only purports to release the defendants, who were parties to the original exchange of properties, but evidently anticipating a similar charge of fraud against the participants in the last transaction, it also releases the "Farm and Home Loan Association, or any person connected therewith." If the defendants were not secretly conspiring with Burgess to procure this release, there was no motive or reason for Burgess to barter for a release of the defendants from fraud on account of the former exchange in which he was not involved. If the defendants were not parties to procuring the release by delivering worthless bonds and notes in consideration therefor, then they are not privity to the contract; they furnished no consideration therefor and may not defend its validity against the charge of fraud by which it was procured.

[3, 4] It is true that a claim for damages for fraud may be waived by stipulation or conduct of the injured party subsequent to the discovery of the deceit, when he acts with full knowledge of the fraud. Under such circumstances the fraud may be waived by acquiescence or ratification of the transaction. Schmidt v. Mesmer, 116 Cal. 267, 271, 48 P. 54; Howland v. Scott, 117 Cal. App. 275, 4 P.(2d) 200; Conner v. Butler, 113 Cal. App. 502, 514, 298 P. 546. Such purported release is, however, no defense to a subsequent suit for damages based upon the fraud when the instrument of release is also procured by fraud and lacks consideration. Since every executory contract must be supported by a valid consideration and its absence renders the instrument nudum pactum and void, an agreement which is not supported by a consideration is unenforceable. Section 1550, Civ. Code; 6 Cal. Jur. 166, § 115; 1 Elliott on Contracts, 442, §§ 253, 254; 6 R. C. L. 683, § 91. The purported release is therefore void. It furnishes no defense to the suit for damages for fraud against the defendants in the present case.

[5] Under the pleadings in this case it was not erroneous for the court to exclude evidence of the price for which the defendant subsequently sold the Chino ranch. That was not involved in the measure of damages for fraud in procuring the exchange of properties. The measure of damages in the present case is the difference between the actual value of the property conveyed to the respondents, at the time of the exchange, and the value thereof as represented by the defendants. 12 Cal. Jur. 843, § 88. The respondents were not charged with misrepresenting the value of their ranch. The exclusion of evidence of the price for which this ranch was subsequently sold was harmless.

[6] At the request of the plaintiffs, the jury was correctly instructed respecting the measure of damages, as follows: "The rule of damages in a case of this kind has been declared by the courts of California to be the difference between the actual value of the property received by the person alleged to

have been defrauded, and what the value of that property would have been if the alleged fraudulent representations had been true. Hence, in this case if you find for the plaintiffs and against the defendants, your verdict should be a sum which represents the difference, if any, between what you find the actual value of the Alta Vista Court was at the time of the exchange, and what the value of the Alta Vista Court was represented to be at the time of the exchange." 12 Cal. Jur. 843, § 88; Hunter v. McKenzie, 197 Cal. 176, 186, 239 P. 1090; Wood v. Niemeyer, 185 Cal. 526, 197 P. 795; Hines v. Brode, 168 Cal. 507, 143 P. 729.

The jury was also further correctly instructed that in ascertaining the amount of damages suffered by the respondents in the present action, neither the value of the Chino ranch nor the sum for which it was resold by the defendants was to be taken into consideration, since the only issue respecting valuation which is involved in the pleadings in this case refers to the difference between the actual and the misrepresented value of the Alta Vista Court property. There is no error in giving these instructions to the jury.

[7, 8] The appellants contend that the court erroneously charged the jury that: "The answer of the defendants admits that the Alta Vista Court at the time of the exchange was not of a greater value than $30,000. You are therefore instructed that in your deliberations you must consider that it is an agreed and proven fact in this case, that the value of said Alta Vista Court at the time of the exchange was the sum of $30,000."

Respecting the value of the Alta Vista Court, including the furniture, the complaint alleges, "That said property was not at said time nor ever has been of the reasonable market value of more than $30,000." In reply to this allegation, the answer "denies that said property was not of the market value of more than $30,000." No further allegation respecting the value of the apartments was made in the answer. This language is a negative pregnant and is an admission that the property was not worth substantially more than the sum of $30,000. It constitutes an admission that the property is worth only a trifle over $30,000. The court therefore correctly instructed the jury that the answer constitutes an admission that the value of that property was $30,000. 21 Cal. Jur. 154, § 105; Janeway & Carpender v. Long Beach Paper & Paint Co., 190 Cal. 150, 211 P. 6; Vuilleumier v. Kelley, 117 Cal. App. 723, 730, 4 P.(2d) 557; Williams v. Myers, 110 Cal. App. 265, 287, 294 P. 61; Prentice v. Zumwalt (Cal. App.) 13 P.(2d) 379.

[9, 10] The appellants contend, however, that the defect in their answer, amounting to a failure to deny that the Alta Vista Court properly was of a greater value than $30,000, was cured by tendering the issue of value in the admission of evidence at the trial on the part of both the plaintiffs and defendants of the actual value of the property. It will be observed the plaintiffs did not admit by the language of their complaint that the property was worth $30,000. They merely alleged it was not worth "*more* than $30,000." Since the measure of damages in this case is "the difference between *the actual value* of the property [at the time it was acquired] * * * and what the value of that property would have been if the alleged fraudulent representations had been true," it became necessary for the plaintiffs to prove the actual value thereof in order to support a judgment for damages. They accordingly proved by the witness Clifton that the lot and building was worth "about $30,000." Lough testified: "I believe I appraised the lot at $5,000 and the building at twenty-three at that time, a total of $28,000." Persons, the loan investigator for the Mutual Building & Loan Association testified, "Lot value I placed at $7,000 and building $23,000, a total of $30,000." This evidence is not in conflict with the issue tendered by the pleadings. It merely tends to establish the actual value of the property to be a sum not exceeding the maximum figure alleged in the complaint as a basis for estimating damages by deducting that sum from "what the value of that property would have been if the alleged fraudulent misrepresentations had been true." This evidence did not justify the defendants in disregarding the admission of their answer to the effect that it was worth not more than $30,000. It is true that two witnesses were permitted to testify for the defendants that the property was worth $50,000. That evidence is in conflict with the admissions of the pleadings and may be disregarded. The court was therefore justified in instructing the jury in accordance with the pleadings that, "The answer of the defendants admits that the Alta Vista Court at the time of the exchange was not of a greater value than $30,000." The defendants may not complain that the court further instructed the jury they must accept the figure of $30,000 as the valuation of the apartments at the time of the exchange. There is some evidence it was then worth less than that sum. An appellant may not complain of an instruction more favorable to him than he deserves.

[11] It is true the admission of evidence under a defective allegation of a pleading, without objection, will generally operate as a waiver of the defect. This rule is invoked on the theory that the issue is tendered by the consent of litigants indicated by the reception of evidence without objection in spite of a defective pleading. 21 Standard Encyc. of Proc. 411; Prentice v. Zumwalt, supra. The rule resulting in the waiver of a defective

pleading is not extended to absolute admissions of the pleadings. It is confined to mere defective or inartistic pleadings, the construction of which may be open to doubt respecting the meaning thereof. Under uniform California authorities the allegation of the answer in the present case constitutes a negative pregnant which amounts to an absolute admission on the part of the defendants that the value of the property was $30,000. The court and jury were bound by this admission. The reception of evidence in conflict therewith raised no issue, and was harmless. The challenged instruction regarding that issue is not prejudicial. In Hall v. Polack, 42 Cal. 218, 225, it is said: "All evidence contrary to the admissions of the pleadings should be disregarded, the admissions being binding on the party. 1 Green L. Ev. §§ 27–205; Mulford v. Estudillo, 32 Cal. 131." To the same effect are the cases of Economy Home Builders, Inc., v. Berry, 95 Cal. App. 106, 272 P. 307, and Paine v. Keszthelyi, 83 Cal. App. 449, 256 P. 864.

[12] The appellants assign the giving of several instructions at the request of the respondents involving the invalidity of the written relinquishment of defendants' liability for fraud, as erroneous. It is claimed the rescission of this document required the return of the notes and bonds to Burgess as a prerequisite to repudiating its validity on the ground of want of consideration. It is asserted the evidence does not support the implied finding of a lack of consideration.

These challenged instructions charge the jury, in effect, that if they find that the consideration wholly failed, for which this release of liability was executed, then the document is nudum pactum and void, and furnishes no defense to the present action. The court further instructed the jury that: "If you find that the release was procured by fraud, * * * (and) If you further find that such consideration had no value at the time of the discovery of the fraud, then I instruct you that they can repudiate the release, and are not bound thereby, even though they failed to return the consideration, for the reason, as you have been advised elsewhere in these instructions, that the law does not require useless acts, and the return of a consideration which has no value, is in law considered to be a useless act."

These instructions contain correct declarations of the law. They are not erroneous. In 1 Elliott on Contracts, 444, § 254, it is said: "By failure of consideration is meant that a sufficient consideration was contemplated by the parties at the time the contract was entered into but either on account of some innate defect in the thing to be given or nonperformance in whole or in part of that which the promisee agreed to do or forbear nothing of value can be or is received by the promisee. As indicated by this definition, failure of consideration may result from lack of value in the thing given or from the act of one of the parties. Where the thing contracted for is a nullity it is ineffectual as a consideration and will not support a promise based thereon."

[13] In the present case the release in question was executed in consideration of the payment to respondents of the sum of $15,000 in notes and bonds which were represented by Burgess to be worth that sum of money. We think the evidence sufficiently shows that all of these notes and bonds were worthless. It follows that "nothing of value" was received by the respondents in consideration for the written release. Since the "thing contracted for," to wit, the notes and bonds, were valueless, the contract of release "is a nullity." The release is therefore ineffectual for any purpose and will not support the promise based thereon. In section 254 of Elliott on Contracts, above cited, it is further said: "Should there be a partial failure of consideration a recovery pro tanto may be had in case the contract is divisible."

In this case the contract of release is not devisible. It is either enforceable in toto, or not at all. We are of the opinion it is absolutely void for want of consideration.

[14] Assuming, without so deciding, that the invalidity of a written release under the circumstances of this case depends upon the procedure for rescission which is prescribed by section 1691 of the Civil Code, restoration of the notes and bonds was not necessary as a prerequisite to the repudiation of the instrument as void for lack of consideration and fraud. It is true the ordinary rule of procedure in equitable suits for rescission requires that "as a condition precedent to the right to maintain an action in equity for cancellation of an instrument, the party complaining must, prior to bringing suit, restore to the other party everything of value received from him by reason of the transaction which included the execution of the instrument, or must offer to restore the same upon condition that such party shall do likewise." 4 Cal. Jur. 764, § 7. Restoration of property received is, however, not required when it is valueless. Gifford v. Carvill, 29 Cal. 589; Rosemead Co. v. Shipley Co., 207 Cal. 414, 278 P. 1038. Section 9 of 4 California Jurisprudence, p. 767, asserts that restoration is not necessary when "the thing received by the plaintiff is of no value whatever to either of the parties; or where the plaintiff has merely received the individual promissory note of the defendant; or where the contract is absolutely void; or where it clearly appears that the defendant could not possibly have been injuriously affected by a failure to restore." Rosemead Co. v. Shipley Co., supra. In the present case nothing was received from the defendants in consideration for the written release. Burgess furnished the entire consideration consisting of his valueless notes

and bonds. He is not a party defendant in this suit. Nor was he a party to the original exchange of properties. It is inconceivable that he would be injured by a failure to return his worthless notes and bonds.

[15] Nor is notice of rescission a necessary prerequisite to the instituting of an action for cancellation of an instrument when there is a total failure of consideration therefor. 6 Cal. Jur. 392, § 235; Rosemead Co. v. Shipley Co., supra; Richter v. Union L. & S. Co., 129 Cal. 367, 62 P. 39; Anderson v. Van Camp Sea Food Co., Inc., 98 Cal. App. 787, 793, 277 P. 1099.

[16] Finally, the appellants challenge as erroneous the giving of an instruction which charges the jury that one has a right, without investigation, to rely upon positive statements of absolute facts, the truth or falsity of which are known to the one relating them, and which are unknown to the injured party. It is asserted this instruction is prejudicial because it clearly applies to the respondents' relinquishment of appellants' fraud in procuring the original exchange of properties, and that their subsequent effort to contract with relation thereto constituted a waiver.

The authorities upon which the appellants rely in support of this contention are not in point. Each of them may be readily distinguished from the facts in the present case. It is true that a valid agreement which is based upon adequate consideration, and is free from fraud, will extinguish former disputed obligations. 5 Cal. Jur. 399, § 14. But it is said in the text last cited, "A compromise can affect only the rights of the parties thereto or those in privity with them." In section 17 of 5 California Jurisprudence, at page 403, it is said: "A compromise agreement, like other contracts, can be voided for fraud and deceit in its procurement." The appellants in the present case were not parties to the written release. The purported compromise of respondents' claim of damages for fraud was made with a stranger to the original exchange of properties. The compromise failed for lack of consideration and fraud.

[17] Moreover, the appellants may not complain of this challenged instruction for the reason that the exact principle of law upon which it is based was given to the jury in another instruction which was offered by the appellants, as follows: "You are instructed that the release agreement * * * is to be deemed a good and valid subsisting agreement unless you find that the plaintiffs in this action have proved to your satisfaction that at the time of the execution and delivery of this agreement the same was procured through fraud or that the consideration for said agreement has failed; and I instruct you that the same instructions which I have given you with relation to fraud in the principal case will govern your considerations in connection with any fraud which may have been claimed by the plaintiffs to have been practiced upon them in connection with the release agreement."

In the giving of this instruction the appellants recognize the correct principles of law applicable to the facts of this case.

The judgment is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

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129 Cal.App. 504

PEOPLE v. WILLIAMS.

Cr. 76.

District Court of Appeal, Fourth District, California.

Feb. 7, 1933.

1. Criminal law 🔑207(4).

Justice of peace conducts preliminary examination of defendant in capacity as magistrate, irrespective of population of his jurisdiction (Code Civ. Proc. §§ 270, 274c).

2. Criminal law 🔑236.

Whether magistrate shall appoint reporter to take down proceedings at preliminary examination, is discretionary with magistrate (Pen. Code, §§ 806–808, 869).

3. Criminal law 🔑236.

Competency of reporter appointed by justice of peace acting as committing magistrate in jurisdiction of 30,000 or more population, to take down testimony at preliminary hearing, need not be established in any specified manner (Code Civ. Proc. §§ 270–274, 274c; Pen. Code, §§ 806–808, 858 et seq.).

Competency of reporter appointed pursuant to Code Civ. Proc. § 274c, applicable to localities where jurisdiction of justice court has population of 30,000 or more, by justice of peace acting as committing magistrate, to take down testimony at preliminary hearing, is not required to be established in any specified manner, notwithstanding provision of Code Civ. Proc. § 274c, that Code Civ. Proc. §§ 270–274, are thereby made applicable to qualifications of such reporters, since a justice of peace who conducts preliminary examination under Pen. Code, § 858 et seq., does so in his capacity as magistrate in view of Pen. Code, §§ 806–808, and hence those sections of the Penal Code specifically applicable to conduct of preliminary examination, and which do not require competency of reporter to be established in any specified manner, must govern.

4. **Criminal law** ⚿245.

Failure of defendant's counsel to object to competency of reporter at preliminary hearing in justice's court *held* waiver of competency (Code Civ. Proc. § 274c).

5. **Criminal law** ⚿301.

Defendant having pleaded not guilty should, before moving to set aside information, have obtained permission to withdraw plea (Pen. Code, § 990).

6. **Criminal law** ⚿301.

Defendant is not entitled as matter of right to withdraw duly made plea, that he may interpose objections to proceedings which should have been presented prior to plea (Pen. Code, § 990).

7. **Indictment and information** ⚿137(5).

That transcript was not certified by reporter appointed to report proceedings at preliminary examination in justice court *held* no ground for setting aside information (Pen. Code, § 869).

Failure of reporter to certify transcript of proceedings at preliminary examination was no ground for setting aside information, notwithstanding Pen. Code, § 869, that if defendant be held to answer charge reporter shall certify transcript, since, magistrate having determined that public offense had been committed and having duly issued a commitment of defendant, foundation was properly laid for filing of information.

Appeal from Superior Court, Orange County; James L. Allen, Judge.

P. A. Williams was informed against for grand theft. From an order setting aside the information, the People appeal.

Reversed.

U. S. Webb, Atty. Gen., and John L. Flynn, Deputy Atty. Gen., for the People.

William P. Webb, of Anaheim, for respondent.

JENNINGS, Justice.

This is an appeal by the people from an order of the superior court setting aside an information. The defendant was charged with having committed the offenses of grand theft and violation of the Corporate Securities Act of the State of California (St. 1917, p. 673, as amended), in a complaint which was filed in the justice's court of Santa Ana township, Orange county. A warrant of arrest was thereupon issued by the justice of the peace of said township. The warrant of arrest was duly served upon the defendant and he was taken before the said justice of the peace, who ordered that he be committed for examination to the sheriff of Orange county in accordance with the provisions of section 863 of the Penal Code and that he be admitted to bail in the sum of $10,000. Thereafter a preliminary examination of the defendant was held before the said justice of the peace. At the conclusion of the examination the justice of the peace found from the evidence which was presented to him that the offenses charged in the complaint had been committed and that there was sufficient cause to believe that the defendant was guilty thereof and ordered that he be held to answer the same and that he be admitted to bail in the sum of $5,000. An order to this effect, signed by the justice of the peace, was duly indorsed on the complaint. The record shows that prior to the introduction of any evidence at the preliminary examination "L. E. Ross was appointed shorthand reporter." Thereafter an information charging the defendant with the commission of the offenses specified in the complaint which was filed in the justice's court was filed in the superior court of Orange county by the district attorney. The defendant was arraigned in the superior court, where he entered a plea of not guilty of the offenses charged and the case was set for trial. On the date designated for the trial of the action the defendant, through his counsel, presented a motion to set aside the information on the ground that the defendant had not been legally committed for the reason that the reporter who had been appointed by the justice of the peace and who had prepared a transcript of the proceedings was not an official reporter selected as prescribed by section 274c of the Code of Civil Procedure. This motion was granted by the superior court and the order setting aside the information was made.

As above indicated, it was respondent's contention, in support of the motion to set aside the information, that the reporter who was appointed by the justice of the peace to take down in shorthand the testimony and proceedings at the preliminary examination, and who prepared a transcript of such proceedings, was not an official reporter appointed as required by the provisions of section 274c of the Code of Civil Procedure and whose competency was established as provided in section 270 of the Code of Civil Procedure, and that the transcript of the proceedings had at the preliminary examination was not certified as required by section 274c of the Code of Civil Procedure. Section 274c of the Code of Civil Procedure is in the following language: "§ 274c. *Phonographic reporters for municipal and justices' courts.* Each municipal court in this state, a majority of the judges concurring, and each justices' court in cities, cities and counties, towns and judicial townships, having a population of thirty thousand or more, may, by order entered upon the minutes of the court, appoint as many competent phonographic reporters as the business of the court may require, to be known as official reporters of such court, and to hold office during the pleasure of the judges of such court respectively. Such reporters, or any one of them, must, at the request of either party or of the court in a civil proceeding, or on the order of the court in a criminal action or proceeding, take down in shorthand all the testimony, the objections made, the rulings of the court, the exceptions taken, all arraignments, pleas and sentences of defendants in criminal cases, the arguments of the prosecuting attorney to the jury, and all statements and remarks made and oral instructions given by the judge; and if directed by the court, or requested by either party, must, within such reasonable time after the trial of such case as the court may designate, write out the same, or such specific portions thereof as may be requested, in plain and legible longhand, or by typewriter, or other printing machine, and certify to the same as being correctly reported and transcribed, and when directed by the court, file the same with the clerk of the court. Those sections of the Code of Civil Procedure of this state numbered 270 to 274, inclusive, are hereby made applicable to the qualifications, duties, official oath, certification of transcripts and fees of official reporters of municipal courts and justices' courts in cities, cities and counties, towns and judicial townships, having a population of thirty thousand, or more."

[1] The record herein shows that the superior court took judicial notice of the fact that Santa Ana township has a population of 30,000 or more.

Chapter 7, part 2, title 3, of the Penal Code is entitled "Examination of the Case, and Discharge of the Defendant, or Holding Him to Answer." In this chapter (section 858 et seq.) is prescribed the procedure to be followed in the preliminary examination of a defendant who has been charged with the commission of a criminal offense by a complaint drawn pursuant to section 806 of the Penal Code. Throughout this chapter the official who is charged with the duty of conducting the preliminary examination of the defendant is referred to as a magistrate. In section 807 of the Penal Code the word "magistrate" is defined as an officer having power to issue a warrant for the arrest of a person charged with a public offense. Section 808 of the Penal Code provides that the justices of the Supreme Court, the judges of the superior court, the judges of the municipal court, justices of the peace, and police magistrates in towns and cities are magistrates. A justice of the peace who conducts a preliminary examination of a defendant charged with the commission of a public offense does so in his capacity as magistrate. County of Tulare v. Fenn, 47 Cal. App. 413, 415, 190 P. 855. The population of the judicial township wherein is located the court over which the justice of the peace presides is purely incidental to the conduct of the examination. The jurisdiction of the justice to act as a magistrate is not affected by reason of the fact that he may preside over a justice's court of enlarged jurisdiction.

[2, 3] Section 869 of the Penal Code provides that "the magistrate before whom the examination is had may, in his discretion, order the testimony and proceedings to be taken down in shorthand in all examinations herein mentioned, and for that purpose he may appoint a shorthand reporter." This language indicates that it is discretionary with the magistrate whether or not he shall appoint a reporter for the purpose of having the proceedings at such examination taken down in shorthand. The appointment of the reporter is not at all essential to the conduct of the examination. Concurring opinion of Beatty, C. J., in Elder v. McDougald, 145 Cal. 740, 749, 79 P. 429. The language of section 274c of the Code of Civil Procedure states that a justice's court located in a township having a population of 30,000 or more "*may*" (italics ours) appoint as many competent phonographic reporters as the business of the court may require, and by specific reference to section 270 of the Code of Civil Procedure it would appear that the competency of such reporters must be established in the manner there designated. Nevertheless, since the power of a justice of the peace to hold preliminary examinations and to commit persons to be held for trial in the superior court is derived from the character of the officer as a magistrate and not from his character as justice of the peace (County of Tulare v. Fenn, supra), it follows that those sections of the Penal Code which are specifically applicable to the conduct of preliminary examinations by magistrates must govern rather than those sections of the Code of Civil Procedure which have for their object the establishment of the competency of reporters in justices' courts. No provision requiring a magistrate, in the conduct of a preliminary examination, to appoint a reporter whose competency is to be established in any specified manner, is to be found in those sections of the Penal Code which relate exclusively to the conduct of such examinations. We conclude, therefore, that respondent's contention that the competency of a reporter who is appointed by a justice of the peace, acting in the capacity of a committing magistrate, to take down the testimony and proceedings at a preliminary examination, must be established in the manner specified in section 270 of the Code of Civil Procedure, when it appears that the court over which the justice presides is located in a township having a

population of 30,000 or more, may not be sustained.

It may be observed, incidentally, that it is not contended by respondent that the reporter who was appointed by the magistrate to take down in shorthand the testimony and proceedings at the preliminary examination was not in fact competent nor that the transcript prepared by the reporter is not in fact a true and correct record of such testimony and proceedings.

[4] Furthermore, it appears that the respondent was represented by counsel at the preliminary examination and that no objection to the competency of the reporter was then made. By thus failing to make the objection at the proper time it must be deemed to have been waived. People v. McIntyre, 127 Cal. 423, 59 P. 779.

[5, 6] It also appears that upon being arraigned in the superior court respondent entered a plea of not guilty and that no application for permission to withdraw the plea had been made at the time respondent presented his motion to set aside the information. The orderly procedure of the cause in the superior court, as established by section 990 of the Penal Code, would have been for the respondent first to have presented his motion to set aside the information. Having failed to do so and having entered a plea, he should then have sought and obtained permission of the court to withdraw the plea that he might in orderly manner present his objection to the information. A defendant in a criminal case is not entitled as a matter of right to withdraw a plea duly made to an information in order that he may interpose objections to the proceedings which should have been presented prior to the plea. People v. Ronsse, 26 Cal. App. 100, 104, 146 P. 65. It is doubtful if the court was authorized to entertain respondent's motion for dismissal of the information after a plea had been duly entered by respondent and no application for permission to withdraw the plea had been presented. Western Meat Co. v. Superior Court, 9 Cal. App. 538, 544, 99 P. 976.

[7] As to the objection that the transcript of the proceedings taken at the preliminary examination was not certified by the reporter appointed by the magistrate, while it is provided by section 869 of the Penal Code that, if the defendant be held to answer the charge, the reporter shall certify the transcript, his failure so to do did not affect the jurisdiction of the magistrate to conduct the preliminary examination and the magistrate having determined that a public offense had been committed and that there was sufficient cause to believe that the respondent was guilty thereof and having duly issued a commitment of the respondent, foundation was properly laid for the filing of the information, which should not be set aside because of the failure of the reporter to certify the transcript whose correctness is not questioned.

For the reasons stated, the order from which this appeal has been taken is reversed.

We concur: BARNARD, P. J.; MARKS, J.

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129 Cal.App. 582

PAYNE v. CALIFORNIA UNION FIRE INS. CO.

Civ. 8753.

District Court of Appeal, First District, Division 1, California.

Feb. 14, 1933.

1. Appeal and error 🔑724(3).

Point that statement in fire policy that building was used only as dwelling constituted warranty, falsity of which avoided policy, *held* inapplicable on appeal from judgment reforming policy for mistake in describing building.

2. Insurance 🔑143(8).

Insured's failure to read fire policy until after loss *held* not to prevent reformation thereof for mistake in describing building as used for dwelling only.

3. Appeal and error 🔑193(9).

Point, first made on appeal, that complaint stated no cause of action need not be considered.

4. Reformation of instruments 🔑36(1).

Complaint *held* sufficient to state cause of action for reformation of fire policy for mutual mistake in describing insured building as used for dwelling only.

The complaint stated parties' actual agreement to insure building used as dwelling, garage, and storage place, failure properly to describe property and its uses through insurer's error, insured's failure to discover mistake until after loss, etc.

Appeal from Superior Court, Los Angeles County; J. A. Smith, Judge.

Action by J. B. Payne against the California Union Fire Insurance Company. Judgment for plaintiff, and defendant appeals.

Affirmed.

Lee A. Solomon, of Los Angeles, for appellant.

J. E. Stillwell, of South Pasadena, and Robert E. Austin and John N. Helmick, both of Los Angeles, for respondent.

COMSTOCK, Justice pro tem.

This action was brought to reform a contract for fire insurance and to recover a money judgment for a fire loss alleged to have been sustained by plaintiff and to have been covered by the contract. Judgment went for the plaintiff and the defendant has appealed therefrom.

It appears from the evidence that plaintiff was the owner of several parcels of real estate in and about Los Angeles. One of these was a frame building with composition roof, about 137 feet long by 20 feet wide, situated at No. 127 Venice boulevard, Venice, Cal., occupied at the time of the issuance of the insurance policy in question herein by a tenant of the plaintiff's for dwelling purposes, and also used as a garage and for the storage of various materials.

Defendant maintained an office at Palms, in the county of Los Angeles, with one George W. Schilling as its agent in charge thereof. Said agent was duly authorized to contract for, execute, and issue policies of fire insurance for defendant. The plaintiff owned a policy of fire insurance covering the said building, which policy was about to expire. The said Schilling had written many fire insurance policies for plaintiff upon his various properties and plaintiff was desirous of having him issue one on the property here involved. Schilling was quite familiar with the property, having visited it and passed by it on numerous occasions, and having it listed for sale or exchange as a real estate broker. A few days prior to the expiration of the old policy, plaintiff took it to Schilling and told him he wanted it renewed, leaving the old policy with him as had been his custom in connection with many other policies which said agent had issued to him under similar circumstances. Several days after placing the order for the new policy, plaintiff called at Mr. Schilling's office, found the policy ready for him, and took it home with him, where he filed it among other insurance policies. This policy was dated August 4, 1928, and covered for a period of three years from that date. The amount of the coverage was $1,500 and the premium charged by the company and paid by plaintiff was $10.50.

On June 9, 1929, a fire occurred in the premises, damaging them to the amount of $400. Plaintiff without delay presented his written proof of loss to defendant and claimed reimbursement to the extent of his damage, but defendant denied liability on the ground that "the building was not located or occupied for the purpose stated in the policy and that the proper rate was not charged for the insurance as written."

After the fire the plaintiff for the first time discovered that the policy had been written erroneously, describing the property as located at "127 Victoria Avenue, Venice, California," instead of 127 Venice boulevard, and as a "composition roof frame building and its additions (if any) communicating and in contact therewith, while occupied only for dwelling house purposes," instead of as a composition roof frame building used as a dwelling and as a garage and as a place of storage of various materials. Plaintiff had never owned any property on a street known as Victoria avenue. The agent knew the location and description of the property to be insured. The error was wholly made in his office. Plaintiff did not read the policy, but relied upon defendant's agent to properly describe the property.

The foregoing facts appear without substantial conflict. There was testimony by Edward Hicks Beach, an employee in Mr. Schilling's office, to the effect that he did the clerical work of writing the policy and that Mr. Schilling had told him the property was at 127 Victoria street. He stated that he had gone with Mr. Schilling's partner to look at the property and had found a street near Venice called Victoria drive or Victoria avenue, but had been unable to find a number "127" or to locate plaintiff's property; that after returning to the office he called Mr. Payne by telephone and asked him if the property was 127 Victoria avenue; that he did not remember what Mr. Payne's answer was, nor whether it was Mr. Schilling or Mr. Payne who told him the building was a dwelling, but he did not think Mr. Payne made any statement as to what kind of building it was that he wanted insured. Upon the subject of this conversation, Mr. Payne testified that he had told Mr. Beach he thought the street upon which the property was located was formerly Virginia avenue, but that it was now Venice, and had referred him to the old policy and had stated he did not know the number.

[1] The first point made for reversal is stated by appellant as follows: "The third paragraph of the findings is not supported by the evidence inasmuch as the said building was not at any time used as a dwelling house within the meaning of the insurance policy and the warranty in the policy that it was used as a dwelling was untrue and the policy was, therefore, void."

The said third paragraph of the findings determines it to be true "That said building is and was at the time mentioned in the pleadings herein used as a dwelling and as a garage and as a place of storage of various materials." Without going into the evidence in detail, suffice it to say that we find it amply sufficient to support this finding as to the character of the use which was being made of the property. Appellant quotes in its brief sufficient of the evidence to establish this. But the real point which appellant seeks to make apparently is that the statement in the policy as issued, that the premises were used only for dwelling house purposes, constituted a warranty that the property was as described, which, if untrue, would avoid the policy. The gist of plaintiff's action is that the parties actually contracted for the insurance of the property at 127 Venice boulevard used as a dwelling and as a garage and place of storage for various materials, but that through error the policy was not written as intended. It is plain then that, if the findings of the lower court are supported by the evidence in regard to the mistake and the judgment of reformation can be upheld, appellant's first point has no application, for in such case only the contract as written contains the alleged untrue warranty, but as reformed it correctly describes the property and there remains no room for the contention.

[2] We pass to a consideration of the second question presented by the appeal, which appellant states as follows: "If there is a misstatement of a warranty material to the risk, can the plaintiff, as the party insured, avoid the effect of the misstatement by showing that it was inserted by an agent of the company, and that he did not discover it until after the loss occurred, nothing having been done by the company or its agent to prevent a reading of the policy?" This is hardly a clear or concise statement of the question. Manifestly, the real point is whether there was anything in plaintiff's failure to read the policy under the circumstances of this case which militates against his urging the mistake and asking for a revision of the contract. It has frequently been held that the mere failure to read an insurance policy does not militate against its reformation upon the ground of mutual mistake. An enlightening case on this subject is that of Hercules Gasoline Co. v. Security Ins. Co., 122 Cal. App. 499, 10 P.(2d) 128. In that case certain motor vehicles and trailers had been insured. While a policy was in force, the insured exchanged a trailer covered therein for another of different name and description. Prior to the expiration of the policy the insurer and the insured entered into negotiations for the issuance of a policy to cover all of the latter's motor vehicles, and during the course of these negotiations the insurer undertook to make a careful check of all the vehicles to be covered so as to obtain a correct description of them for use in the new policy. The policy was prepared in the office of the insurer without consultation with the insured. Through a mistake upon the part of the insurer the policy erroneously described a Hercules trailer as a Utility trailer, this latter being the name of the trailer previously insured and described in the old policy. It was the intention of both the insurer and the insured to have the policy describe the Hercules trailer and the omission of it from the policy was the result of mutual mistake. The insured received the policy as issued and retained it. The mistake was not known or discovered until after an accident which became the basis of a claim under the policy. The action was one to reform the policy upon the ground of mutual mistake and to recover upon it as reformed. In commenting upon the very question now before us, the court, in deciding the case, said at page 503 of 122 Cal. App., 10 P.(2d) 128, 130: "The evidence upon the part of respondent establishes a clear case of mutual mistake in leaving out of said second policy the Hercules trailer. Nor does the fact that the agents and officers of respondent failed to read said policy militate against it. Respondent was assured by appellant that its motor vehicles would be checked so that a correct description of each of them would be set forth in the policy. Respondent relied upon this representation and its failure to read the policy does not prevent its reformation. California Packing Corp. v. Larsen, 187 Cal. 610, 203 P. 102; Sullivan v. Moorhead, 99 Cal. 157, 33 P. 796; Travelli v. Bowman, 150 Cal. 587, 89 P. 347; Cantlay v. Olds & Stoller Inter-Exchange, 119 Cal. App. 605, 7 P.(2d) 395." We consider this case determinative of the issues on this appeal.

Appellant cites the case of Bank of Fruitvale v. Fidelity, etc., Co., 35 Cal. App. 666, 170 P. 852, as authority for the proposition that a policy is not subject to revision on the ground that it does not cover a particular risk applied for where it is not shown that the insurer knew, or could have known that the insured would not examine the policy, or that the insurer, or its agent, took affirmative action to prevent such examination. This case was distinguished in the case of Hercules Gasoline Co. v. Security Ins. Co., supra, as being dissimilar upon the facts and a case where the court properly held under the circumstances that no fraud or mistake sufficient to authorize a reformation of the policy had been shown. It is similarly distinguishable from the case before us.

The complaint offered to pay any difference in the amount of premium found to be due on account of the reformation. The court found that the rate which should have been charged was $18.75 and deducted the difference between this and the $10.50 paid from plaintiff's recovery. No point is made on the appeal in respect to this.

We have carefully read and considered all of the authorities cited by appellant and find none among them which in any way changes the conclusions we have reached. We deem it unnecessary to comment further upon them.

[3, 4] Appellant in its reply brief attempts for the first time on this appeal, and also, so far as appears from the record before us, for the first time during the case, to make the

point that the complaint fails to state a cause of action. We are not obliged to consider a point so tardily made, but we may say that the complaint appears to us entirely sufficient. It sets forth the actual agreement of the parties, the mutual intention to have the policy conform thereto, the failure to properly describe the property and its uses through the error of the defendant, the fact of plaintiff's failure to discover the mistake until after the loss and every other element necessary to the statement of a cause of action for revision of the policy upon the ground of the mutual mistake of the parties.

The findings are supported by the evidence and a careful reading of the entire record has disclosed no error. The judgment is affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

129 Cal.App. 589

HARRY H. CULVER & CO. v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

Civ. 8822.

District Court of Appeal, Second District, Division 2, California.

Feb. 14, 1933.

1. Courts 🔑37(1).

Silence cannot confer jurisdiction, but may preclude claim that cause tried as action at law was equitable case outside municipal court's jurisdiction.

2. Courts 🔑37(1).

Defendant not demurring to complaint, nor objecting to taking of testimony in municipal court action for money received, could not complain after judgment, on showing of pleadings, verdict, and judgment only, that case was in equity.

3. Action 🔑25(2).

Action to recover amount paid on contract to purchase realty *held* action at law within municipal court's jurisdiction, not in equity.

4. Vendor and purchaser 🔑120.

Notice to vendor that purchaser rescinded purchase of realty, offered to restore everything of value received, and demanded return of money paid because of fraud, and would sue for refund, if vendor disregarded notice, accomplished rescission of contract.

Application by Harry H. Culver & Co., a corporation, for a writ of mandate to the Superior Court in and for Los Angeles County, Lucius P. Green, Judge thereof, and others. On respondents' demurrer to the petition.

Demurrer sustained, alternative writ discharged, and proceedings dismissed.

Leslie S. Bowden and O. J. Marston, both of Los Angeles, for petitioner.

Everett W. Mattoon, County Counsel, and J. F. Moroney, Deputy County Counsel, both of Los Angeles, for respondents.

STEPHENS, Justice.

The petitioner asks that this court command the Superior Court to proceed with a certain cause pending therein. In addition to the Superior Court, the judge thereof, who has handled the cause so far, and the marshal and clerk of the municipal court of Los Angeles, are made parties respondent.

The alternative writ issued and respondents have demurred to the petition on the ground that the facts stated therein do not entitle petitioner to relief. This litigation began with an action in the said municipal court entitled Jens Henry Jensen, Plaintiff, v. Harry H. Culver & Company, Defendant, a Corporation (petitioner herein), in which the plaintiff asks the return of $1,450 theretofore paid defendant as part payment on a contract to purchase real estate. The action is framed after the fashion of the common count. The complaint is denominated "Complaint—Money Had and Received," and sets up as an exhibit a notice to the defendant that plaintiff rescinds "such purchase" and offers to restore everything of value received and demands return of money paid, "Because of the willful and deliberate fraud and deception practiced upon me by your company in inducing me * * * to enter into a contract for the purchase of" certain described real estate. It may be noted that neither the complaint nor the exhibit specify any particular as to the fraud and deception allegedly practiced upon the said plaintiff. This notice (Exhibit A to complaint and made a part thereof) closes as follows: "I am giving you this notice preliminary to the institution of suit to compel the refund of my money in the event you see fit to disregard this notice." The data furnished us in this proceeding indicates that this municipal court action proceeded to trial and verdict and judgment for plaintiff before jury and judge, upon the complaint and a written answer amounting to a general denial.

[1] No demurrer, or objection to the taking of testimony, appears to have been injected into the case.

We here break the logical outline of the facts to remark that this latter circumstance, as it occurs to us, vitally affects the claim long after made by said defendant, that the case is equitable and outside the jurisdiction of the municipal court. Of course, silence cannot confer jurisdiction of a subject-matter, but it can, and we think herein does, preclude this belated claim that the cause was not in fact what it was tried as, to wit, a money had and received case following an accomplished rescission.

To continue with the recital of facts: After judgment, the municipal court made an order setting aside as null and void the referred to judgment on the ground that the subject-matter was equitable in nature and therefore cognizable only in the Superior Court. The plaintiff appealed, and the appellate department of the Superior Court reversed this referred to order. Thereupon defendant Culver Company instituted an action in Superior Court praying therein that the said referred to municipal court judgment be set aside as null and void because of the jurisdictional question heretofore mentioned. A demurrer to the complaint in the Superior Court proceeding was interposed and was sustained without leave to amend.

We have now gone around the eventful circle of this litigation and are back to our starting point, to wit, the proceeding through which we are asked to command the Superior Court to proceed and declare the municipal court judgment a nullity.

[2] Respondent's demurrer must be sustained, the writ discharged, and the proceedings dismissed, for the following reasons:

(1) The municipal court case was framed as a money had and received case, and the issue thus tendered was met by defendant therein (petitioner here) as such, and so far as we are informed, was tried to judgment as such. It was too late after judgment went against it for defendant corporation to here complain upon the showing only of the pleadings, verdict, and judgment that it was a case in equity. So far as we know, the rescission intended by the notice (Exhibit A, municipal court complaint) was regarded by said defendant as an accepted and accomplished rescission. Indeed, it would seem that we must regard this as true, as there is no denial respecting the notice, its statement of fact or its service.

[3] (2) The case, in the municipal court, is one sounding in law and not in equity. The difference of opinion as to this point is, of course, the real cause for all of the referred to proceedings following the judgment in municipal court. This point is the sole ultimate question decided by the appellate department of the Superior Court when it reversed the municipal court order declaring the judgment a nullity. Although we are by no means certain that decision on this point is strictly or technically necessary, as may be seen by our first reason for decision, we nevertheless think it proper to here decide the point for its influence on the future of this litigation.

[4] Accordingly, we have examined all of the authorities cited to us. In this we have read the referred to opinion of the Superior Court appellate department, with great care and admiration. Jensen v. Culver & Co. (Cal. Super.) 15 P.(2d) 907. Upon the reasoning of that opinion and the authorities therein cited, we hold that in the circumstances of the instant proceeding the rescission of the contract was accomplished by the notice served, and that the action brought to recover the money theretofore paid upon the contract was one in law and not in equity.

Respondent (by demurrer) resists petitioner's allegation that he has no plain, speedy, or adequate remedy by appeal. As we believe decision on the merits of the subject-matter will be more useful than decision on this point, we herein assume rather than decide this allegation to be true.

The demurrer is sustained, the alternative writ is discharged and the proceedings dismissed.

We concur: WORKS, P. J.; CRAIG, J.

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129 Cal.App. 536

CLARK v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al.

Civ. 4845.

District Court of Appeal, Third District, California.

Feb. 9, 1933.

Hearing Denied by Supreme Court April 10, 1933.

1. **Insurance** ⚷435.

Nephew temporarily employed on uncle's ranch as member of harvesting crew, though furnished board and sleeping quarters by employer, was not "living on premises" of employer within exception of workmen's compensation policy (St. 1917, p. 877, § 69(a).

> Nephew, who resided with his father, was not, while temporarily employed on uncle's ranch as member of harvesting crew, "living on the premises" of his uncle within provision of workmen's compensation insurance policy issued to his uncle that policy did not cover injuries sustained by any relative of insured living on premises occupied by insured, unless such relative was specifically mentioned by name in schedule as covered by policy or by indorsement attached thereto, because of ambiguity of the phrase "living on the premises," and in view of St. 1917, p. 877, § 69(a), providing that the act shall be liberally construed.

2. Insurance 🔑**146(3).**

Ambiguous language of insurance contract will be construed most strongly against insurer.

3. Insurance 🔑**146(3).**

Provisions of workmen's compensation insurance contract limiting or avoiding liability must be construed strictly against insured, and all ambiguities resolved against insurer (St. 1917, p. 877, § 69(a).

Proceeding by Irwin Clark to review a portion of the finding and award of the State Industrial Commission holding that petitioner's employer, Howard Clark, was not covered by a compensation insurance policy issued to him by the State Compensation Insurance Fund.

Order annulled.

L. E. Johnston, of Napa City, for petitioner.

A. I. Townsend, of San Francisco, for respondents.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

The petitioner asks this court to review that portion of the findings and award entered by the Industrial Accident Commission in a proceeding which holds specifically that defendant employer was not covered by the terms of a compensation insurance policy issued to him by the State Compensation Insurance Fund.

[1] The admitted facts are that Clark Brothers were the owners of a grain harvester which they used not only to harvest their own crops but also the crops of their neighbors. Among others, they harvested the crops of Howard Clark. Howard Clark had no interest in the harvester, but by agreement with Clark Brothers he was given the privilege of selecting one of the two sack bucks on the outfit, and during the time the harvester was working on his ranches he paid the wages of the sack buck he had selected. The duties of the sack buck are to follow the harvester in the field and gather the sacked grain as it is dropped from the harvester and take it to the warehouse or other point designated by the owner. Under such agreement Howard Clark selected his nephew Irwin Clark, the petitioner herein, as sack buck. Irwin Clark was a young man residing with his father at Monticello, which is about five miles from the ranch of Howard Clark, where the injury hereinafter referred to occurred.

Irwin Clark began work with the harvester in the latter part of June, and after working on the ranches of Clark Brothers the outfit moved to the Howard Clark ranch about July 12th, and began harvesting there. The custom of the neighborhood, and the practice on the Howard Clark ranch, was that while the harvester was on his ranch he boarded the threshing crew and provided sleeping quarters, the men, however, furnished their own bedding. On the particular occasion here in question, the weather being hot, the men were sleeping outside of the bunkhouse. While thus employed and under the circumstances as detailed, Irwin Clark sustained the injury for which he is seeking compensation.

The policy of insurance issued to Howard Clark by respondent State Compensation Insurance Fund and in force at the time of the accident contained the following provision: "It is agreed that this policy does not extend to or cover injuries or death resulting therefrom sustained by any relative by blood or marriage * * * of the insured, * * * when such relatives are living on the premises occupied by the insured and/or in the household of the insured unless such relative is specifically mentioned by name in the schedule as covered by the policy or by endorsement attached to the policy."

The Industrial Accident Commission in its findings denied petitioner any award against the State Insurance Fund on the ground that "on July 12, 1932, the date of the injury herein, the policy of the State Compensation Insurance Fund was of an excluded type, excluding relatives living on the premises occupied by the insured and/or in the household of the insured and at the time Irwin M. Clark was a relative of the employer herein and living on his premises and hence the coverage of this case does not extend to the above injury."

The question here involved concerns the status of petitioner and the interpretation to be given to the word "living on the premises," as used in the foregoing proviso.

It is admitted that Howard Clark is the uncle of Irwin Clark and that Irwin Clark was not specifically mentioned by name in the schedule or in an endorsement attached to the policy.

It is not claimed that the petitioner was a member of the household of the assured, as he lived with and under the same conditions as the balance of the harvester crew. Under what particular circumstances the presence of a person would constitute "living on the premises" we do not attempt to here state. Each case depends upon its own particular facts, and all we can say is that a member of a harvester crew present on the premises for a specific temporary purpose does not constitute "living on the premises."

Respondent has cited several cases to show that "living" has been construed as meaning "the fact of existing in a certain place."

In Hanson v. Graham, 82 Cal. 631, 23 P. 56, 7 L. R. A. 127, it is held that the section governing attachment of property of nonresidents referred to actual as distinguished from constructive or legal residence, notwithstanding the general intention to return to the place of legal residence domicile.

In Long v. Ryan, 30 Grat. (Va.) 718, quoted in the above-entitled case, held to the same effect and also held that in "statutes relating to taxation, settlements, right of suffrage, and qualification for office, it may have a very different construction from that which belongs to it in the statutes relating to attachments."

In the case of O'Brien v. O'Brien, 16 Cal. App. 103, 116 P. 692, 693, the court said the "statement of a witness that he lived at a certain street and number in a specified city was not inconsistent with his 'residence' in another county, since a person may 'live' in one place, and have a legal residence in another."

[2] From the foregoing it appears that the word "live" is at least ambiguous, and therefore the rule which is well established that where the language of an insurance contract is ambiguous it will be construed most strongly against the insurer, is applicable in the present proceeding.

We recognize the far-reaching effect of this opinion for the provision here called in question is contained in every policy of compensation insurance issued to an individual in this state, it having been promulgated in 1929 by the insurance commissioner and the Industrial Accident Commission under authority granted in section 31(a) of the Workmen's Compensation Insurance Safety Act of 1917 (St. 1917, p. 860, § 31(a), as amended by St. 1929, p. 1169, § 2).

Prior to 1929 the provision read: "It is agreed upon the delivery and acceptance of this policy that if the employer is an individual and has a family * * * residing within this employer's household, this policy shall not apply to any member or members of such family except those named in the declarations * * *."

It will be noted that the provision originally excluded relatives "residing within this employer's household" whereas it now excludes relatives "living on the premises occupied by the insured and/or in the household of the insured."

It is obvious that the amendment has enlarged the scope and field of the proviso, but we do not believe it can be carried to the extent urged by respondent. Under their interpretation every member of the harvesting crew would be held to be living on the premises of Howard Clark during the period of employment. If the commission had intended that mere presence was to be the test they would have clearly so expressed it. To hold that a nephew, who resided in Monticello with his father, but was injured while employed for a brief period as a member of a harvesting crew by his uncle, was "living on the premises," is not only a strained interpretation of the statute but a violation of the canon of construction contained in the act itself.

[3] "Whenever this act, or any part or section thereof, is interpreted by a court, it shall be liberally construed by such court with the purpose of extending the benefits of the act for the protection of persons injured in the course of their employment." Section 69(a) of the Compensation Act (St. 1917, p. 877).

In accordance therewith the provisions of the contract limiting or avoiding liability must be construed strictly against the insured and all ambiguity resolved against the insurer. Everett v. Standard Insurance Co., 45 Cal. App. 332, 187 P. 996; Welch v. British Am. Assurance Co., 148 Cal. 223, 82 P. 964, 113 Am. St. Rep. 223, 7 Ann. Cas. 396; Maryland Casualty Co. v. Industrial Accident Commission, 178 Cal. 491, 173 P. 993.

Webster's New International Dictionary defines the word "living" as meaning to abide, to dwell, to reside; and defines the word "reside" as "to dwell permanently or for a considerable time; to have a settled abode for a time."

Ballentine's Law Dictionary defines the word "live" as meaning, "to live in a place is to reside there, to abide there," and defines "reside" by saying, "persons who are said to reside in a place usually include all those who are the actual stated dwellers there even though they may have a technical domicile elsewhere."

In Words and Phrases, First, Second, and Third Series, "to live, to reside, to dwell, to have one's home, are usually equivalent and convertible terms."

"Where in the gift of a house there was a condition that the donee should 'live and reside' therein, it was held the word 'live' added nothing to its point." T. & R. 530.

We are therefore of the opinion that in view of the ambiguity existing in the phrase "living on the premises" and the admonition imposed on the court as to liberality of construction, we must hold that under the facts here adduced petitioner was not "living on the premises" and is therefore protected by the terms of the policy, and the award of the Commission heretofore entered is annulled.

We concur: R. L. THOMPSON, J.; PLUMMER, J.

129 Cal.App. 787

The CITY OF LOS ANGELES (a Municipal Corporation), Plaintiff and Appellant, v. Sadie D. Griffith ABBOTT et al., Defendants; Alice Virginia Hatfield, Defendant and Respondent.

Civ. 7293.

District Court of Appeal, Second District, Division 2, California.

Feb. 3, 1933.

As Amended on Denial of Rehearing Mar. 3, 1933.

Appeal by plaintiff from a judgment of the Superior Court of Los Angeles County, Samuel R. Blake, Judge, of dismissal of an action in eminent domain.

Affirmed.

Prior opinion, 1 P.(2d) 538.

Erwin P. Werner, City Atty., and Arthur Loveland and Arthur W. Nordstrom, Deputies City Atty., all of Los Angeles, for appellant.

E. C. Pyle, of Los Angeles, for respondent.

CRAIG, Justice.

An action in eminent domain having been discontinued following proceedings in injunction to restrain condemnation of properties in the city of Los Angeles, a judgment of dismissal was entered, from which the plaintiff appealed.

Said judgment awarding attorney's fees is reversed. Upon the authority of City of Los Angeles v. Abbott (Cal. Sup.) 17 P.(2d) 993, the judgment dismissing said action is affirmed.

Judgment affirmed.

We concur: WORKS, P. J.; STEPHENS, J.

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129 Cal.App. 788

The CITY OF LOS ANGELES (a Municipal Corporation), Plaintiff and Appellant, v. Sadie D. Griffith ABBOTT et al., Defendants; Delbert C. Kemp, Defendant and Respondent.

Civ. 7401.

District Court of Appeal, Second District, Division 2, California.

Feb. 3, 1933.

As Amended on Denial of Rehearing Mar. 3, 1933.

Appeal by plaintiff from a judgment of the Superior Court of Los Angeles County, Douglas L. Edmonds, Judge, of dismissal of an action in eminent domain.

Affirmed.

Erwin P. Werner, City Atty., Frederick von Schrader, Asst. City Atty., and Arthur W. Nordstrom and C. N. Perkins, Deputies City Atty., all of Los Angeles, for appellant.

Thomas Tyler Robinson, of Los Angeles, for respondent.

CRAIG, Justice.

An action in eminent domain having been discontinued following proceedings in injunction to restrain condemnation of properties in the city of Los Angeles, a judgment of dismissal was entered, from which the plaintiff appealed.

Said judgment awarding attorney's fees is reversed. Upon the authority of City of Los Angeles v. Abbott (Cal. Sup.) 17 P.(2d) 993, the judgment dismissing said action is affirmed.

Judgment affirmed.

We concur: WORKS, P. J.; STEPHENS, J.

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129 Cal.App. 789

The CITY OF LOS ANGELES (a Municipal Corporation), Plaintiff and Appellant, v. Sadie D. Griffith ABBOTT et al., Defendants; Benevolent Realty Holding Company (a Corporation), Defendant and Respondent.

Civ. 7540.

District Court of Appeal, Second District, Division 2, California.

Feb. 3, 1933.

As Amended on Denial of Rehearing Mar. 3, 1933.

Appeal by plaintiff from a judgment of the Superior Court of Los Angeles County, Myron Westover, Judge, of dismissal of an action in eminent domain.

Affirmed.

Prior opinion, 1 P.(2d) 541.

Erwin P. Werner, City Atty., and Arthur Loveland and Arthur W. Nordstrom, Deputies City Atty., all of Los Angeles, for appellant.

J. Wiseman Macdonald, of Los Angeles, for respondent.

CRAIG, Justice.

An action in eminent domain having been discontinued following proceedings in injunction to restrain condemnation of properties in the city of Los Angeles, a judgment of dismissal was entered, from which the plaintiff appealed.

Said judgment awarding attorney's fees is reversed. Upon the authority of City of Los Angeles v. Abbott (Cal. Sup.) 17 P.(2d) 993, the judgment dismissing said action is affirmed.

Judgment affirmed.

We concur: WORKS, P. J.; STEPHENS, J.

129 Cal.App. 790

The CITY OF LOS ANGELES (a Municipal Corporation), Plaintiff and Appellant, v. Sadie D. Griffith ABBOTT et al., Defendants; The Lankershim Estate (a Corporation), Defendant and Respondent.

Civ. 7542.

District Court of Appeal, Second District, Division 2, California.

Feb. 3, 1933.

As Amended on Denial of Rehearing Mar. 3, 1933.

Appeal by plaintiff from a judgment of the Superior Court of Los Angeles County, Myron Westover, Judge, of dismissal of an action in eminent domain.

Affirmed.

Prior opinion, 1 P.(2d) 541.

Erwin P. Werner, City Atty., and Arthur Loveland and Arthur W. Nordstrom, Deputies City Atty., all of Los Angeles, for appellant.

J. Wiseman Macdonald, of Los Angeles, for respondent.

CRAIG, Justice.

An action in eminent domain having been discontinued following proceedings in injunction to restrain condemnation of properties in the city of Los Angeles, a judgment of dismissal was entered, from which the plaintiff appealed.

Said judgment awarding attorney's fees is reversed. Upon the authority of City of Los Angeles v. Abbott (Cal. Sup.) 17 P.(2d) 993, the judgment dismissing said action is affirmed.

Judgment affirmed.

We concur: WORKS, P. J.; STEPHENS, J.

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129 Cal.App. 791

The CITY OF LOS ANGELES (a Municipal Corporation), Plaintiff and Appellant, v. Sadie D. Griffith ABBOTT et al., Defendants; Richard R. Freeman et al., Defendants and Respondents.

Civ. 7544.

District Court of Appeal, Second District, Division 2, California.

Feb. 3, 1933.

As Amended on Denial of Rehearing Mar. 3, 1933.

Appeal by plaintiff from a judgment of the Superior Court of Los Angeles County, Myron Westover, Judge, of dismissal of an action in eminent domain.

Affirmed.

Prior opinion, 1 P.(2d) 542.

Erwin P. Werner, City Atty., and Arthur Loveland and Arthur W. Nordstrom, Deputies City Atty., all of Los Angeles, for appellant.

J. Wiseman Macdonald, of Los Angeles, for respondents.

CRAIG, Justice.

An action in eminent domain having been discontinued following proceedings in injunction to restrain condemnation of properties in the city of Los Angeles, a judgment of dismissal was entered, from which the plaintiff appealed.

Said judgment awarding attorney's fees is reversed. Upon the authority of City of Los Angeles v. Abbott (Cal. Sup.) 17 P.(2d) 993, the judgment dismissing said action is affirmed.

Judgment affirmed.

We concur: WORKS, P. J.; STEPHENS, J.

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129 Cal.App. 792

The CITY OF LOS ANGELES (a Municipal Corporation), Plaintiff and Appellant, v. Sadie D. Griffith ABBOTT et al., Defendants; Dora Haynes, Defendant and Respondent.

Civ. 7546.

District Court of Appeal, Second District, Division 2, California.

Feb. 3, 1933.

As Amended on Denial of Rehearing Mar. 3, 1933.

Appeal by plaintiff from a judgment of the Superior Court of Los Angeles County, Myron Westover, Judge, of dismissal of an action in eminent domain.

Affirmed.

Prior opinion, 1 P.(2d) 542.

Erwin P. Werner, City Atty., and Arthur Loveland and Arthur W. Nordstrom, Deputies City Atty., all of Los Angeles, for appellant.

J. Wiseman Macdonald, of Los Angeles, for respondent.

CRAIG, Justice.

An action in eminent domain having been discontinued following proceedings in injunction to restrain condemnation of properties in the city of Los Angeles, a judgment of dismissal was entered, from which the plaintiff appealed.

Said judgment awarding attorney's fees is reversed. Upon the authority of City of Los Angeles v. Abbott (Cal. Sup.) 17 P.(2d) 993, the judgment dismissing said action is affirmed.

Judgment affirmed.

We concur: WORKS, P. J.; STEPHENS, J.

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129 Cal.App. 646

LYNCH v. MELBY.

Civ. 4738.

District Court of Appeal, Third District, California.

Feb. 16, 1933.

Hearing Denied by Supreme Court April 17, 1933.

1. Quieting title 🔑44(3).

In quiet title action, evidence showed that defendant sold two lots of disputed property and tendered plaintiff 3 per cent. of purchase price under terms of deed which required plaintiff to thereupon release lots from his oil rights.

2. Mines and minerals 🔑54(2).

Deed conveyed fee-simple title subject to grantors' right to 1 per cent. of oil produced, only if produced before grantee sold lots.

> Deed conveyed lots subject to exceptions that grantors were entitled to 1 per cent. of all oil produced from the lots, but if grantee should sell the lots then, in lieu of the foregoing share in any oil produced on the lots sold, the grantors were, at time of sale, entitled to 3 per cent. of the purchase price of the lots which were to be free from any claim by the grantors because of any oil produced thereon.

3. Deeds 🔑143.

Deed, which reserved to grantors right to receive 3 per cent. of purchase price when grantee sold lots conveyed, reserved no right in grantors' successor in interest to be consulted in fixing of price (Civ. Code, §§ 1638, 1639).

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by H. L. Lynch against Paul Melby, wherein defendant filed a cross-complaint. From a judgment for defendant, plaintiff appeals.

Affirmed.

Ray H. Enter and Frank A. Enter, both of Los Angeles, for appellant.

G. Roy Garnett, of Los Angeles, for respondent.

BURROUGHS, Justice pro tem., delivered the opinion of the court.

This action was brought to quiet plaintiff's title to the land described in the complaint. The defendant answered denying plaintiff's title thereto and alleging title in himself. By way of a cross-complaint the defendant seeks declaratory relief under the provisions of section 1060 et seq. of the Code of Civil Procedure. The plaintiff admits the existence of an actual controversy as defined in the Code sections above referred to, but denies the other material allegations of the cross-complaint. Judgment went for defendant and cross-complainant, and plaintiff appeals.

It appears from the evidence that on November 18, 1925, John S. Holmstrand and Ida S. Holmstrand, the predecessors in interest of the plaintiff in this action, conveyed to the defendant Paul Melby the property in dispute, subject to the following exceptions: "Save and except that said John S. Holmstrand and said Ida S. Holmstrand shall together be entitled to one per cent of all oil produced, or that may be produced, from said lots, or any of them, but, in the event that said Paul Melby shall hereafter sell said lots, or any of them, then, in lieu of the foregoing share in any oil produced, or that may be produced, on or from said lots thus sold, said Holmstrand and wife. shall, at the time of such sale, be entitled to, and shall receive Three per cent (3%) of the purchase price of said lot or lots thus sold, and said lots thus sold shall be free from any claim by said Holmstrand and wife, or either of them, because of any oil produced, or that may be produced, thereon or therefrom."

The court found that since the execution and delivery of the deed of conveyance above referred to no oil has ever been produced on any of the lots nor are there any oil leases in existence on said lots; also that since the plaintiff, as the successor in interest of the Holmstrands, has acquired their interest therein, the defendant Melby has sold lots 5 and 22 of said tract of land to one Emily I. Ward for the sum of $1,800 cash and that he has tendered to the plaintiff the sum of $54, being 3 per cent. of the purchase price as provided in said deed, but that the plaintiff has refused to accept said sum or to release said lots as provided in the deed from Holmstrand and wife to him.

[1] Appellant first contends that there is no evidence of a sale of lots 5 and 22. In answer to this contention the record shows that the respondent testified that he had an escrow for the sale of said lots for the sum of $1,800 to one Emily I. Ward, that his attorney had notified the appellant that the sale had been

made and that there was on deposit in the bank for him the sum of $54, being 3 per cent. of the purchase price, and requested a release of said lots 5 and 22; but that appellant had refused to release the same or execute a deed for that purpose. The respondent further testified that no oil had been produced on said land, that there were no oil wells or any drilling for oil on the tract of land, and that there were no oil leases covering the same or any part thereof. We think that this evidence sustained the findings of the court as above set out.

[2] The court also found that the appellant is not the owner of 1 per cent. of all oil produced on said lots unless said oil is actually produced prior to a sale by respondent and only at the time of the sale is the appellant entitled to 3 per cent. of the purchase price upon his releasing the lot or lots so sold from the effect of his oil rights. This last finding presents the real controversy between the parties and requires a construction of the exception contained in the deed and which has already been set out herein. It will be noted from a reading of the above exception that the grantors shall together be entitled to 1 per cent. of all oil produced, but it also gives to the grantee named in the deed the power to sell said property or any part thereof free of any claim of the grantor or his successors in interest upon paying to the latter in lieu of the said oil rights 3 per cent. of the purchase price, and it is therein stated that upon said payment then and in that event the property shall be free and clear of all claims of the grantors for any oil produced or to be produced thereon or therefrom. It is clear from the expression above used that the estate conveyed was a fee-simple title, but if oil was produced before the grantee sold the lots then the grantor therein named was entitled to 1 per cent. thereof and not otherwise.

[3] It is further urged by the appellant that he has a right under the exception clause to be consulted in the fixing of the price for which said lots or any one of them may be sold by the grantee. However, it is clear that the only right reserved to the grantor or his successors in interest is to receive 3 per cent. of the sale price. There is no intimation that any control other than this one interest is reserved to him or them. Oral evidence is not admissible to vary the terms of a written instrument if the language is clear and does not involve an absurdity. Sections 1638, 1639, Civ. Code.

Complaint is also made of a finding by the court that appellant's predecessors in interest accepted 3 per cent. of the purchase price of one other lot in a sale previously made by the defendant. In reply to this it is sufficient to say that in view of the foregoing construction placed upon the exception clause, such a finding becomes immaterial. We are of the opinion that under the plain reading of the deed its intent and purpose is clear and upon the sale of a lot or lots the respondent, upon paying 3 per cent. of the purchase price to the appellant, has a right to receive a deed from the latter for his interest therein.

The judgment is affirmed.

We concur: PLUMMER, Acting P. J.; R. L. THOMPSON, J.

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129 Cal.App. 627

CRENSHAW v. ROY C. SEELEY CO. et al.

Civ. 8659.

District Court of Appeal, First District, Division 2, California.

Feb. 16, 1933.

Rehearing Denied March 18, 1933.

Hearing Denied by Supreme Court April 17, 1933.

1. Trusts ⚷25(1).

Instrument *held* to create trust, not mere contingent relationship of debtor and creditor.

The instrument involved recited that corporation held described interest in certain property in trust for deceased, that deceased should be entitled to one-fourth of all proceeds from sale, leasing or other disposition of property or any portion thereof after corporation received therefrom such sums as it expended in acquiring property, and that corporation should have absolute control of property and could lease, sell, or otherwise dispose thereof, or any portion thereof.

2. Trusts ⚷197.

Same duties and obligations were imposed on corporate trustee's managing officer when he purchased trust property on own behalf as would have been imposed on trustee had it attempted to acquire trust property for own account (Civ. Code, § 2230).

3. Trusts ⚷197.

Alleged consent of deceased beneficiary's widow and executrix to sale of trust property to trustee's president *held* insufficient to remove statutory restrictions on trustee and its agent (Civ. Code, § 2230).

Alleged consent of deceased beneficiary's widow and executrix to corporate trustee's sale of trust property to trustee's president and managing officer was insufficient to remove restrictions imposed on trustee and its agent by Civ. Code, § 2230, providing that neither trustee nor agent of trustee may take part in any transaction concerning trust in which agent has adverse interest to that of beneficiary except as therein provided, because it did not appear that deceased beneficiary's widow was the only person interested in beneficiary's estate nor that alleged consent was given with full knowledge of all facts.

4. Trusts 🔑371(2).

Complaint by deceased beneficiary's administrator *held* sufficiently to plead cause of action based on constructive fraud of corporate trustee's president (Civ. Code, §§ 1573, 2230, 2234).

Complaint, seeking accounting for profits of trust property, after setting forth provisions of declaration of trust wherein corporation agreed to hold certain interest in property in trust for beneficiary, recited that, after beneficiary's death, trustee sold property to its president and managing officer and another for $42,000, and shortly thereafter such purchasers sold property to others for about $105,000. It further alleged that corporate trustee's sale of property was result of conspiracy to defraud deceased beneficiary's estate.

5. Trial 🔑397(5).

Where pleadings, evidence, and findings made case of constructive fraud, failure to find on issues of conspiracy and actual fraud *held* not to affect judgment (Civ. Code, §§ 1573, 2230, 2234).

6. Trusts 🔑274.

Judgment against trustee's officer based on constructive fraud in purchasing trust property properly awarded plaintiff one-fourth of profits made by trustee's officer individually on resale of property (Civ. Code, § 2230).

Deceased beneficiary's estate was properly awarded one-fourth of profits realized by officer of trustee individually, who with another had purchased property from trustee and subsequently resold it at much higher price, as against any contention that, because beneficiary was entitled under declaration of trust to one-fourth of proceeds only after deduction for trustee's expenditures in acquiring property, beneficiary's estate was not entitled to one-fourth of entire profits made by trustee's officer, since controversy did not involve trustee, but only liability of trustee's officer individually to beneficiary's estate for officer's violation of duties imposed on him as trustee's agent.

Appeal from Superior Court, Los Angeles County; Harry A. Hollzer, Judge.

Action by George L. Crenshaw, administrator of the estate of L. O. Crenshaw, deceased, against the Roy C. Seeley Company, Roy C. Seeley, and others. From an adverse judgment, defendant last named appeals.

Affirmed.

Chapman & Chapman and Oscar A. Trippet, all of Los Angeles, for appellant.

Hill, Morgan & Bledsoe, of Los Angeles, for respondent.

SPENCE, Justice.

Plaintiff, as administrator of the estate of L. O. Crenshaw, deceased, sought an accounting of profits alleged to have been realized through the sale of the property held in trust for the deceased. From a judgment in favor of plaintiff and against the defendant Roy C. Seeley in the sum of $7,745, said defendant appeals.

The declaration of trust executed on February 19, 1924, reads as follows:

"Know All Men by These Presents: That Roy C. Seeley Co., a corporation organized and existing under and by virtue of the laws of the State of California, with its principal place of business in Los Angeles, California, does hereby admit, certify and declare that there has been conveyed to it the following described property, situate in the County of Los Angeles, State of California, to wit:

"The Southwest one-quarter of the Southeast one-quarter, and the south one-half of the northeast one-quarter of Section One (1), Township, 3 South, Range 15 West, S. B. B. & M., in the Rancho Sausal Redondo, in the City and County of Los Angeles, California,—and it holds the following described interest in and to said property in trust for L. O. Crenshaw, of Los Angeles, California.

"1. That the said L. O. Crenshaw shall be entitled to one-fourth (¼) of any and all proceeds arising from the sale, leasing or other disposition of said property, or any portion thereof, after the said Roy C. Seeley Co. shall have received therefrom such sums as have been expended by it in the acquisition of said property, and any and all interest expended by it by reason of the Trust Deed existing thereon, and any and all expenditures for carrying charges in connection therewith, it being understood and agreed that the purchase price of said property was the sum of Thirty-six Thousand Dollars ($36,000.00) Twelve Thousand Dollars ($12,000.00) of which was paid by said Roy C. Seeley Co. in cash, and that the balance thereof is represented by a Trust Deed upon said property in the principal sum of Twenty four thousand Dollars ($24,000.00) due on or before three (3) years from the date thereof, and bearing interest at the rate of seven per cent (7%) per annum, payable semi-annually.

"2. It is understood and agreed that Roy C. Seeley Co. shall have absolute control of said property, and may lease, sell or otherwise dispose of said property, or any portion thereof, or any right, title or interest therein as it may deem advisable, provided, however, that in the event of the death of Roy C. Seeley or in the event that Roy C. Seeley should cease to own more than one-half of the stock of Roy C. Seeley Co., and shall cease to own more than one-half of the stock of any corporation owning more than one-half of the stock of Roy C. Seeley Co., then L. O. Crenshaw shall have the right, upon demand, to have conveyed to him a one-fourth (¼) undivided interest in and to said property and a one-fourth (¼) undivided interest in and to any and all leases or agreements in connection with said property made by said Roy C. Seeley Co., upon payment to said Roy C. Seeley Co., of one-fourth (¼) of all moneys due it by reason of the moneys expended by it in the acquisition of said property, and in payment of interest and carrying charges in connection therewith, and from and after such time, the right of said Roy C. Seeley Co. to sell, lease or dispose of said property, or any portion thereof, without the consent of L. O. Crenshaw, shall cease and terminate.

"In Witness Whereof the Roy C. Seeley Co. has caused this agreement to be executed by its duly authorized officers this 19th day of February, 1924.

"Roy C. Seeley Co.
"By [Signed] Roy C. Seeley, President
"Daisy McIntyre, Secretary
"February 19, 1924.

"I hereby accept the foregoing Declaration as evidence of my interest in and to the land described therein.

"[Signed] L. O. Crenshaw."

The name of the corporation was thereafter changed to the Roy C. Seeley Holding Company, but we will refer to it herein as the Seeley Company. L. O. Crenshaw died in August, 1924, and shortly thereafter his widow was appointed executrix. In January, 1929, she resigned as such executrix, and plaintiff George L. Crenshaw was appointed administrator.

It appears without dispute that at the time of the declaration of trust and at all times thereafter defendant Roy C. Seeley was president and managing head of the Seeley Company, that in 1927 the Seeley Company sold said property to defendants Roy C. Seeley and Thomas Beyrle, for the sum of $42,000, and that shortly thereafter said defendants Roy C. Seeley and Thomas Beyrle sold said property to others for the sum of approximately $105,000.

The action was brought against the Seeley Company, Roy C. Seeley, Thomas Beyrle, and others. The foregoing facts were set forth in the complaint, and it was further alleged that the sale by the corporation was the result of a conspiracy on the part of the defendants to defraud the estate of L. O. Crenshaw, deceased. These allegations relating to conspiracy, and many other allegations of the complaint were denied by the answer, but the facts set forth in the preceding paragraph were admitted. The trial court gave judgment in favor of plaintiff and against the defendant Roy C. Seeley in an amount equal to one-fourth of the profits made by him individually on the resale of the property.

[1] Appellant contends that "there never was any trust created even as between the Seeley Company and Crenshaw or his estate." In our opinion this contention is without merit. Appellant cites and relies upon Molera v. Cooper, 173 Cal. 259, 160 P. 231, and In re Lamb, 61 Cal. App. 321, 215 P. 109, but these decisions are not in point. It appears to be appellant's theory that, as the declaration of trust provided that the trustee should have "absolute control" of the property, the beneficiary had no interest in the property, but merely a contingent interest in the proceeds therefrom. We believe that appellant places an unwarranted construction upon the words "absolute control," which words are frequently found in instruments creating trusts and defining the trustees' powers. The entire instrument must be read as a whole, and these words cannot be construed to nullify the remaining provisions thereof. The instrument before us did more than create "a contingent relationship of debtor and creditor" with respect to the anticipated proceeds of the property as argued by appellant. It expressly purported to create a trust in favor of the named beneficiary, and in our opinion it created a trust in the property itself. Hannah v. Canty, 175 Cal. 763, 167 P. 373.

[2] Appellant further contends that "as between the Crenshaw estate and the defendant Seeley there not only never was trust relationship, but there never was any contractual relationship with him or duty imposed upon him of any kind." Under the undisputed facts in this case, this broad contention cannot be sustained. The defendant Seeley was at all times the president and managing head of the Seeley Company, the corporate trustee. He was therefore an agent of the trustee. In purchasing the property on his own behalf, his interests were necessarily adverse to those of the beneficiary. Section 2230 of the Civil Code provides that neither a trustee nor the agent of the trustee may take part in any transaction concerning the trust in which he has an interest adverse to that of the beneficiary except as herein provided. It is therefore clear that in purchasing the trust property from the trustee the same duties and obligations were imposed upon the defendant Seeley as would have been imposed upon the trustee itself had it attempted to acquire the trust property for its own account.

[3] Endeavoring to bring himself within the exceptions set forth in section 2230 of the

Civil Code, appellant makes the further contention that, "if there was any trust impressed upon this property, and even if Seeley occupied the position of agent of the trustee, the beneficiary of the trust consented to his participation in the sale." In support of this contention appellant calls our attention to certain communications between appellant and the widow of the deceased. Although the widow was the executrix at the time of the sale to appellant, it does not appear that she was the only person interested in the estate of L. O. Crenshaw, deceased, nor does it appear that any alleged consent on her part was given with a full knowledge of all of the facts which might have affected her decision. Under these circumstances the alleged consent of the widow would be insufficient to remove the restrictions imposed upon the trustee and its agent by the provisions of said section 2230.

[4, 5] Appellant makes several further contentions regarding the insufficiency of the pleadings, the evidence, and the findings to support the judgment. In this connection it is claimed that the trial court failed to find upon material issues raised by the pleadings. We find no merit in these contentions. The complaint sufficiently pleaded a cause of action based upon constructive fraud on the part of appellant. Civ. Code, §§ 2230, 2231, and 1573. There were further allegations of conspiracy and actual fraud on the part of all of the defendants, but judgment was entered solely against appellant. The evidence may have been insufficient to sustain all of these allegations relating to conspiracy and actual fraud, but we do not believe that appellant may complain upon that ground nor upon the ground that the trial court failed to make findings upon some of said issues. We are of the opinion that the pleadings, evidence, and findings were all sufficient to make out a case of constructive fraud on the part of appellant, and therefore findings upon the issues of conspiracy and actual fraud would have been findings upon issues which would not have affected the judgment. Darrow v. Robert A. Klein & Co., 111 Cal. App. 310, 295 P. 566. There were certain findings made by the trial court which appellant claims are unsupported by any evidence, but these last-mentioned findings were not essential to support the judgment, and we therefore deem it unnecessary to discuss the sufficiency of the evidence to support said findings.

[6] Appellant further complains of the amount of the judgment. It will be noted that the trial court awarded judgment in favor of respondent for one-fourth of the profits actually realized by appellant individually, or, in other words, one-fourth of one-half of the total profit realized by appellant and defendant Beyrle upon the resale of the property. It will be further noted that the trial court gave judgment in favor of the Seeley Company and the defendant Beyrle. It seems to be appellant's theory that, as respondent was entitled under the declaration of trust to one-fourth of the proceeds, but only after certain deductions, respondent is not entitled to one-fourth of the entire profits made by appellant. With this theory we cannot agree. The present controversy does not involve the trustee. It had sold the trust property to appellant, and we are here concerned with the extent of the liability of appellant to respondent for appellant's violation of the duties imposed upon him as agent of the trustee. We are satisfied that the trial court adopted the correct measure of liability. If the deceased had been the sole beneficiary of the trust, respondent would have been entitled to recover the entire amount of the profit realized by appellant, or the sum of approximately $31,000, but, as the deceased was entitled to only the one-fourth interest therein, an amount equal to one-fourth of said profit was properly awarded.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

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129 Cal.App. 552

ABELSETH et al. v. CITY AND COUNTY OF SAN FRANCISCO et al.

Civ. 8441.

District Court of Appeal, First District, Division 2, California.

Feb. 10, 1933.

1. Trial ⚷194(17).

In action for injury to pedestrian by street car, instruction that maintenance of four street car tracks in street was not a nuisance, and that tracks had been laid and cars were being operated in conformity with the law, *held* error as comment on facts.

2. Street railroads ⚷118(11).

Instructions as to pedestrian's negligence, in action against street railroad, which failed to state that pedestrian's negligence must be a proximate cause of the accident to bar recovery *held* erroneous.

3. Trial ⚷296(4, 5).

That erroneous instruction on negligence was followed by correct instruction on same subject did not cure error in first instruction.

4. Street railroads ⚷118(8).

Instruction that street car had right of way *held* error as contrary to ordinance providing that no vehicles, including street cars, should enter lawfully marked crosswalks when upon that half of street there was pedestrian within crosswalk.

5. Trial 🔑260(1).

Refusal of requested instructions is not error, where their substance was covered by instructions given.

6. Trial 🔑194(17).

Instruction that motorman "was obviously aware of the plaintiff's position" *held* properly refused as attempt to procure instruction on question of fact.

7. Trial 🔑194(17).

Instruction that pedestrian could not recover against street car company unless she was "guilty of what has been called ordinary care" *held* properly refused.

8. Street railroads 🔑112(3).

Refusal to instruct that burden of proving contributory negligence rested upon street railroad, in action by pedestrian, *held* error.

9. New trial 🔑99.

Motion for new trial was properly denied, where newly discovered evidence was cumulative and was discovered more than a year later through advertisements in the public press which might have been inserted before.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action by Selma B. Abelseth and another against the City and County of San Francisco and another. From judgment for defendants, plaintiffs appeal.

Reversed and remanded for new trial.

Clarence A. Henning and Raymond Perry, both of San Francisco, for appellants.

John J. O'Toole, City Atty., and Henry Heidelberg, Deputy City Atty., both of San Francisco (John R. Golden, of San Francisco, of counsel), for respondents.

STURTEVANT, Justice.

The plaintiffs, husband and wife, commenced this action to recover damages alleged to have been incurred from injuries sustained by Mrs. Abelseth when she was hit about 2:15 p. m., July 29, 1929, by one of the defendants' street cars. The accident happened on Market street, east of Eighth street. Near the place of the collision there is a pedestrian lane crossing Market street. Mrs. Abelseth had been in the Crystal Market and came out with a package in her hand, and was in the act of crossing from the south side of Market to the north side. It was the contention of the plaintiffs that as she was in the pedestrian lane in the act of crossing Market street one of the defendants' cars approached from her left and knocked her down. On the other hand it was the contention of the defense that she was carrying in her left arm a bundle that obscured her view of the traffic approaching from the west, and furthermore that she was not in the lane, but was some distance east, walking diagonally across Market street; that she was not hit, but fell of fright. The plaintiffs further contend that under the doctrine of the last clear chance the defendants were liable whether Mrs. Abelseth was within or without the pedestrian lane. The jury returned a verdict in favor of the defendants, and the plaintiffs have appealed and have brought up a bill of exceptions.

[1] 1. The plaintiffs attack a large number of instructions which were given at the request of the defendants. Under this attack it is claimed the court instructed the jury on facts by giving six different instructions. An examination of each of the six discloses that one is subject to that attack. Instruction XXXIII was as follows: "The maintenance of four street car tracks upon said Market street is not a nuisance per se, that is, in and of itself, as such street car tracks have been so laid and cars are being operated thereon in conformity with the law."

It was vulnerable to the attack made by the plaintiffs. It told the jury that the defendants were operating the cars in conformity with the law; but that was one of the principal questions of fact at issue.

[2, 3] 2. It is next contended that certain formula instructions were given which were incomplete. Instructions XLIX, LI, and LVI were to the effect that if Mrs. Abelseth was guilty of negligence plaintiffs could not recover. They contained no statement to the effect that such negligence must first be shown to be a proximate cause of the accident. It was error to give any one of them. Rush v. Lagomarsino, 196 Cal. 308, 319, 237 P. 1066. As to instruction XLIX the defendants admit the error. As to instruction LVI the defendants contend that, admitting it was erroneous standing alone, nevertheless the error was cured by giving instruction LVII. In other words it is the contention of the defendants that the fact the latter instruction was free from error, and immediately followed one containing error, the error was cured. The contention may not be sustained. The point has been decided against the defendants. Douglas v. Southern Pacific Co., 203 Cal. 390, 393, 264 P. 237.

3. It is next claimed that as to contributory negligence the rule applicable to collisions with steam railroads was by the trial court erroneously applied to a collision with a street railroad. In making this point the plaintiffs attack instructions XXXII, XLIII,

and LV. We have carefully read each one. While we do not approve the giving of them in the instant case, we think they were not subject to the attack made on them. Because they wholly ignore ordinance 7691 we do not approve them. Assuming, for the purposes of this decision, that said instructions purported to state the general rule in street car accident cases of the duty of a pedestrian to look and listen (60 C. J. 497), they wholly ignored the enactment of Ordinance No. 7691 and its effect on the rule as to the quantum of care to be exercised by a pedestrian lawfully traversing a crosswalk in strict compliance with the provisions of said ordinance.

[4] 4. Plaintiffs further assert that erroneous instructions were applied to the pedestrian lane. In this connection they call to our attention that section 9 of ordinance 7691, supra, is as follows:

"Section 9. *Pedestrian's Right of Way at Intersection.*

"(a) It shall be unlawful for the operator of any vehicle or street car to drive into any crosswalk which is marked as provided in section 6 of this ordinance while there is in such crosswalk upon the half of the roadway upon which such vehicle is traveling any pedestrian engaged in crossing the roadway until such pedestrian shall have passed beyond the path of said vehicle." They then quote instruction XXX as follows: "A street car has from necessity the right of way over that portion of a street upon which alone it can travel and which it cannot leave, paramount to that of persons and ordinary vehicles. Though this superior right is not exclusive and does not prevent others from driving or passing across or along its tracks at any time or place when, by so doing, it will not materially interfere with the progress of the cars, it is the duty of the citizen, whether on foot or driving a vehicle, to give unobstructed passage to the cars which cannot turn or leave the track."

Thereupon they argue that the instruction wholly ignored the provisions of the ordinance. The argument is manifestly sound. The defendants attempt to sustain the instruction by citing Bailey v. Market Street Cable Ry. Co., 110 Cal. 320, 42 P. 914. That case is not helpful. It stated the law before the enactment of the ordinance. But a bare reading of the ordinance discloses that it materially changed the rights and duties of one crossing street car tracks in San Francisco. Before the enactment of Ordinance No. 7691, a street car did not stop at all cross streets, nor at any cross street, except on signal. Since the enactment of the ordinance, all vehicles including street cars may not enter lawfully marked crosswalks when upon that half of the street there is a pedestrian within the crosswalk. If such person is lawfully there, in no proper sense is he "obstructing passage."

5. The plaintiffs next attack instructions XXV, XXX, XXI, XL, XLI, XLII, and XLIV. Those instructions involved several entirely different subjects; but we find no merit in the attacks.

[5-8] 6. The plaintiffs next complain because the trial court refused to give eight several requested instructions. For convenience we have lettered them A to H, inclusive. The first two were properly refused because they were covered by plaintiffs' instructions XIII–XVI, inclusive. C told the jury that the motorman was "obviously aware of the plaintiff's position." That was clearly an attempt to instruct on a question of fact. It was not error to refuse it. E stated that the plaintiff was innocent unless she was "guilty of what has been called ordinary care." It was not sound law, and was properly refused. F, G, and H were covered by plaintiffs' instructions XVII and XVIII. D stated that the burden of proving contributory negligence rested on the defendants. It was in proper form, and should have been given. No similar instruction on that subject was given. The defendants quote instructions XX and XXI. Neither one purported to state on whom the burden of proof rested. Manifestly they were not a substitute for the instruction that was refused.

[9] 7. In due time the plaintiffs made a motion for a new trial. Among other grounds they based their motion on the ground of newly discovered evidence. In support of their motion they produced the affidavits of three different men. Each affidavit contained the statement that the affiant witnessed the accident, and that Mrs. Abelseth was in the pedestrian lane at the time she was hit. The motion was denied, and the plaintiffs assign the ruling as error. The assignment may not be sustained. On the trial the plaintiffs produced two witnesses who testified that Mrs. Abelseth was in the pedestrian lane when she was hit. The evidence indicated in the above-mentioned affidavits was therefore cumulative merely. Moreover, the accident happened July 29, 1929. The trial was had eight months later. The names of the new witnesses were obtained in September, 1930, by inserting advertisements in the public press. The record does not show any excuse why that course was not taken sooner. The court did not err in denying the motion. Spiegelman v. Eastman, 95 Cal. App. 205, 217, 272 P. 761.

An examination of the errors above mentioned discloses that the case was tried on a misconception of the law. It follows that the judgment should be, and it is, reversed, and the action is remanded for a new trial.

We concur: SPENCE, Acting P. J.; GOODELL, Justice pro tem.

129 Cal.App. 518

SWING et al. v. LINGO et al.

Civ. 665.

District Court of Appeal, Fourth District, California.

Feb. 7, 1933.

1. Appeal and error 🔑907(3).

Where appeal is on judgment roll alone, findings must be liberally construed to uphold judgment, and, if from facts found other facts may be inferred to support judgment, assumption is that trial court made them.

2. Appeal and error 🔑931(4).

From court's findings that conditional vendee delivered truck to creditor to discharge debt, that there was no assignment "except as aforesaid," and that debtor was not owner, it will be assumed that court found that transaction constituted an assignment within Vehicle Act.

3. Assignments 🔑34.

In absence of statute requiring that assignment be in writing, it is immaterial whether assignment is oral or in writing (Civ. Code, § 1052).

4. Appeal and error 🔑931(4).

Where trial court found that conditional seller of truck retained certificate of ownership, it will be assumed in support of judgment that conditional vendee, when assigning his interest, did not have access to such certificate, and that court so found.

5. Automobiles 🔑192(1).

Vehicle Act, making owner responsible for acts of another who drives vehicle with owner's consent, express or implied, must be strictly construed (Civ. Code, § 1714¼).

6. Automobiles 🔑192(1).

Conditional vendee, without access to certificate of ownership who delivered truck to satisfy claim of creditor who assumed unpaid installments, without procuring new certificates of ownership or registration, *held* not "owner" liable to person injured by creditor while driving truck (St. 1923, p. 524, § 45, as amended by St. 1929, p. 514).

[Ed. Note.—For other definitions of "Owner," see Words and Phrases.]

7. Appeal and error 🔑931(4).

Where trial court found that "during month of August, 1931," conditional vendee of truck assigned his right to another, it will be assumed in support of judgment that transaction was consummated before August 14, 1931, effective date of statute imposing new duties on vendors of motor vehicles (St. 1923, p. 517, § 45¾, as added by St. 1931, p. 2105).

8. Statutes 🔑263.

Statutes will be construed as operating prospectively, unless an intention that they shall have retrospective effect is clearly expressed.

9. Automobiles 🔑19.

Statute imposing on vendors of motor vehicles additional duty of giving the notice therein provided will be given prospective construction only, since its language does not indicate that it was intended to operate retrospectively (St. 1923, p. 517, § 45¾, as added by St. 1931, p. 2105).

Appeal from Superior Court, San Bernardino County; F. A. Leonard, Judge.

Action by Davidson Swing, a minor, by George W. Swing, his guardian ad litem, and William Fagg, a minor, by George W. Swing, his guardian ad litem, against Eddie Lingo and J. W. Cramp. From that part of judgment denying recovery against J. W. Cramp, the plaintiffs appeal.

Affirmed.

Swing & Swing, of San Bernardino, for appellants.

George H. Moore and Gerald O'C. Egan, both of Los Angeles, for respondent.

O'Connor & Findlay, of Colton, for defendant.

JENNINGS, Justice.

Plaintiffs brought this action to recover damages for personal injuries sustained by them as a result of a collision between a motorcycle on which they were riding and an automobile truck which was driven by the defendant Lingo. The action was tried before the court without a jury, and resulted in the rendition of a judgment in favor of plaintiffs against the defendant Lingo and a denial of recovery as to the defendant J. W. Cramp. Plaintiffs have appealed from that portion of the judgment which denied them recovery from defendant Cramp.

The court found that the collision between the motor vehicles which caused the injuries of which appellants complain occurred on October 17, 1931, at which time the defendant Lingo was in possession of the truck and was driving and operating the same, and that respondent, Cramp, was not then in possession of the truck, and was not present and did not participate in the negligent and careless acts of the defendant Lingo which the court found were the proximate cause of the injuries sustained by appellants. The court further found that prior to the month of August respondent, Cramp, had acquired possession of the truck pursuant to the terms of a written conditional sale contract whereby the owner agreed to sell said truck to Cramp upon the payment by him of certain monthly payments, and that at the time the contract was made the truck was caused to be registered with the division of motor vehicles of the state of California in the name of the seller as legal owner and in the name of respondent, Cramp, as registered owner, and that on the date of the collision the conditional sale contract had not been completed and final payment of the amount due under the contract had not been made. The court further found that, prior to the month of August, 1931, respondent, Cramp, and defendant Lingo had been engaged in a joint enterprise, and that during said month they had a settlement by which Cramp was found to be indebted to Lingo, and in payment of such indebtedness it was orally agreed between them that Lingo should take possession of the truck as owner thereof, whereupon Cramp delivered the truck to Lingo as owner in full satisfaction of the aforesaid indebtedness, and Lingo thereupon assumed the payment of the balance remaining due under the conditional sale contract, and made the payments thereon, and "that there was no assignment of said conditional sale contract except as aforesaid and no transfer of said truck other than as aforesaid, prior to said 17th day of October, 1931." It is also found that at no time prior to the collision either the vendor under the conditional sale contract or respondent, Cramp, had delivered the certificate of ownership to defendant Lingo, and that Lingo never had possession of such certificate of ownership, and did not write, or cause to be written, his signature or his address upon such certificate, and that neither Lingo nor any one on his behalf forwarded the certificate of ownership or the certificate of registration to the division of motor vehicles, and that such division of motor vehicles did not, prior to the collision, issue a new certificate of registration or certificate of ownership for said truck to defendant Lingo, and that neither Lingo nor Cramp notified the state division of motor vehicles of any sale or transfer of the truck to the defendant Lingo. From the aforesaid findings, the court drew the conclusion that respondent, Cramp, was not the owner of the truck at the time of the collision, and was not liable to appellants for any injuries suffered by them as a result of such collision.

It is the contention of appellants that, since the court specifically found that there was a failure to comply with the provisions of the California Vehicle Act requiring re-registration of motor vehicles "upon a transfer of the title or interest of a legal owner or owner in or to a vehicle registered under the provisions" of said act, and since subdivision (e) of section 45 of the act unequivocally declares that until such re-registration has been effected, "delivery of such vehicle shall be deemed not to have been made and title thereto shall be deemed not to have passed and said intended transfer shall be deemed to be incomplete and not to be valid or effective for any purpose," the court's conclusion that respondent, Cramp, was not the owner of the truck at the time of the collision is not justified by the findings, and its judgment that appellants recover nothing from said respondent is therefore erroneous. Liability of respondent is predicated upon the provisions of section 1714¼ of the Civil Code, which imputes to the owner of a motor vehicle the negligence of any person using or operating such vehicle with the permission, express or implied, of such owner, and fastens upon the owner a liability for injuries caused by the negligence of the person so using or operating the vehicle.

Prior to the enactment of section 1714¼ of the Civil Code by the Legislature in 1929 (St. 1929, p. 566), the mere loan of a motor vehicle by the owner thereof did not render him liable for the borrower's conduct in operating it. Brown v. Chevrolet Motor Co., 39 Cal. App. 738, 179 P. 697; Barton v. McDermott, 108 Cal. App. 372, 291 P. 591. The above-mentioned statute, however, imposes upon the owner of a motor vehicle, merely by virtue of ownership, a new liability analogous to the liability which arises from the doctrine of respondeat superior. Sutton v. Tanger, 115 Cal. App. 267, 269, 1 P.(2d) 521. The last paragraph of the statute contains the following language:

"*Vendor and Vendee under Contracts of Conditional Sale.* If a motor vehicle be sold under a contract of conditional sale whereby the title to such motor vehicle remains in the vendor, such vendor or his assignee shall not be deemed an owner within the provisions of this section, but the vendee or his assignee shall be deemed the owner notwithstanding the terms of such contract, until the vendor or his assignee shall retake possession of such motor vehicle. A chattel mortgagee of a motor vehicle out of possession shall not be deemed an owner within the provisions of this section."

[1, 2] Since the appeal herein is presented on the judgment roll alone, the court's findings must be liberally construed for the purpose of upholding, rather than defeating, the judgment, and, if from the facts found by the court other facts may be inferred which will support the judgment, it will be assumed that the trial court made such inferences. Breeze v. Brooks, 97 Cal. 72, 77, 31 P. 742, 22 L. R. A. 257; Paine v. San Bernardino, etc., Co., 143 Cal. 654, 656, 77 P. 659; Ochoa v. McCush, 213 Cal. 426, 430, 2 P.(2d) 357. Under this rule we are entitled to assume, in support of the judgment, that the trial court inferred that the oral agreement which it was found was entered into between respondent, Cramp, and defendant Lingo, whereby possession of the truck was transferred to Lingo in full satisfaction of an indebtedness due to Lingo from Cramp, constituted an assignment by Cramp to Lingo of whatever interest the former had in the truck. The very language of

the court's finding stating that there was no assignment of the conditional sale contract "except as aforesaid" and no transfer of the truck "other than as aforesaid" indicates that from the facts it had theretofore found the court drew the inference that the making of the oral agreement by Cramp and Lingo and the delivery of the truck by the former to the latter, the continued possession of the truck by Lingo, and the making of the monthly payments by Lingo, constituted an assignment. Furthermore, the court's conclusion that respondent was not the owner of the truck at the time of the collision makes it inevitable that the court drew the suggested inference since the above-quoted language of the statute, by virtue of whose provisions alone liability might be fastened upon respondent, states that the original vendor of the truck, under a conditional sale contract, shall not be deemed the owner, but that the vendee or his assignee shall be deemed the owner. Either Cramp or Lingo must therefore have been deemed to be the owner. Since the court drew the conclusion that Cramp was not the owner, it necessarily follows that it must have considered Lingo to be the owner, and, under the language of the statute, it could only have so considered him because the court drew the inference that an assignment had been effected and that thereby Lingo had become the assignee of Cramp.

[3] No difficulty is encountered in indulging in the assumption that the court drew the suggested inference because the assignment from respondent to Lingo was verbal. Section 1052 of the Civil Code specifically provides that a transfer may be made without writing in every case in which a writing is not expressly required by statute. It is therefore the general rule that, in the absence of a statute requiring that an assignment be in writing, it is immaterial whether it is made orally or by writing. 3 Cal. Jur. § 20, p. 262; Smith v. Peck, 128 Cal. 527, 61 P. 77; Ralph v. Anderson, 187 Cal. 45, 200 P. 940; Bruno v. Severini, 51 Cal. App. 163, 196 P. 501; McGown v. Dalzell, 72 Cal. App. 197, 236 P. 941.

Appellants, however, strenuously contend that, because the court's findings show that there was a failure to comply with the provisions of the California Vehicle Act requiring re-registration of the truck with the division of motor vehicles, no transfer of interest from respondent to Lingo took place, and respondent remained the "owner" of the truck and was the owner thereof, and subject to the liability created by section 1714¼, Civil Code. It must be conceded that the findings unequivocally show noncompliance with the provisions of section 45 (as amended by St. 1929, p. 514) of the California Vehicle Act, requiring re-registration of a motor vehicle upon a transfer of the title or interest of "a legal owner or owner in or to a vehicle registered under the provisions of this act." Subdivision (e) of said section is in the following language:

"(e) *Until said division shall have issued said new certificate of registration* and certificate of ownership as hereinbefore in subdivision (d) provided, delivery of such vehicle shall be deemed not to have been made and title thereto shall be deemed not to have passed and said intended transfer shall be deemed to be incomplete and not to be valid or effective for any purpose."

In Samuels v. Barnet, 79 Cal. App. 529, 533, 250 P. 405, 406, the court, in discussing the meaning of certain language of the California Vehicle Act (Stats. 1919), said: "The section quoted provides that unless these restrictions are followed the 'intended transfer shall be deemed to be incomplete and not to be valid or effective for any purpose.' The Legislature could scarcely have used words which would have been more expressive of the intention to declare that such transfers should not be effective for any purpose."

Nevertheless, as this court had occasion to observe in Sly v. American Indemnity Co., 15 P.(2d) 522, the effect of the very broad language of subdivision (e) of section 45 of the act has been appreciably modified by certain decisions wherein purchasers of motor vehicles have been permitted to recover in actions of claim and delivery and for conversion, although there had been no compliance with statutory provisions requiring registration and the issuance by the state division of motor vehicles of a new certificate of registration. Furthermore, it is to be noted that by subdivision (a) of section 45 of the California Vehicle Act it is provided that, "upon a transfer of the title or interest of a legal owner or owner in or to a vehicle registered," as required by the statute, the person whose interest is to be transferred and the transferee "shall write their signatures" upon the *certificate of ownership* issued for such vehicle, and that by subdivision (b) of said section it is provided that "within ten days thereafter, the transferee shall forward both the certificate of ownership so endorsed and the certificate of registration to the division, which shall file the same upon receipt thereof." It is therefore apparent that the duty of setting in motion the machinery of re-registration is cast, not upon the transferor, but upon the transferee. Yet, in accordance with the contention advanced by appellants, the logical result of interpreting literally the language of subdivision (e) of section 45 is to impose upon the transferor the harsh liability declared in section 1714¼, Civil Code, because of the nonperformance by the transferee of the duty imposed by subdivision (b) of section 45 of the California Vehicle Act.

[4-6] It is urged that the court's findings herein show that respondent failed to comply

with the provisions of subdivision (a) requiring that his signature be appended to the certificate of ownership. In this connection it is to be observed that the findings also show that the certificate of ownership which was issued to the seller at the time the truck was sold to respondent under the conditional sale contract remained in the possession of the seller, the legal owner under the contract, at all times material to the present inquiry. In accordance with the general rule heretofore stated we are entitled, in support of the judgment, to indulge in the further inference that the respondent did not have access to the certificate of ownership, which was in the possession of the legal owner, and to assume that the trial court so inferred. We then have presented the situation of a vendee of a motor vehicle under a conditional sale agreement who sells his interest in such vehicle, but for some reason beyond his control cannot comply with the duty imposed upon him of attaching his signature to the certificate of ownership. Literal interpretation of subdivision (e) of section 45 of the California Vehicle Act would lead to the conclusion that the transfer from respondent to defendant Lingo under the above-narrated circumstances should "be deemed to be incomplete and not to be valid or effective for any purpose." From this it might seem to follow, as appellants contend, that, as the transfer from respondent to Lingo is to be deemed wholly invalid and ineffective, respondent, being the vendee under the conditional sale contract, must be deemed to be the owner as declared by the language of the final paragraph of section 1714¼, Civil Code, and therefore subject to the liability imposed by said statute. In the final analysis this contention rests upon the premise that no assignment of interest from respondent to Lingo was effected, because of the failure of Lingo to forward the necessary certificates to the division of motor vehicles, and therefore the court was not justified in concluding that respondent was not the owner of the truck. It is, however, apparent that respondent's liability is to be measured by the provisions of section 1714¼, Civil Code. This statute, as hereinabove noted, imposes upon the owner of a motor vehicle a liability analogous to the liability arising from the familiar legal doctrine of respondeat superior. In order that liability shall attach, two factors must be present. These are, first, ownership, and, second, permission, express or implied, by the owner. Since the statute imposes a new and unusual liability which partakes of the nature of a penalty, it should not, at least, receive a construction favoring the imposition of such liability. Snell v. Bradbury, 139 Cal. 379, 382, 73 P. 150; Merrill v. Los Angeles Cotton Mills, Inc., 120 Cal. App. 149, 7 P.(2d) 329. The element of permission by the owner necessarily presupposes the right of control by the owner. The Legislature obviously recognized that the right of control of a motor vehicle is a necessary incident to its ownership, since the statute which imposes upon the owner of a motor vehicle liability for the negligence of a person using or operating such vehicle with the owner's permission provides that, if a motor vehicle be sold under a contract of conditional sale whereby title remains in the vendor, such vendor or his assignee shall not be deemed an owner within the provisions of the statute, "but the vendee, or his assignee shall be deemed the owner, notwithstanding the terms of such contract, until the vendor or his assignee shall retake possession of such motor vehicle." It is thus apparent that the intent of the Legislature was to fasten liability upon the individual who is entitled to possession of the motor vehicle and can control its operation rather than upon the individual who is the legal owner. The vendor of a motor vehicle under a conditional sale contract, although by the provisions of such contract he retains title to the vehicle, and is therefore the owner, has surrendered possession of it and cannot direct its operation. He may not use it himself nor grant permission to another to use it. A similar situation presents itself when the vendee of a motor vehicle under a conditional sale contract makes an assignment of his interest in such vehicle to a third person and surrenders possession of the vehicle to his assignee. The assignee then occupies the position of his assignor. He has possession of the vehicle, and may control its operation. The vendee under the conditional sale contract is no longer entitled to use the vehicle or to grant permission to another to use it. He has lost this important incident of ownership. The Legislature evidently recognized that the vendee of a motor vehicle under a conditional sale contract might, by assignment, as effectually surrender possession and control of such vehicle as the original vendor did by the terms of the condition sale contract, for it is provided that "the vendee *or his assignee* shall be deemed the owner." (Italics ours.) Assuming that respondent herein did not have access to the certificate of ownership of the truck, it would be just as reasonable to hold that the vendor under the conditional sale contract is liable for the injuries of appellants as to conclude that respondent is liable. Neither the vendor nor respondent had possession of the truck, neither could control its operation, neither could rightfully permit another to use or operate it. We are therefore of the opinion that the court's conclusion that respondent was not, at the time of the collision, the owner of the truck within the meaning of section 1714¼, Civil Code, is justified by the court's findings and the inferences which we are entitled to assume the court drew.

Appellants make a further contention that is entitled to consideration. It is urged that, notwithstanding the failure to observe the provisions of section 45 of the California Vehicle Act, respondent could have effectually escaped the liability imposed by section 1714¼, Civil Code, by compliance with the provisions of section 45¾ of the California Vehicle Act (as added by St. 1931, p. 2105). This latter section is in the following language:

> "*Report of Transfers and Liability of Owners.* Whenever the owner of a motor vehicle registered under this act shall sell or transfer his interest in and the possession of said motor vehicle to another, said owner shall immediately notify the division of motor vehicles of such sale or transfer, giving the date of same, the names and addresses of such owner and of the transferee, and such description of the vehicle as may be called for in any official form provided for such purpose by the division; provided, however, that in the event said notice be given or in the event of failure to give said notice, an owner who has made a bona fide sale or transfer of such motor vehicle and delivered possession thereof to a purchaser and who has made proper endorsement and delivery of the certificate of ownership as provided in this act, shall not by reason of any of the provisions of this act be deemed the owner of such motor vehicle so as to be subject to liability under the provisions of section 1714¼ of the Civil Code of this state."

By this section an additional duty is imposed upon vendors of motor vehicles registered under the California Vehicle Act. Such vendors are required to give notice to the state division of motor vehicles of sales or transfers of motor vehicles. Irrespective of whether such notice is given, it is specifically provided that, in cases of bona fide sales of motor vehicles accompanied by change of possession, if proper indorsement and delivery of the certificate of ownership to a purchaser has been made, the owner shall not "by reason of any of the provisions of this act be deemed the owner of such motor vehicle so as to be subject to liability under the provisions of section 1714¼ of the Civil Code of this state."

[7-9] Section 45¾ of the California Vehicle Act became effective on August 14, 1931. The court found that during the month of August, 1931, respondent and Lingo had a settlement, as a result of which the oral agreement between them was made whereby the truck was turned over to Lingo in full satisfaction of the indebtedness found to be due from respondent to Lingo. We are entitled to assume in support of the judgment that the agreement between these parties was fully consummated prior to August 14, 1931. Section 45¾ of the California Vehicle Act, imposing upon vendors of motor vehicles the additional duty of giving the notice therein provided, was not, therefore, in effect when the transfer from respondent to Lingo took place. The language of the statute does not indicate that it was intended to be retrospective in its operation. In accordance, therefore, with the well-established rule that statutes are to be construed as operating prospectively unless an intention that they shall have a retrospective effect is clearly expressed, we conclude that this statute did not operate retrospectively, and that respondent was under no duty to give to the state division of motor vehicles notice of the transfer of his interest in the truck to Lingo. Callet v. Alioto, 210 Cal. 65, 67, 290 P. 438.

For the reasons stated herein the judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

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129 Cal.App. 559

EWALT v. MORTGAGE SECURITIES, INC., OF SANTA BARBARA.

Civ. 4726.

District Court of Appeal, Third District, California.

Feb. 10, 1933.

1. Usury ⚷16.

Entire contract may be considered in determining whether it was an illegal effort to exact usurious interest (St. 1919, p. lxxxiii, § 3).

2. Usury ⚷12, 114.

Illegal intent to exact prohibited profit for loan of money is essential to establish usury, and court may examine into all circumstances of transaction to ascertain intent with which it was accomplished (St. 1919, p. lxxxiii, § 3).

3. Usury ⚷114.

Where note expressly stated that it evidenced part of loan, court properly admitted evidence of surrounding circumstances to determine whether challenged note constituted illegal contract for usurious interest (St. 1919, p. lxxxiii, § 3).

4. Usury ⚷16.

In cases of doubt as to whether contract is void for usury, construction upholding contract will be accepted (St. 1919, p. lxxxiii, § 3).

5. Usury ⚷117.

Burden is upon one who charges that usurious interest was exacted to prove charge by preponderance of evidence (St. 1919, p. lxxxiii, § 3).

6. Usury ⚷121.

Findings in usury case *held* not inadequate because court failed to expressly find execution and delivery of two separate notes to evidence entire loan or because court failed to specify exact rate of interest (St. 1919, p. lxxxiii, § 3).

> Court found that loan of $28,000 was evidenced by two promissory notes, one for $21,000 and the other for $11,760, that for 5-year term of entire loan, borrower agreed to pay interest in the sum of $12,110, and that the note for $11,760 represented balance of interest with a portion of principal of entire loan on entire transaction, and that total amount of interest that could lawfully have been charged for loan of $28,000 for five years was $14,700, that amount actually charged was $12,110, that by reason of discount and total interest paid by borrower, the sum remaining to be paid for the $28,000 loan was $10,030, which was not a usurious rate of interest.

7. Appeal and error ⚷931(1).

In construing findings, every reasonable intendment will be made in favor of the judgment.

8. Trial ⚷404(1).

Findings of ultimate facts are all that are required, and such findings should be read together and reconciled in support of judgment if possible.

Appeal from Superior Court, Santa Barbara County; William D. Dehy, Judge.

Suit by Betty N. Ewalt against Mortgage Securities, Incorporated, of Santa Barbara. From judgment for defendant, plaintiff appeals.

Affirmed.

James W. Briscoe, of Santa Barbara, for appellant.

Heaney, Price & Postel, of Santa Barbara, for respondent.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

The plaintiff brought suit under the provisions of the Usury Law of California to recover treble the alleged amount of interest which she was compelled to pay for a loan of money according to the terms of a promissory note. Judgment was rendered against her upon findings which declare that the challenged note was evidence of only a portion of a larger indebtedness incurred as a part of the same transaction which was not usurious as a whole. From this judgment the plaintiff has appealed.

The appellant and Otis L. Griffin purchased the Chrysler Garage at Santa Barbara. The garage property was subject to an indebtedness of $30,000, represented by two notes held by the respondent, which were executed by former owners of the property and secured by trust deeds upon the garage property. One thousand dollars of this indebtedness was due July 1, 1928. About this time Griffin applied to the respondent for a loan to refinance the debt. After the $1,000 had been paid the appellant and Griffin made a formal written application to the respondent to borrow $29,000 to refinance the indebtedness against the property. It was agreed that if the owners of the garage would reduce the indebtedness to $28,000 by paying another $1,000 thereon, respondent would renew the loan for the sum of $28,000, at about 9 per cent. interest per annum. This loan was to be represented by one note for the sum of $21,000, due in five years, at 7 per cent. interest per annum, payable quarterly and secured by deed of trust on the garage property. The balance of the loan, to wit, the sum of $7,000 and precomputed interest for the entire five-year term, together with commissions on the whole transaction, were to be included in a second note aggregating the sum of $11,760, secured by a second deed of trust on the same property. It was explained this entire loan would have to be divided in this manner to improve the security and render a part of the loan more marketable. This arrangement was agreed upon by the respective parties. Two notes were executed according to these terms on June 28, 1928, and secured by a first and second deed of trust. The smaller note was made payable in sixty equal installments of $196 each. This note did not authorize its payment prior to maturity.

For five consecutive months, after the execution of these notes, payments were regularly made thereon in one check upon the entire transaction for the sum of $318.50 each. From these payments the sum of $196 was regularly credited to the smaller note and the balance was credited to the $21,000 note. In the application for the loan of $28,000, in the discussion regarding the terms thereof, and in the payment and crediting of installments thereon, these two notes were treated as a part of the same transaction. The total amount of these installments which was paid and credited to the $11,760 note was the sum of $980. Thereupon the appellant applied to the respondent to discount and pay the last-mentioned note. The balance of this note was discounted and paid December 19, 1928, for the agreed sum of $8,700. This settlement was made by paying the respondent the total sum of $9,680 in full settlement of the $11,760 note, which included the principal amount of $7,000 and the additional sum of $2,680. The appellant asserts the last-mentioned sum was an usurious charge of interest upon the $7,000 loan. She claims this note should be considered as an entirely separate transaction from the loan represented by the $21,000 note. Upon that theory this suit was commenced under the provisions of section 3 of the California Usury Act (2 Deering's Gen. Laws of 1931, p. 1908, Act 3757; Stats. 1919, p. lxxxiii) to recover treble the sum of $2,680 which she was compelled to pay in satisfaction of this $11,760 note.

The court adopted findings to the effect that the $11,760 note represented only a part of a single transaction involved in the borrowing of $28,000 for the period of five years, at a rate of interest which aggregated only the sum of $12,110, which is less than 12 per cent. interest per annum and is not illegal or usurious; that the entire loan was divided, for convenience, between two promissory notes which were secured by first and second deeds of trust on the garage property; that the first note was for $21,000, payable in five years, at 7 per cent. interest per annum payable quarterly; and that there was added to the second note part of the interest and commissions to be earned by the first note, together with interest on the balance of the principal, aggregating the sum of $11,760, payable in sixty installments of $196 each; that this note was in the following language: "$11760.00

"Santa Barbara, Cal., June 28th, 1928.

"Five years after date for value received, we, jointly and severally promise to pay to Mortgage Securities, Inc., of Santa Barbara, or order, at its office in Santa Barbara, California, the sum of Eleven Thousand Seven Hundred Sixty Dollars, payable in monthly installments of One Hundred Ninety-six Dollars, on or before the 28th day of each and every month hereafter.

"Any payments provided for in this note or in the Trust Deed securing it whether of principal, interest, insurance, taxes or any other payments or charges, shall bear interest at the highest rate for which it is now legal to contract in California from the time the same become due until paid. Should default be made in the payment of any installment when due, then the whole sum of principal and interest shall become immediately due and payable at the option of the holder of this note. Interest to maturity on this note is included in the face thereof and in the event the due date is accelerated by action of the holder thereof the balance due thereon shall be reduced to such sum as shall be necessary to make the interest on the whole loan of which this is a part, equal to the highest legal rate for which it is now lawful to charge in this state. Principal and interest payable in gold coin of the United States of the present standard. This note is secured by a certain deed of trust to Security Title Insurance and Guarantee Company, a corporation.

"[Signed] Betty N. Ewalt
"[Signed] Otis L. Griffin."

The court further found the appellant paid five monthly installments on this last-mentioned note, aggregating the sum of $980; that on December 19, 1928, by agreement, this note was discounted and satisfied in full by the payment of a further sum of $8,700. This suit was then commenced to recover treble the amount of $2,680, which is the alleged usurious interest exacted upon payment of this note. Judgment was thereupon rendered in favor of the defendant.

The appellant's theory is that the $11,760 note is a separate transaction which is severable from the entire loan of $28,000, and that $2,680 which was exacted as interest and commissions on the $7,000 principal involved in the $11,760 note is usurious.

The appellant asserts the findings and judgment are not supported by the record. While the evidence is conflicting upon some of the essential elements of this transaction, we are satisfied the findings and judgment are adequately supported in every necessary respect. The evidence is convincing that the challenged note for $11,760 represents a part of a single transaction and agreement concerning the procuring of the $28,000 loan. The very language of the challenged note confirms this fact. It declares that: "Interest to maturity on this note is included in the face thereof and in the event the due date is accelerated by action of the holder thereof the balance due thereon shall be reduced to such sum as shall be necessary to make the *interest on the whole loan* [of $28,000] *of which this is a part*, equal to the highest legal rate for which it is now lawful to charge in this state."

[1-3] The terms of the entire contract may be considered in determining whether it was an illegal effort to exact usurious interest. Since an illegal intent to exact prohibited profit for the loan of money is essential to establish usury, a court may examine into all the circumstances of the transaction to ascertain the intent with which it was accomplished. In the present case the court properly admitted evidence of the surrounding circumstances of the entire transaction for the purpose of determining whether the challenged note constitutes an illegal contract for usurious interest. Haines v. Commercial Mtg. Co., 200 Cal. 609, 616, 254 P. 956, 255 P. 805, 53 A. L. R. 725; Lamb v. Herndon, 97 Cal. App. 193, 275 P. 503, 505; 27 R. C. L. 211, § 12. In Lamb v. Herndon it is said: "The case appears to have been tried upon the theory that under the pleadings the court had the right, not only to consider the written agreements, but also extraneous facts

and circumstances, including prior negotiations, for the purpose of determining whether or not the transaction was or was not usurious. A corrupt intent is one of the necessary elements of usury (Webb on Usury, 372; Tyler on Usury, 238), and to enable it to determine whether or not the intent existed the court had the right to admit in evidence all the surrounding circumstances and especially the negotiations that preceded the transaction. For as was said by the court in the case of Douglass v. Boulevard Co. et al., 91 Conn. 601, 100 A. 1067: 'Every circumstance surrounding or connected with the transaction is material, if in any manner it will reveal the intention of the parties.' Lowenstein & Sons v. British-American Mfg. Co. (D. C.) 300 F. 853."

The authorities are uniform to the effect that oral evidence is competent to determine the character, intent, and effect of the entire transaction. 27 R. C. L. 212, § 13; Jones Syndicate v. Internal Revenue Com. (C. C. A.) 23 F.(2d) 833; Baker v. Butcher, 106 Cal. App. 358, 289 P. 236, 238; Van Noy v. Goldberg, 98 Cal. App. 604, 277 P. 538. In the case of Baker v. Butcher it is said: "The existence of an illegal agreement for the payment of usurious interest must affirmatively appear from the evidence adduced at the trial. The burden of showing the illegal agreement for the payment of usurious interest is upon him who challenges the transaction as void."

"In the case of Lowenstein & Sons v. British-American Mfg. Co. (D. C.) 300 F. 853, 858, wherein two instruments were considered a part of one transaction for the purpose of determining whether it was tainted with usury, the court said: "Since the testimony as to when this matter first came up is so uncertain, it becomes necessary to consider the attendant circumstances to arrive at a decision as to whether that which on its face seems to have been two transactions was really one, and whether the salary and commissions payable to Lowenstein Bros. for 'services' were really extra interest for the use of the money loaned by M. Lowenstein & Sons, Inc."

[4, 5] If the transaction is left in doubt as to whether the contract is rendered void for violation of the Usury Act, that construction will be accepted which will uphold it. The burden is upon one who charges the exacting of usurious interest to prove it by a preponderance of the evidence. Coley v. Wolcott, 103 Cal. App. 140, 146, 284 P. 241; 27 R. C. L. 268, § 71.

The case upon which the appellant chiefly relies in support of his contention that the challenged note in this case is conclusive evidence of a separate transaction from that which is represented by the $21,000 note, is Duke v. Levy, 208 Cal. 376, 281 P. 496. An examination of that case clearly establishes the fact that the several notes which were involved therein were founded upon separate and distinct transactions between different individuals. Several cases were consolidated for the purpose of trial. There was no contention in that case that these notes represented evidence of a single transaction. That case is not in point.

[6-8] The findings are not uncertain or inadequate because the court failed to specifically state that the plaintiff executed and delivered to the respondent two separate notes as evidence of an entire loan of $28,000, or because the court failed to specify the exact rate of interest which was charged. In construing the findings every reasonable intendment is in favor of upholding the judgment. Findings of ultimate facts are all that is required. They should be read together and reconciled in support of the judgment, if possible. 2 Cal. Jur. 871, § 511. The court did find: "That said loan of $28,000 was evidenced by two promissory notes, made, executed and delivered by plaintiff and said Otis L. Griffin on said 28th day of June, 1928; and that one of said promissory notes so executed and delivered by plaintiff to defendant was in the principal sum of $21,000 * * * and the other of said promissory notes so executed and delivered by plaintiff to defendant was in the principal sum of $11,760 * * * that for the entire loan of $28,000 plaintiff agreed to pay interest [for the entire five-year term of the loan] in the sum of $12,110 * * * that said promissory note * * * in the principal sum of $11,760 represents said balance of interest [together with a portion of the principal of the entire loan] on the entire transaction, to-wit, the loan of $28,000. * * * It is not true * * * that said transaction or said promissory note of $11,760 was usurious. * * * That the total amount of interest that lawfully could have been charged by defendant from plaintiff for the loan of the said sum of $28,000 was $14,700, and that the interest actually charged * * * was and is $12,110, * * * and that by reason of the discount * * * the total interest [actually] paid by plaintiff, and that remaining to be paid for said sum of $28,000, is the sum of $10,030, and that said sum of $10,030 is not an usurious rate of interest on said loan of $28,000."

The foregoing findings are sufficiently specific to determine all the necessary issues in this case. It is a mere matter of mathematical calculation to determine exactly what rate of interest was charged. Moreover, it appears that 5 per cent. commission was charged for negotiating the loan, all of which was included in the $11,760 note. The commission therefor amounted to $1,400. Only $350 of this sum should properly be charged against the last-mentioned note. This furnishes further evidence of the fact that the loan of $28,000 constituted one transaction, and that it was divided between the two notes as a matter of convenience to enhance the marketable value of at least a portion of the debt.

The judgment is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

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129 Cal.App. 601

RATHBUN v. HILL et al.

Civ. 4679.

District Court of Appeal, Third District, California.

Feb. 14, 1933.

1. Replevin 🔑57.

Complaint of conditional buyer's assignee alleging assignee's right of immediate possession and that defendants wrongfully took and withheld possession stated cause of action.

Complaint alleged that buyer of hay-baler under conditional sale contract assigned his interest to plaintiff who agreed to comply with terms of such contract; that plaintiff was entitled to immediate possession; that defendants, among whom were seller and buyer under original contract, took possession of hay-baler without plaintiff's consent and wrongfully retained possession; and that, by being deprived of use of hay-baler, plaintiff was damaged in specified amount. It was contended that complaint did not state cause of action because it did not allege value of plaintiff's interest in property involved.

2. Replevin 🔑11(2).

Demand for possession before bringing replevin action *held* unnecessary; defendants alleging ownership and denying plaintiff's right to possession.

3. Replevin 🔑82.

$581 for detention of hay-baler wrongfully taken from possession of conditional buyer's assignee *held* not excessive under evidence.

Evidence showed that hay-baler in question was taken from assignee's possession about middle of June by original buyer and seller under conditional sale contract, under which purchase price of $1,270 was payable at rate of $1 for each ton of hay baled, that hay-baling season continued from June to October, inclusive, and that assignee had negotiated for baling more than enough hay to pay balance of price at rate of $1 a ton; and that earning capacity or rental value of hay-baler fixed at $1 a ton would have returned to assignee more than sum of $581 allowed for its detention.

4. Replevin 🔑10.

Generally, replevin will not lie against one not in possession except where defendant, having had possession, wrongfully parts therewith before beginning of action.

5. Replevin 🔑106.

Conditional buyer's assignee obtaining replevin judgment against original buyer and seller *held* entitled only to value of his interest in property if redelivery could not be had.

Appeal from Superior Court, Colusa County; Ernest Weyand, Judge.

Action by Lyon Rathbun against J. A. Hill, I. G. Zumwalt, and another. Judgment for plaintiff, and the last-named defendant appeals.

Affirmed on condition of remittitur, otherwise reversed.

U. W. Brown, of Colusa, and George R. Freeman, of Willows, for appellant.

Alva A. King and E. Vayne Miller, both of Colusa, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

The plaintiff had judgment in this action for the recovery of a certain hay-baler, with an alternative judgment for the value thereof, in the sum of $641.66, in the event that recovery of the hay-baler could not be had, and also damages in the sum of $581 for the detention thereof. From this judgment the defendant I. G. Zumwalt alone appeals.

The record shows that on or about the 10th day of April, 1930, a conditional contract of sale of the hay-baler involved in this action was entered into between the defendant Zumwalt, as seller, and the defendant Hill, as purchaser, whereby the defendant Hill agreed to purchase from the defendant Zumwalt a certain hay-baler known as a "John Deere" power press, together with a "Novo" motor, for the sum of $1,270, to be paid for at the rate of $1 per ton for each ton of hay baled by said press, the money earned for baling hay to be promptly paid by the purchaser to the seller as soon as earned and collected. All of the purchase price to be paid by November 1, 1931.

In pursuance of this conditional contract, the defendant Hill took possession of the hay-baler, operated the same during the year 1930, and made payment on the purchase price thereof at the rate of $1 per ton as the hay was baled on said press, to the amount of $620, leaving a balance due on the purchase price of $650. Thereafter, and on or about the 25th day of March, 1931, the defendant Hill entered into a contract of sale with the plaintiff, whereby the defendant Hill transferred to the plaintiff all his right, title, and interest in and to the hay-baler or power press, the plaintiff agreeing in said contract to comply with all the terms and conditions of the conditional contract of sale entered into between the defendants Hill and Zumwalt. At the time of entering into the contract between the plaintiff and Hill, the plaintiff paid on account of the purchase price of said hay-baler or power press the sum of $100, which was delivered to and accepted by the defendant Zumwalt, and credited as so much payment on the conditional contract of sale.

On or about the 14th day of June, 1931, the defendant Hill, becoming dissatisfied with the quantity of hay being baled by the plaintiff, took possession of the power press and motor, and the same were, up until the time of the trial of this action, withheld from the possession of the plaintiff. After the taking of possession of the power press and motor by the defendant Hill, it appears that Hill redelivered the same to the defendant Zumwalt, who had some repairs made thereon, and thereafter, and on or about the 24th day of June, 1931, the power press and motor were redelivered to the defendant Hill by Zumwalt under a different contract of sale. The conditional contract of sale first executed between the defendants Hill and Zumwalt appears to have been canceled, and a promissory note for the purchase price of the power press and motor executed by Hill and delivered to Zumwalt was also taken up and canceled. In connection with this transaction, it appears that the defendant Risley became associated with Hill in possession and control of the power press and motor. Some negotiations took place between the plaintiff and Zumwalt relative to the return of the power press and motor to the plaintiff, and, according to the plaintiff's testimony, the plaintiff was informed that he could regain possession of the power press and motor only by bringing suit.

Upon this appeal the defendant Zumwalt sets forth four grounds for reversal: First, that the complaint does not state a cause of action; second, that the evidence is insufficient to justify the verdict; third, that the damages are excessive; fourth, error in instructing the jury.

[1] The complaint alleges the assignment by Hill of all his right, title, and interest in and to the property involved herein, and that the plaintiff is entitled to the immediate possession thereof. The complaint then alleges the value of the property as being in the sum of $1,000. Paragraph III of the complaint alleges that on the 14th day of June, 1931, the defendants, without right and without consent of the plaintiff, took possession of said described personal property, and ever since have, and at the time of the filing of the complaint, wrongfully continued to retain possession of said property without the consent of the plaintiff. The complaint further alleges that the plaintiff has been deprived of the use of said property, to his damage in the sum of $49.50 per day. The prayer of the complaint is for the return of the property, or its value, in the sum of $1,000, and for damages in the sum of $49.50 for each day of the detention of said property by the defendants.

The appellant bases his allegation that the complaint does not state a cause of action on the fact that the complaint does not allege the value of the interest in the property involved. No authorities are cited to support this contention. It is true, as hereinafter stated, that the plaintiff, in the event recovery of the property cannot be had, is entitled only to a money judgment equivalent to the value of his interest in the property. The right of immediate possession is alleged to be in the plaintiff, which possession is alleged to be wrongfully withheld by the defendants, the damages resulting from the detention being also set forth. We think these allegations state a cause of action.

[2] Under the assignment that the evidence is insufficient to support the verdict, the appellant alleges the absence of a demand before the beginning of the action. In so far as the defendant Zumwalt is concerned, we think the conversations set forth in the record as having taken place between the plaintiff and the defendant Zumwalt sufficient to constitute a demand. However, the answers of the three defendants show that no demand was necessary, as all of the defendants have denied the right of the plaintiff to the possession of the property, the defendants Hill and Risley setting forth ownership therein under a conditional contract of sale, and the answer of the defendant Zumwalt, showing that he is still the legal owner, and denying the right of the plaintiff to the possession of the property.

[3] A considerable portion of the briefs filed by the respective counsel urging the second grounds set forth for reversal overlap and cover the claim on the part of the appellant that the damages are excessive. By the verdict, the sum of $581 was allowed as damages for the detention of the property. The property was taken from the possession of the defendant on the 14th day of June, 1931. The trial was had in the month of December, 1931. The evidence shows that the hay-baling season continued through the months of June, July, August, September, and October. It further appears from the testimony that the plaintiff had entered into negotiations with different farmers relative to the baling of the hay produced by them to the extent of several hundred tons, more than sufficient to pay the

remainder of the purchase price of the power press and motor, by making payment of $1 for each ton of hay baled during the baling season of 1931. The record shows that the purchase price of the baler was $1,270; that during the season of 1930 the defendant Hill had made payment on the purchase price of the power press and motor in the sum of $620, this payment being made at the rate of $1 for each ton of hay baled by Hill, which shows that the earning capacity or rental value of the baler, which was fixed at $1 per ton, would have returned to the plaintiff more than the sum of $581 allowed by the jury for the detention thereof.

[4] The appellant further contends that the action must fail as to Zumwalt for the reason that the testimony shows that the possession of the power press and motor was not in Zumwalt at the time of the beginning of the action. In support of this contention a number of cases are cited, including that of California Packing Corporation v. Stone, 64 Cal. App. 488, 222 P. 193, 195, where all the cases to which our attention is called are listed. In that action this court used the following language: "In an action in replevin or claim and delivery, being an action for the recovery of specific personal property, in order to sustain a judgment for the plaintiff, it must be shown that possession was in the defendant at the time of the beginning of the action, or that he had the power to make delivery of the personal property for the recovery of which the action is prosecuted."

The answer of the defendant Zumwalt, after denying the right of the plaintiff to the possession of the property, contains the following: "Denies that this defendant, ever since said date and/or does now wrongfully detain possession thereof from plaintiff, but upon the contrary alleges that since the 14th day of June, 1931, to-wit: on the ——— day of June, 1931, defendant J. T. Hill voluntarily delivered possession of said personal property to this defendant in settlement and cancellation of said conditional sales contract for the purchase of said hay-baler by said Hill from this defendant, dated April 10, 1930, whereupon this defendant repaired said hay-baler and subsequently and prior to the bringing of this action, to-wit: on June 23, 1931, entered into a conditional sales contract with said J. T. Hill and one A. P. Risley whereby this defendant agreed to sell said hay-baler to said Hill and Risley, and delivered the same to the said defendant Hill and Risley." This pleading on the part of the defendant Zumwalt shows the legal title to the property still vested in him, and also shows the attempt found by the verdict of the jury to be a wrongful one on the part of the appellant to place the property beyond the reach of the appellant.

While the general rule prevails, as stated by this court in the case of California Packing Corporation v. Stone, supra, that an action in replevin will not lie against one not in possession at the time of the bringing of the suit, yet there is a well-defined exception thereto. The exception is stated as follows in a number of the cases, to wit: "The rule that an action to recover the possession of personal property does not lie against one not in possession of the property, does not obtain where the defendant had been in possession and wrongfully disposed of the property prior to the commencement of the action without the knowledge of the plaintiff at the time." Our attention has not been called to anything in the record indicating that the plaintiff knew of the second conditional sales contract between the defendants at the time of the beginning of suit.

The facts disclosed by the record show that the appellant, after the attempt on the part of the plaintiff to obtain possession of the property involved herein, and the conversations which took place between the parties, amounting to a demand, as we have stated, dispossessed himself of the immediate possession, and we may add that there is nothing in the record showing that the appellant did not have, at the time of the trial, control of the property, as well as the legal title thereto, nor that he did not have the power to make redelivery.

In the case of Andrews v. Hoeslich, 47 Wash. 220, 91 P. 772, 18 L. R. A. (N. S.) 1265, 125 Am. St. Rep. 896, 14 Ann. Cas. 1118, it is held that, under the circumstances disclosed by the record in this case, the action of replevin will lie. On page 1269 of 18 L. R. A. (N. S.) a large number of cases are quoted supporting the rule which we have stated, that, where the defendant has wrongfully parted with the possession of the property before the action is commenced, it does not lie within his power to defeat the suit by such wrongful practices. A defendant cannot part with property in bad faith and then plead his own bad faith as a defense to the plaintiff's cause of action. See, also, White v. Miley et al., 137 Wash. 80, 241 P. 670, where the Supreme Court of Washington points out instances where the exception to the general rule applies.

[5] It is finally urged that the court erred in its instructions to the jury, and that the plaintiff was not and is not entitled to a recovery of the full value of the power press and motor in the event that redelivery is not made. This contention appears to be well taken. At the request of the plaintiff, the court instructed the jury as follows: "If you find from the evidence that the plaintiff, Lyon Rathbun, has a right to the possession of the hay-baler, you shall award him as damages the return of the hay-baler or the value of the baler in case a return cannot be had."

This instruction was erroneous. The plaintiff, in event that redelivery could not be had, was entitled only to recover the value of his interest therein.

In Campbell v. Smith, 96 Cal. App. 689, 274 P. 758, 760, this court had before it a case involving an identical issue, and we there quoted with approval the following: "Where, in an action of replevin by the general owner of property against one who has a special interest therein, the property has been delivered to the plaintiff, the true value to be assessed and recovered by the defendant—where the suit goes in his favor—is the value of his special or limited interest in the goods recovered." The cases are too numerous to be recited, and therefore we refer only to page 696 of 96 Cal. App., 274 P. 758, 760, supra, where the cases may be found.

In Booth v. People's Finance & Thrift Co. of Modesto et al., 12 P.(2d) 50, 51, the same question was before this court, and we there held as follows, quoting from the cases there listed, to wit: "In Bunnell v. Baker, 104 Cal. App. 313, 285 P. 877, 879, 286 P. 1090, 1091, the extent of the recovery under such circumstances is there stated: 'The interest of respondent in the trucks was not the entire estate therein, but was special and limited. The value of his interest should have been determined by taking the market value of the trucks and deducting therefrom the amount remaining unpaid under the terms of the conditional sales contract. In case delivery of the trucks could not be made, he was not entitled to a judgment for the full market value of the trucks, but only to the value of his special interest in them. Lindsey v. Butte, 96 Cal. App. 465, 274 P. 428 (275 P. 525); Connell v. Hogg, 181 Cal. 730, 186 P. 134; Conolley v. Power, 70 Cal. App. 70, 232 P. 744; Griffith v. Reddick, 41 Cal. App. 458, 182 P. 984. As the jury evidently followed the instructions of the court and found the full market value of the trucks at the time of trial, and judgment was entered for this amount in case the trucks were not returned to respondent, we must conclude that the giving of the instructions on the question of value was prejudicial error requiring a reversal of the case.'" The instruction of the court in the Booth Case was as follows: "If you find from the evidence in this case that a delivery or return of said motor vehicle cannot be had, then if you find as aforesaid, that the plaintiff is entitled to the possession of said motor vehicle, your verdict shall be for the plaintiff and against the defendant, in such amount as you find from the evidence to be the reasonable value of said motor vehicle." The instruction in the case at bar is identical in substance with the one which we have just quoted, and which was held erroneous, and shown to be erroneous, by the authorities which we have cited. The special interest of the plaintiff in the power press and motor was the sum of $100, being the whole amount of his payment on the purchase price thereof. The value of the power press and motor was fixed by the jury at the sum of $641.66, which was in excess of the value of the plaintiff's interest therein to the amount of $541.66.

In order that the cause may be finally determined upon this appeal, we will follow the rule laid down in the case of Wilkinson v. Singh, 93 Cal. App. 337, 269 P. 705, and also followed in the Booth Case, supra, and make the following order:

That, in the event the plaintiff shall, within twenty days after the filing of this opinion, file with the clerk of this court a remittitur of $541.16 of the sum found as the value of the property to be recovered by the plaintiff in the event that redelivery of the property cannot be had, the judgment herein as so modified shall stand affirmed; otherwise reversed.

The appellant will be awarded his costs on appeal.

We concur: **PULLEN, P. J.; R. L. THOMPSON, J.**

PER CURIAM.

It appearing that the respondent has filed in this court on this, the 28th day of February, 1933, a remittitur of compensatory damages in the sum of $541.16, the judgment in this cause is hereby modified to that extent, and as modified, is affirmed. The appellant is awarded costs.

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129 Cal.App. 545

ZENOS v. HARDEN.

Civ. 8726.

District Court of Appeal, First District, Division 2, California.

Feb. 10, 1933.

Rehearing Denied March 11, 1933.

Hearing Denied by Supreme Court April 11, 1933.

1. Account stated 🔑20(1).

In action against plaintiff's former partner to surcharge stated account, whether dissolution was predicated upon stated account rather than give or take trade *held* for trial court.

2. Account stated 🔑1.

Account stated may be oral.

Appeal from Superior Court, Monterey County; H. G. Jorgensen, Judge.

Action by John Zenos, to surcharge a stated account, against E. E. Harden. From a judgment for plaintiff, defendant appeals.

Affirmed.

George M. Naus, of San Francisco, Wyckoff, Gardner & Parker, of Watsonville, and Hubert Wyckoff, Jr., of San Francisco, for appellant.

Russell Scott, Paul L. Pioda, J. A. Bardin, and J. T. Harrington, all of Salinas, for respondent.

STURTEVANT, Justice.

The plaintiff brought a bill in equity to surcharge a stated account alleged to have been the basis on which a dissolution of a partnership had theretofore been made between the plaintiff and the defendant. The defendant answered, and the action was tried before the court sitting without a jury. The court made findings in favor of the plaintiff, and, from the judgment entered thereon, the defendant has appealed, and has brought up typewritten transcripts.

The defendant claims that the findings are not sustained by the record. In this connection the defendant vigorously asserts there was no evidence that the dissolution was predicated on any account between the partners, but that it was a contract of sale arrived at by a trade in the nature of give or take. We think there is an abundance of evidence in the record sustaining the findings. While the transaction culminated in a give or take trade, there was evidence it was based on the stating of accounts.

For some years prior to the dissolution above mentioned, the plaintiff and the defendant had been partners engaged in producing and marketing truck crops. The plaintiff operated properties at Holtville, in Imperial county, and the defendant operated properties located at Salinas, in Monterey county. Their operations were very extensive. At each place they farmed hundreds of acres. At each place they maintained an office, and what appear to be full and accurate accounts were kept by trained accountants. By reason of the difference in climatic conditions, any certain crop matured during certain months at Salinas; but the same crop matured several months earlier at Holtville. In each county the partners rented lands, and large portions of their crops were harvested therefrom. At the end of any certain season the assets were largely moneys in bank, paid-up rent, and crops planted to be grown and harvested the following year. As of August 31, 1928, which is the end of the season at Holtville, the plaintiff rendered to the defendant a full account of the affairs of the partnership in Imperial county. That account showed assets in the sum of $93,601.10. Later the defendant rendered to the plaintiff an account as of December 31, 1928, which is the end of the season at Salinas. That account showed the affairs of the partnership at Salinas and showed the assets in Monterey county as being in the sum of $167,849.86. Both accounts, among other things, purported to show the net profits for the year 1928. In the early part of January, 1929, the defendant went to Holtville, and soon after arriving there, according to the testimony of the plaintiff, he delivered to the plaintiff two yellow sheets purporting to show the affairs of the partnership at Salinas down to December 31, 1928. There was evidence that the defendant was an experienced business man and familiar with bookkeeping methods, and that he proceeded at once to make an examination of the accounts of the plant in Imperial county. After he had examined those accounts he proposed the dissolution of the partnership. A quarrel at once ensued between the plaintiff and the defendant, and for a day or two it appears they were not on speaking terms. Mr. Boyett, a public accountant who had acted for the partnership on other occasions, was called in by Mr. Harden, to act as mediator. He examined the accounts and made certain inquiries of the defendant as to the facts, and the statements made to him by the defendant were, at the defendant's request, repeated to the plaintiff. Mr. Boyett testified that he was interested in ascertaining the net profits of the plants for the preceding year to the end that he might, on that basis, form an estimate of the value of each plant. It is at once apparent that such a course was advisable. In raising truck crops the amount and quality of the yield is altogether problematical until the crop has been harvested. After the crop has matured, the value per pound or per ton is altogether problematical until the crop has been sold. Until sales have been made it is quite difficult to do more than express a guess as to the value of a growing crop. It thus became quite material to ascertain the values as shown by the net profits during the last preceding years. Some of these facts were contained in the accounts, and some were stated orally by the defendant. In discussing the terms of a dissolution, facts taken from the accounts were referred to by the plaintiff, they were referred to by the defendant, and they were referred to by Mr. Boyett. There is evidence that in this manner the parties endeavored to arrive at terms. There is no evidence that any one was sent out to appraise any tract of land or any crop. There is no evidence that the plaintiff went to Salinas or sent an agent there to make any examination. There is no evidence that while at Holtville Mr. Harden spent any time or had any agent spend any time in making any appraisals at Holtville. On the other hand, the record discloses evidence to the effect that the dissolution rested wholly on the facts shown by the accounts, supplemented by the oral statements of the defendant. As nearly as we can understand the record Mr. Boyett arrived at El Centro Saturday night. Sunday morning he and Mr. Zenos met at breakfast. They had a long talk. Later they separated, and Mr. Boyett had a talk with Mr. Harden. Still later Mr. Boyett called at the office at Holtville, where he and Mr. Zenos had a long talk in which Mr. Boyett repeated the statements made to him by Mr. Harden. Together they returned to El Centro. That evening, the date being February 2, 1929, all three met in Mr. Harden's room in the hotel. Prior to that meeting the uncontradicted evidence is that Mr. Harden had examined the account rendered by Mr. Zenos, and he had also examined the books of the Holtville plant. Mr. Zenos had made at least a cursory examination of the account exhibited to him by Mr. Harden, and he had heard from Mr. Boyett the additional facts stated by Mr. Harden as to the affairs of the plant at Salinas. Almost at once it was mentioned that $75,000 was about the difference between the values of the two plants. Taking the net profits for a guide, Mr. Boyett arrived at similar values. Mr. Zenos testified: "I asked Harden, I said, 'Gene, you started this thing, just make a proposition. What do you want?' and he says, 'Well you know what the Salinas deal has got,' and I says, 'I do, and I do know what you gave me the figures'—I did know what he gave me and I had all the confidence in him and his word was as good as gold to me, and I says, 'All right, you got so much money there.'" In another place he testified that Mr. Harden made the statement that he "turned everything into cash, I didn't have any work done on the ranches, and no prepaid rent, and nothing on hand whatsoever, except the cash, and naturally as long as I knew Mr. Harden and have such confidence as I had in him in spite of his going back on a gentleman's agreement we had, I took his word upon it and I didn't hesitate, and I said, 'All right.' * * * The exact figures was the 31st day of August, 1928 for the Imperial deal and the 31st day of December for the Salinas district. * * * It was for the reason that there is only two months in the year that you could—the only time possible that you can come nearest to any of the net profits would be August 31st for Imperial value and December 31st for Salinas. * * * Mr. Harden told him (Boyett) to take the figures from the 31st of August, 1928, for the Imperial Valley and take the 31st of December, 1928, for the Salinas district, and from these two months to arrive at the net profits or the capital each district had." Later in the evening the minds of the parties met. Mr. Boyett, being present, was asked to reduce the agreement to writing. He did so, and a copy thereof is as follows:

"El Centro, Calif. 2/2/29

"Agreement:

"This agreement made and entered into by and between John Zenos and E. E. Harden, doing business as Zenos and Harden, it is agreed that we are to dissolve the partnership heretofore in force upon the following basis: E. E. Harden is to take over the assets of the partnership at Salinas, which exceeds the assets of the partnership at Holtville, Calif. For the difference in the assets E. E. Harden is to pay John Zenos $30,000.00 thirty thousand dollars, $10,000.00 on 2/4/29, and the balance $20,000.00 on or before 30 days from date. It is mutually agreed that John Zenos is to assume all liabilities at the Holtville plant, and E. E. Harden to assume the liabilities at the Salinas plant. Dissolution of partnership effective 2/4/29.

"[Signed] John Zenos
"[Signed] E. E. Harden

"Witness:
"R. O. Boyett"

[1] Thereafter, on February 4, the plaintiff executed to the defendant a bill of sale transferring his interest in personal property located in Monterey county. On the same day the defendant executed a bill of sale transferring his interest in personal property located in Imperial county. Within thirty days after February 2, 1929, the defendant paid the plaintiff $30,000. Considering all of this evidence, and giving force and effect to every part, it certainly cannot be said as a matter of law that the transaction constituted a trade of give or take, and did not constitute a stated account, balance struck, and a payment over of the balance. They determined the values of the two plants, and the actual difference in values as distinguished from the book values as shown by the accounts before them. Having done so they then discussed which plant each one wanted to take as his share of the balance of the assets. On that subject their minds also met. The plaintiff agreed to take over the Holtville properties, and the defendant agreed to take over the Salinas properties. If, as claimed, this was a give or take trade, why did the parties discuss the accounts? Why did they call in a public accountant for help? Why not an experienced farmer? In short, we think the trial court was right in holding that the parties made a stated account, and that the matter of give or take was but an incident of the transaction. In so holding, we think the case is not governed by the doctrine of Johnstone v. Morris, 210 Cal. 580, 292 P. 970, but that it is governed by such cases as Branger v. Chevalier, 9 Cal. 353; Adams v. Gerig, 25 Cal. App. 638, 145 P. 106, and First National Bank v. Stansbury, 62 Cal. App. 336, 217 P. 91. In other words whether the dissolution was the result of a compromise, a give or take trade, or upon an accounting had, or partly on each, is a question of fact, at least in part, for the determination of the trial court. In the instant case that question has been determined by the trial court, and its determination cannot be said to be unsupported by the evidence.

[2] In contending that the findings do not support the judgment, we understand the defendant to claim that the evidence does not show that in writing the parties struck a balance. This contention may not be sustained for several reasons. There was the written account regarding the properties in Imperial county, and there is no question but that it showed a balance struck. There was also a

written account as to the affairs in Monterey county. It also showed a balance struck. Whether orally or in writing a balance was struck between those two accounts is immaterial. An account stated may be oral. Converse v. Scott, 137 Cal. 239, 70 P. 13. When, as here, it appears that the exact balance as shown by the writings was $74,247.76 and the plaintiff's one-half interest $37,123.88, and the matter is settled by accepting $30,000, such fact is not conclusive to the effect that a balance was not struck. As shown above, the accounts included several items as book value, and the exact market value was extremely difficult of ascertainment. Instead of going into the courts, the plaintiff waived a claim of $7,123.88—less than 3 per cent. on the total assets involved. Certainly it may not be said as a matter of law that $30,000 was not the correct balance, and that $37,123.88 was the correct balance. The question was wholly problematical. The parties solved the problem for themselves.

We find no error in the record. The judgment is affirmed.

We concur: SPENCE, Acting P. J.; GOODELL, Justice pro tem.

CHITWOOD v. HICKS, County Auditor.*

Civ. 694.

District Court of Appeal, Fourth District, California.

Feb. 2, 1933.

Hearing Granted by Supreme Court April 3, 1933.

1. Courts 🔑55.

Secretary to judge of superior court is attaché of state institution, and not "county officer, deputy or employee," as regards constitutionality of statute relating to secretary's appointment and salary (St. 1927, p. 1728, as amended by St. 1931, p. 2512; Const. art. 6, § 1; art. 1, § 11; art. 4, § 25, subd. 33; art. 11, § 5).

[Ed. Note.—For other definitions of "County Officer," "Deputy" and "Employee," see Words and Phrases.]

2. Statutes 🔑93(8).

Classification "counties of twelfth class" in statute relating to appointment of stenographers to superior court judges *held* not to render act unconstitutional as using classification proper only in county government act, where description applied to single county (St. 1927, p. 1728, as amended by St. 1931, p. 2512; Const. art. 11, § 5).

3. Statutes 🔑74(2), 76(3).

Statute providing for appointment of stenographer for superior court judges, in "counties of twelfth class" and fixing stenographer's salary, *held* not void as special legislation, though classification affected but one county (St. 1927, p. 1728, as amended by St. 1931, p. 2512; Const. art. 1, § 11; art. 4, § 25, subd. 33).

Original proceeding by Aileen Chitwood for writ of mandate to be directed to Ray T. Hicks, as County Auditor of Riverside County.

Writ granted.

Prior opinion, 17 P.(2d) 1023.

C. L. McFarland and Geo. A. Sarau, both of Riverside, for petitioner.

Earl Redwine, Dist. Atty., of Riverside, for respondent.

MARKS, Justice.

This is an original proceeding instituted here to have issued a peremptory writ of mandate directing the respondent, as county auditor of the county of Riverside, to issue to petitioner a warrant in the sum of $375 in payment of her salary for the months of June, July, and August, 1932, as stenographer or secretary to the Honorable O. K. Morton, one of the two judges of the Superior Court of the state of California in and for the county of Riverside.

The facts of the case, certain questions upon which counsel are in accord and which do not require the consideration of this court, and the sole ground upon which the issuance of a peremptory writ of mandate is contested by respondent, are clearly set forth in the brief of his counsel as follows:

"In 1927 Riverside county was a county of the fifteenth class. In 1931, by re-classification, Riverside county became a county of the twelfth class. Pol. Code, § 4005c, as amended by St. 1931, p. 128, § 1. In 1927, the Legislature by enactment of chapter 848 (Statutes of 1927, page 1728) provided stenographic assistance to the judges of the Superior Court in counties of the fifteenth class, as follows:

"'Section 1. In counties of the fifteenth class having more than one judge there shall be appointed by the judges of the Superior Court one competent stenographer and typist of skill in such work, whose duties shall be to render such service as such judges may require each day. * * * Section 2. The salary of such stenographer shall be paid by the county in monthly installments and at the same time and in the same manner and out of the same fund as the salaries of the county officers are paid.'

"The above statute was amended by the Legislature in 1931 through the enactment of chapter 1199, Statutes of 1931 (page 2512) which enactment reads as follows:

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*For subsequent opinion see 25 P.2d 406.

" 'Section 1. Section 1 of an act entitled: "An act to provide a stenographer and typist for judges of the Superior Courts, and providing for their salaries and the payment thereof," approved May 31, 1927, is hereby amended to read as follows: Section 1. In counties of the twelfth class having more than one judge there shall be appointed for each judge of the Superior Court, one competent stenographer and secretary skilled in such work, whose duties shall be to render such services as such judge may require each day. * * *'

"Chapter 1199, Statutes of 1931, became effective on the 14th day of August, 1931. Pursuant to the provisions of that enactment, the Honorable G. R. Freeman, judge of the Superior Court of Riverside county, department one, appointed Mrs. Flora Kauffman, to discharge the duties of stenographer and secretary, while the Honorable O. K. Morton, judge of the Superior Court of Riverside county, department two, appointed Mrs. Aileen Chitwood, petitioner herein, to discharge the duties of stenographer and secretary respectively.

"Both Mrs. Kauffman and Mrs. Chitwood entered upon such employment and have continued to and now are acting as stenographer and secretary to the two judges of the Superior Court as aforesaid.

"Subsequent to the enactment of chapter 1199, Statutes of 1931, and while Mrs. Kauffman and Mrs. Chitwood were employed as hereinbefore set out the question arose as to the propriety of the county auditor of Riverside county, Ray T. Hicks, respondent herein, drawing his warrants in favor of Mrs. Kauffman and Mrs. Chitwood, in payment of the monthly salary provided for by chapter 1199, Statutes of 1931. Since the 31st day of May, 1932, the respondent has refused to draw his warrant as county auditor under the provisions of chapter 1199, Statutes of 1931, in favor of either Mrs. Chitwood or Mrs. Kauffman.

"Referring to the points and contentions of the petitioner in support of the application filed herein, the respondent respectfully submits as follows: 1. The respondent agrees that the petitioner's appointment as such stenographer and secretary was made under the provisions contained in chapter 1199, Statutes of 1931, page 2512. 2. The respondent also agrees that the Legislature has the power to provide clerical assistance for the efficient functioning of the Superior Court and other courts of record, provided, that in making such provision the same must not be violative of the Constitution of the state of California. 3. It is also agreed by the respondent that the petitioner is not a county officer and that the purpose of the statutes in question was to provide for only employees as mere adjuncts of the Superior Court to be appointed for the purpose of relieving it of certain of the administrative phases of its judicial functions. 4. And finally it is agreed by the respondent herein that the proper procedure in presenting this matter to the court is by and through a petition for a writ of mandate."

[1] The superior courts are courts of the state (article 6, § 1, Const.) and the judges of these courts are state officers. Petitioner, as a secretary to a judge of the Superior Court, is an attaché of a state institution, and is in no respect a county officer, deputy, or employee. Noel v. Lewis, 35 Cal. App. 658, 170 P. 857. The many decisions of our courts concerning county officers, deputies, and employees are inapplicable here.

Respondent bases his defense to the petition upon two grounds: First, that the act under which petitioner was appointed (Stats. 1931, p. 2512) is special legislation which violates the provisions of article 1, § 11, and article 4, § 25, subd. 33 of the State Constitution; second, that as the act creating the position which she holds provided for her appointment in a county of the "twelfth class" it is unconstitutional and void as attempting to provide for the appointment of a state employee under a classification which could be effective for county officers, deputies, and employees only. Article 11, § 5, Const.; Pratt v. Browne, 135 Cal. 649, 67 P. 1082.

Article 1, § 11 of the Constitution provides that "All laws of a general nature shall have a uniform operation." Article 4, § 25, subd. 33 of the Constitution provides: "The legislature shall not pass local or special laws in any of the following enumerated cases, that is to say: * * * Thirty-third—In all other cases where a general law can be made applicable."

Illustrations might be given of many special acts of the Legislature which have been upheld by the Supreme Court in cases where general laws could not fit the circumstance under which they were required to operate, and no constitutional prohibition to their passage existed. As was said in discussing the constitutionality of the act creating the Sacramento Drainage District (People v. Sacramento Drainage District, 155 Cal. 373, 103 P. 207, 212): "The act does no violence to article 1, § 11, nor to article 4, § 25, nor to article 11, § 6, of the Constitution of the state. * * * Nor, while a special act, is the law obnoxious to the other sections of the Constitution above cited. The considerations dictating the necessities of a special law are plain as above set forth. It would require a clear showing upon the face of the law itself that a special act was not required, before a court would interfere with the determination of a co-ordinate branch of the government upon this subject." The same question was considered in People v. McFadden, 81 Cal. 489, 22 P. 851, 854, 15 Am. St. Rep. 66, where it was said: "It is also claimed that the act is void because it is in conflict with or passed in violation of article 4, § 25, subd. 33, of the constitution, where it is provided that 'the legislature shall not pass local or special laws * * * in cases where a general law can be made applicable.' This point is not well taken. While it may be found practicable to, and the legislature has already endeavored by a single act to provide a uniform system of county government, we can hardly conceive it possible, in view of the varied conditions of the different localities in this state, if indeed it could be done in any state, to frame a single law which should meet the necessities of each attempt to organize a new 'political subdivision of the state.' In any event, whether such a law could 'be made applicable' depends upon questions of fact which this court has no means of investigating, and upon the solution of which it would not attempt to substitute its judgment in place of that of the legislature. The policy of adding to the number of the 'political subdivisions of the state' is one to be determined by the legislative department of the government in each instance when the proposition to do so is made; and if the determination be favorable, then the legislative department alone must fix and determine the boundaries of such subdivision."

Section 5 of article 11 of the Constitution provides for the classification of counties by the Legislature in accordance with population for the purpose of providing for local county governments and fixing the salaries of county officers, deputies, and employees. In accordance with the powers conferred by this section we find that it reclassified the counties of the state in accordance with the population determined by the census of 1930. Stats. 1931, p. 128. In section 1 of this act we find the following: "The population of the counties of this state is hereby ascertained and determined to be * * * as follows: * * * 12. Riverside 81,024." In section 2 of the same act is the following: "For the purpose of regulating the compensation of all officers herein provided for, the several counties of this state are hereby classified, according to their population * * * as follows, to wit: * * * counties containing a population of eighty thousand and under eighty-two thousand shall belong to and be known as counties of the twelfth class." Riverside is the only county falling within this classification.

[2, 3] We find that the same Legislature which passed the amendatory act in question increased the number of judges of the Superior Court in the county, of Los Angeles. St. 1931, p. 1063. In accomplishing this purpose it provided that "In counties of the first class there shall be fifty judges of the Superior Court. * * *" The legal effect of the language used in this enactment, in so far as the reference to Los Angeles county by its classification is concerned, cannot be distinguished from that of the act under which petitioner claims her appointment, wherein it is provided that "In counties of the twelfth class having more than one judge there shall be appointed for each judge of the Superior Court, one competent stenographer and secretary. * * *"

The act under which petitioner was appointed did not state that such an appointment would be effective "in Riverside county," but used the words "counties of the twelfth class having more than one judge * * * of the Superior Court." This description applies to no county in the state other than Riverside. It is admitted the constitutional provisions under consideration permit of the passage of laws affecting county officers, deputies, and employees. It has been held that a county government act passed under authority of this section should not attempt to fix the salary of an attaché of the Superior Court. Pratt v. Browne, supra. The question then arises, Does the use of the term "counties of the twelfth class," in the act under which petitioner was appointed, render it unconstitutional by using a classification or description of Riverside county that was only proper to use in a county government act, petitioner being not a county employee, but an attaché of a state court? As the act in question forms no part of a county government act, we have concluded that the answer must be in the negative. The expression "In counties of the twelfth class having more than one judge" is evidently descriptive only, and is another and rather awkward way of saying "In Riverside county." It being used only for the purpose of designation and not being an uncertain designation, we can see no serious objection to its use by the Legislature in the act in question. For the reasons given, we do not consider the act approved June 19, 1931 (Stats. 1931, p. 2512), unconstitutional.

Our conclusions do not conflict with Pratt v. Browne, supra, relied upon by respondent. This case is only authority for the rule that a county government act cannot fix the salary of a reporter of a superior court; he being an attaché of a state court and not one of the officers, deputies, or employees of a county whose salary may be fixed in a county government act passed under the provisions of section 5 of article 11 of the Constitution. Had the act under which petitioner was appointed and claims her salary been passed as a part of the Riverside County Government Act, Pratt v. Browne, supra, would be authority for our denying her the relief she seeks. Such is not the case.

It is ordered that a peremptory writ of mandate issue as prayed for.

We concur: BARNARD, P. J.; JENNINGS, J.

STOOTS v. BLICKLE.*

Civ. 4674.

District Court of Appeal, Third District, California.

Feb. 7, 1933.

Hearing Granted by Supreme Court April 7, 1933.

1. Statutes ⚷274.

Where right is created solely by statute, and is not reduced to possession or perfected by final judgment, repeal of statute without saving clause destroys remedy.

2. Automobiles ⚷6.

Amendment of statute by eliminating right of recovery for injuries or death of minor automobile guest resulting from gross negligence *held* to preclude recovery for gross negligence in death action, though accident occurred before amendment became effective (St. 1923, p. 517, § 141¾, as added by St. 1929, p. 1580, as amended by St. 1931, p. 1693; Code Civ. Proc. § 376; Civ. Code, § 2096).

3. Statutes ⚷225¾.

Where statute has been judicially construed, law subsequently enacted on same subject should be considered in light of court's decision.

4. Appeal and error ⚷173(2).

Defendant *held* not estopped, in statutory action for gross negligence causing death of minor automobile guest, from urging on appeal retroactive operation of amendment, by having failed to raise point below (St. 1923, p. 517, § 141¾, as added by St. 1929, p. 1580, as amended by St. 1931, p. 1693; Code Civ. Proc. § 376; Civ. Code, § 2096).

Appeal from Superior Court, Yolo County; W. A. Anderson, Judge.

Action by C. A. Stoots against Charles F. Blickle. Judgment for plaintiff, and defendant appeals.

Reversed.

Butler, Van Dyke, Desmond & Harris, of Sacramento, for appellant.

C. C. McDonald, of Woodland, for respondent.

PARKER, Justice pro tem., delivered the opinion of the court.

This is an action brought by the father of a minor killed in an automobile accident while riding as a guest. The child, a minor of the age of nine years, was one of five occupants of an automobile which was driven by his uncle, the defendant Blickle. It is conceded throughout that the decedent was a guest of the defendant at the time of the accident.

We are called upon to construe section 141¾ of the California Vehicle Act as amended in 1931 (St. 1923, p. 517, § 141¾, as added by St. 1929, p. 1580, as amended by St. 1931, p. 1693), and to determine its effect upon the present action. The chronology of the case may be outlined sufficiently to present the point.

The accident occurred in the state on May 17, 1931. This action was commenced on September 4, 1931. At the time of the accident, to wit, May 17, 1931, section 141¾ read in part as follows: "If such person so riding as a guest be a minor and sustain an injury or be killed or die as a result of injury sustained while so riding as such guest, then neither the parents nor guardian nor the estate nor legal representatives or heirs of such minor shall have any right of recovery against the driver or owner or person responsible for the operation of said vehicle for injury sustained or as a result of the death of such minor. Nothing in this section contained shall be construed as relieving the owner or driver or person responsible for the operation of a vehicle from liability for injury to or death of such guest proximately resulting from the intoxication, wilful misconduct or gross negligence of such owner, driver or person responsible for the operation of such vehicle; provided, that in any action for death or for injury or damage to person or property by or on behalf of a guest or the estate, heirs or legal representatives of such guest, the burden shall be upon plaintiff to establish that such intoxication, wilful misconduct or gross negligence was the proximate cause of such death or injury or damage."

In 1931 this section was amended. The amendment practically re-enacted the statute with the omission of the words "gross negligence." The present statute reads, word for word, as quoted hereinabove, save for the omission noted. The section as amended took effect on August 14, 1931. It will be conceded that the section as it stands after the 14th of August, 1931, restricts the right of recovery by a parent for the death of a minor guest to cases wherein such death proximately results from willful misconduct or intoxication of the owner, driver, or person responsible for the operation of such vehicle. So therefore we have this situation: On May 17th, when the minor guest was killed, the plaintiff, father of said minor, had a cause of action against defendant driver, providing the death of the minor resulted from the gross negligence of said defendant.

This cause of action arose under the provisions of section 376, Code of Civil Procedure, with which section may be read section 2096 of the Civil Code. The right of plaintiff's father was and is purely a statutory right.

In Kramer v. San Francisco Market St. R. R., 25 Cal. 435, decided in 1864, it is said:

⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 30 P.2d 392.

"That a civil action for the death of a person, per se, cannot be maintained by any one at common law is too well settled to admit of discussion at the present time. This rule is so well and firmly established that an investigation of its reason and philosophy would be idle and useless." See, also, Bond v. United Railroads, 159 Cal. 276, 113 P. 366, 48 L. R. A. (N. S.) 687, Ann. Cas. 1912C, 50; Dickinson v. Southern Pacific Co., 172 Cal. 727, 158 P. 183.

[1] When a cause of action is founded on a statute, a repeal of the statute before final judgment destroys the right of action. People v. Bank of San Luis Obispo, 159 Cal. 65, 112 P. 866, 37 L. R. A. (N. S.) 934, Ann. Cas. 1912B, 1148. It, perhaps, may be better stated that it is a rule of universal application that where a right is created solely by a statute, and is dependent upon the statute alone, and is still inchoate and not reduced to possession or perfected by final judgment, the repeal of the statute destroys the remedy, unless the repealing statute contains a saving clause. Moss v. Smith, 171 Cal. 777, 155 P. 90; Freeman v. Glenn County Co., 184 Cal. 508, 194 P. 705; Krause v. Rarity, 210 Cal. 646, 293 P. 62, 77 A. L. R. 1327; Coombes v. Franklin, 213 Cal. 164, 1 P.(2d) 992, 4 P.(2d) 157. These principles are undisputed.

[2, 3] It must be further conceded, in applying these principles to the present discussions, that the amendment of 1931, before noted, did take away any cause of action in favor of a guest on account of injury to, or death of a minor resulting from gross negligence. Our inquiry would therefore narrow down to the question of a saving clause. We can find none. The leading case on the subject is the case of Krause v. Rarity, 210 Cal. 646, 293 P. 62, 66, 77 A. L. R. 1327. This case deals with the effect of section 141¾ (California Vehicle Act), as it was originally enacted, with reference to causes of action theretofore arising. It was definitely held that the section as enacted in 1929 had no retroactive effect in a cause of action in favor of a guest, founded on the negligence of an owner or driver of a vehicle. And this was held in a case where the claimed cause of action was one existing solely by virtue of statutory authority. However, the situation in the Krause Case was much different from the one here presented. The court was definitely of the opinion that the statute of 1929 would have wiped out all causes of action not reduced to final judgment. The court says: "It is apparent that, if the new section [141¾, California Vehicle Act] had been enacted without the proviso, the rule * * * would apply, the plaintiffs' cause of action would have been wiped out, and no recovery could be had on the judgment * * * for the reason that said judgment has not become final." The proviso referred to was that portion of the section reserving a cause of action in cases where the injury resulted from gross negligence. The conclusion of the court was that the effect of section 141¾ (California Vehicle Act) was not to repeal section 377, Code of Civil Procedure (equally applicable to section 376 of the same Code), but simply to change the degree of negligence required to permit a recovery. The later amendment of 1931 did something more than this. It completely destroyed and forever wiped out any cause of action in favor of a guest or the parents of a minor guest on account of negligence of a driver or owner of a vehicle, whether such negligence be slight, ordinary, or gross. By no stretch of meaning can the term negligence be interchanged with, or deemed synonymous with, willful misconduct or intoxication.

We agree with the oft-announced rule that it is to be presumed that no statute is intended to have a retrospective operation, and will not be given such effect unless such intention appears from the language of the statute. Yet the court in the Krause Case, supra, construing this very section has said that in the absence of the saving clause found in the proviso of the 1929 section (141¾, California Vehicle Act), the intention of the Legislature would have been conclusively manifest. So here, finding the saving clause absent, we must adopt the same reasoning.

In construing a statute the law presumes that where a statute has been judicially construed, a law subsequently enacted on the same subject is to be considered in the light of the interpreting decisions. Oakland Paving Co. v. Whittell Realty Co., 185 Cal. 113, 195 P. 1058. Accordingly, when the Legislature in 1931 amended the California Vehicle Act (section 141¾) it had been decided in Krause v. Rarity, supra, that the section without a saving clause would destroy every statutory cause of action resting on negligence which had not been reduced to final judgment. With this decision in mind the Legislature re-enacted the section without the saving clause, manifesting clearly the intent.

With isolated excerpts from the Krause Case the respondent here argues that the rule of that case is a simple ipse dixit, declaring that section 141¾ (California Vehicle Act 1929) is not retroactive. This is not exactly true. The court held the statute to be a repeal of sections 377 and 376 of the Code of Civil Procedure, but that the proviso, and the proviso alone, acted as a saving clause.

Respondent, again quoting detached portions of the Krause Case, argues that the amendment of 1931, by retaining the terms "wilful misconduct" and "intoxication," still preserved his cause of action and only changed the proof required to permit a recovery. We cannot accede to such a view. There is a clear and distinct difference between negligence and willful misconduct. We need but cite the authorities on this point. Tognazzini v. Freeman, 18 Cal. App. 468, 123 P. 540;

Whiteford v. Yuba City High School, 117 Cal. App. 462, 4 P.(2d) 266.

A statute giving a right of action for injuries resulting from unlawful conduct would not be construed as conferring a right of action where the sole ground of recovery was alleged negligence, and vice versa, and the cited cases distinctly so hold.

Respondent quotes the following language found at the close of the opinion in the Krause Case: "We find nothing in section 141¾ which would justify, much less compel the conclusion that said section was intended to be retrospective. In such case the new law would have no effect on litigation pending at the time it was enacted." We construe the language as a part of the entire opinion and as expressing the court's conclusion from the language and reasoning preceding.

It is our opinion and holding that on September 4, 1931, when the case was commenced, there was no cause of action in plaintiff, and none stated in the complaint which counted upon and alleged gross negligence as the sole ground of recovery. It may be true that as a matter of first impression and academic discussion it might be found that there is some degree of comparison and interchangeability between gross negligence and willful misconduct; that negligence might, under certain conditions, assume such proportions as to be classed as willful misconduct, and still retain the characteristics of negligence. This leads us afar into theory and speculation. The cited authorities clearly show that the terms, in law, have attained distinctive meanings, and the meaning given these terms in the law is the meaning deemed to have been in the mind of the legislators.

[4] Respondent urges that appellant is estopped from urging the claims of the statute's retroactive operation, for the reason that such claim was not urged in the court below. The record does disclose that at no stage of the action in the trial court was the point advanced. No demurrer was filed, and the answer simply denied the allegation of gross negligence and the allegation of damage. On motion for nonsuit, on motion for directed verdict, and on motion for new trial the point was not disclosed. At the request of the defendant, as well as of plaintiff, the jury were instructed that plaintiff could recover upon proof of gross negligence.

All in all, the record discloses affirmatively, and appellant concedes, that up to the stage of appeal the point herein decided was never presented. On many occasions our courts have voiced a harsh disapproval of such a course, and have often refused to consider a point raised on appeal for the first time under similar conditions. The rule has its foundation on a motion of fairness both to the litigants and to the trial court. It is more generally applied in cases where the error claimed on appeal might have been corrected if brought to the attention of the parties, or of the court below. But where there is no cause of action against a defendant, and the facts appear to indicate that the facts will not support any cause of action, the rule does not apply.

The rule is discussed in California Jurisprudence, vol. 2, p. 242 et seq., and authorities collected and cited. The subject is continued along throughout the supplements up to and including 1932. But the gist of the rule seems to be that an appellant will be estopped only in cases where the defect or omission claimed could have been remedied or supplied if attention had been sooner called thereto. But where, as here, a plaintiff has no cause of action at all, it would seem a harsh rule to hold that he shall be rewarded for his astuteness in avoiding a dangerous contact, on the theory that his adversary was misleading him with the idea that he might recover upon establishing certain facts.

After all, the substantive law is not so flexible as to be swayed from its purpose and intent on grounds of expediency. The rule is made to encourage diligence and promote fair play; yet the practice of the law is something more than a game. The rights of all persons are involved within the law and its enforcement, and regardless of the propriety and perhaps the necessity of a regulated procedure, it should not be decreed that a substantive right should be destroyed in order to promote a rule of conduct, save where such a course is absolutely demanded. The cases collected in California Jurisprudence as noted bear out the foregoing statement of principle.

To repeat, the plaintiff, after the date of August 14, 1931, never had any cause of action against defendant on the grounds of gross negligence, and if the point had been raised at the commencement of the action, plaintiff could not have amended to supply such a cause of action. Intoxication is entirely out of the case, and if it were conceded that plaintiff could have changed his form of action to one charging willful misconduct, the facts of the case would not have supported the new action. Plaintiff's cause of action was destroyed before the action was commenced, and therefore at no time during the procedure would he have been entitled to a judgment. No rule of expediency could render just a judgment in his favor.

Finally, from a careful review of the case as presented, we would not hold, if such a holding was necessary, that the facts proven would support a charge of gross negligence, assuming a cause of action had remained in plaintiff. While this is unnecessary to the decision, we may nevertheless summarize the facts adduced.

Defendant was driving his car, at the time of the accident, at a speed of not more than thirty miles per hour. Accompanying him were his sister and her three children. The sister sat with defendant in the front seat and the three children in the back seat. The family had been at some sort of a home picnic and reunion and were returning home in daylight. For some short distance prior to the accident the defendant had been skirting the edge of the highway, occasionally getting off on the shoulder. The car was a closed car, but at the time, the windows were opened, due to the lady having a headache and feeling more at ease with the fresh air entering the car. A brisk wind was blowing, sufficient to engage the activities of the lady in holding to her hat. The children were playing around in the back, throwing out papers and having their own innocent fun as they were homeward bound. Of a sudden the sister noted that the auto was veering off the highway and headed direct for a pole alongside. She called to the defendant twice and he became aroused and veered the car past the pole, but in so doing struck the pole with the side of the car, throwing the boy out. The boy was killed. Nobody knows what caused the accident. The theory of plaintiff is that the defendant was asleep. There is no evidence directly in support of this claim. All that the record discloses is that defendant, at an earlier period of the day, felt sleepy; that he had lost some rest a night or two before and that driving against the wind and sun he felt "kind of tough." His explanation of the accident was that he must have dozed off. Yet his sister beside him did not testify that he had been dozing or asleep. The other children did not so testify. The defendant did not so testify. His conclusion was that he must have dozed off.

Considering gross negligence from the standard established in Krause v. Rarity, supra, and the cases therein cited, as well as the case of Rastel v. Stieber (Cal. Sup.) 8 P.(2d) 474, it can hardly be said that a case wherein it cannot be determined what the negligence was, presents a showing of gross negligence. Forgetting for the moment any legal definition, the term "gross" imports "large," even to the layman. It is a word of common use and understanding, and in such use conveys always the notion of something out of the ordinary, whether the term is used with reference to number or to size. In law, the term "gross negligence" has been defined as the "want of slight diligence," as "an entire failure to exercise [ordinary] care, or the exercise of so slight a degree of care as to justify the belief that there was an indifference to the things and welfare of others" and as "that want of care which would raise a presumption of the conscious indifference to consequences." Krause v. Rarity, supra. Respondent argues that such a showing is made here upon the bare statement of defendant that he could account for the accident in no other way than that he must have dozed off. Respondent argues also that appellant confessed having had some mechanical difficulty with the auto, the nature or extent of the difficulty not being pointed out. It is then further argued that if defendant knew he was drowsy, it was gross negligence for him to attempt to drive the car. But no such showing appears. The defendant testified that he did not experience any difficulty in keeping awake; though he felt drowsy, yet he did not remember going to sleep. No one else remembers that fact, and one guess might be as good as another. Therefore, the defendant *guesses* that he must have been asleep, though he refuses to testify that he was.

We are directed to no line of authority holding such a showing to measure up to the requirement of a statute which limits a recovery to injuries sustained as a result of gross negligence. The available authority is to the contrary. Kaplan v. Kaplan, 213 Iowa, 646, 239 N. W. 682; De Shetler v. Kordt, 43 Ohio App. 236, 183 N. E. 85.

The judgment is reversed.

We concur: PULLEN, P. J.; THOMPSON, J.

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129 Cal.App. 355

BRIDGE v. NEW AMSTERDAM CASUALTY CO. et al.

Civ. 7433.

District Court of Appeal, Second District, Division 1, California.

Jan. 31, 1933.

1. Judgment 🔑255.

Ordinarily, evidence upon which judgment in favor of plaintiff may rest must conform to allegations in complaint.

2. New trial 🔑31.

That, in second trial, evidence upon which judgment in favor of plaintiff rested did not conform to allegations in complaint, did not warrant new trial where evidence was identical with that presented on first trial (Const. art. 6, § 4½).

3. Appeal and error 🔑1053(3).

In action to recover money expended to prevent sale of property covered by trust deed executed to indemnify defendants from loss on bail bond, admitting evidence that defendants permitted principal to leave jurisdiction *held* harmless where court instructed that principal could go where he pleased so long as he appeared in court when required.

4. Appeal and error 🔑730(2).

Specifications of error, which failed to set forth instructions given which related to subject-matter of either criticized instruction or instruction which was refused, presented nothing for review.

5. Appeal and error ⚿184.

On appeal, defendants cannot for first time contend that plaintiff was not entitled to jury trial.

6. Action ⚿36.

That quasi equitable issues were injected on trial of action at law commenced within statutory period *held* not to constitute action one in equity so that doctrine of laches would apply to commencement of action.

7. Depositions ⚿95.

That only part of deposition was admitted *held* not error, where refused portion dealt only with impeachment of one who had not testified.

8. New trial ⚿41(2).

New trial should not be granted for error in rejecting evidence which, if admitted, would not have resulted in any way favorable to complaining party (Const. art. 6, § 4½).

Appeal from Superior Court, Los Angeles County; A. C. Finney, Judge.

Action by Maude L. Barnes Bridge against the New Amsterdam Casualty Company and others. From a judgment in favor of plaintiff, defendants, except named defendant, appeal.

Affirmed.

See, also (Cal. App.) 19 P.(2d) 80.

Arthur T. Stollmack, of Los Angeles, for appellants.

A. Brigham Rose, of Los Angeles, and Bernard Considine, of New York City, for respondent.

HOUSER, Justice.

The defendants Cochran, Seanor, and Shafer were partners engaged in the business of furnishing so-called criminal bail bonds executed by the defendant New Amsterdam Casualty Company. Broadly speaking, and without reference to either the details contained in, or the legal consequences arising from, the provisions of a written agreement which was in force between the partnership and the bond company, based upon the fact that the partnership had deposited with the bond company certain collateral as security to indemnify it from any loss that might ensue therefrom, it was understood that the partnership had authority to "fill in" blank bonds which theretofore had been "executed" by the bond company. Also, presumably acting within the provisions of said agreement, in seeking indemnity from possible loss on account of a bond in the sum of $5,000 executed, or to be executed, in behalf of a person accused of the commission of a criminal offense, the partnership induced plaintiff in the instant action to execute a bond of indemnity in favor of the bond company, and at the same time to execute in favor of the partnership a promissory note in the sum of $6,000, the payment of which being secured by a deed of trust of which one of the partners was the trustee.

The accused person whose appearance in court was guaranteed by the bond, having failed to appear on the date when the action against him finally was set for trial, the trial court ordered the said bond forfeited. Thereupon, following the failure of plaintiff to pay to the bond company, or to the partnership, the amount specified in the bond, plus certain moneys expended by the partnership in causing the accused person thereafter to be surrendered to the court, the partnership instituted the necessary steps precedent to a sale of the real property described in the deed of trust which had been executed by plaintiff. On the day when the sale of the property originally was scheduled to occur, in assumed consideration of having the date of such sale postponed for thirty additional days, plaintiff purportedly agreed in writing with the bond company and the partnership that she would not cause a court injunction to issue restraining such sale; and, in addition thereto, that she would "raise sufficient to pay said indebtedness." In that connection, the bond company denies any knowledge of, or participation in, such assumed agreement. However, after the lapse of said time to which the sale of the property had been postponed, in pursuance of proceedings instituted under the provisions of the deed of trust, an aunt of the plaintiff, in behalf of the latter, bought the property which was the subject of the trust deed for the sum of $6,500, which sum was stipulated between or among the interested parties as being the correct amount of the liability of plaintiff under her bond of indemnity to the bond company and her agreement with the partnership; which sum of $6,500 was paid to and received by the defendants. Some time later, plaintiff, deeming herself damaged by reason of certain circumstances connected with the transaction, brought an action against the individual members of the partnership and the bond company to recover a judgment for the $6,500 which had been paid by her to the partnership. On the trial of the action, which took place before the court without a jury, judgment was rendered in favor of plaintiff for the full amount demanded in her complaint, to wit, $6,500. In the absence of the judge who rendered such judgment, a motion for a new trial, presented by the defendants to a different judge, was granted. At the second trial of the action, which occurred before the court sitting with a jury, a verdict for the sum of $6,500 was returned, upon which judgment was entered. It is from the latter judgment that the instant appeal is prosecuted by the individual defendants Cochran, Seanor, and Shafer.

[1, 2] The complaint in the action contained two counts. By the first, in effect the complaint charged that as an inducement upon which she relied and acted in executing her indemnity bond and her promissory note and deed of trust as aforesaid, the partnership had made certain material, false representations of fact. By reference thereto, and by appropriate allegations therein contained, the second count of the complaint adopted all the allegations contained in the first count thereof, and in substance then alleged that the defendants became and were indebted to the plaintiff in the sum of $6,500. On the first trial of the action no evidence was offered by plaintiff to establish some of the material allegations of fact set forth in the complaint; but additional evidence was offered and received by the trial court in proof of certain other important facts, all of which, to the satisfaction of the trial judge, established the ultimate fact that plaintiff had been defrauded, and, as a matter of law, was entitled to a judgment against the defendants. In rendering judgment, the trial court ordered that the complaint be amended "to conform to the proof." However, no amendment to the complaint was ever filed. On the second trial of the action, the same situation obtained; that is to say, for the purpose of establishing the fraud of the defendants, evidence of relevant and material facts not alleged in detail in the complaint was received by the court and submitted for the consideration of the jury. Nor was any evidence offered by plaintiff as to some of the facts set up in her complaint with reference to the asserted fraud of the defendants. In such circumstances, the defendants complain variously to this court in substance that plaintiff should not be permitted to predicate a cause of action upon one statement of facts and recover a judgment upon a different set of facts. It is a well-established rule that ordinarily the evidence upon which a judgment in favor of a plaintiff may rest must conform to the allegations contained in the complaint in the action. The purpose of the allegations of fact in a complaint is to apprise the defendant in the action of the grounds upon which the plaintiff relies as a basis for his right to a judgment in his favor. The natural purpose of such rule is to enable the defendant to controvert, to excuse, or to justify such allegation of facts; and undoubtedly, notwithstanding the exception which permits the pleading of at least a common-law action by means of the so-called common counts, which may or may not afford the desired or desirable information of facts upon which the alleged cause of action is based, any rule by which a defendant might be forced to trial without knowledge on his part of the allegation of ultimate facts upon which the alleged cause of action against him may depend would place the defendant at a decided disadvantage. As affecting the instant judgment, it should be remembered that, although the evidence upon which the judgment rests does not correspond to nor reflect all the facts alleged in the complaint, such judgment is the result of the second trial of the action; and, as appears to be conceded by the parties to this appeal, the evidence therein adduced was practically identical with that presented on the first trial. In other words, on the second trial of the action the defendants were in no wise "surprised" by the evidence which was offered by the plaintiff in support of her alleged cause of action. And although theoretically, in the state of the pleading, it may have been error to admit the greater part of the evidence to which reference has been had, it is clear that in its reception on the second trial of the action the defendants were in no wise prejudiced in their substantial rights in the premises. Without a recitation of details, this court is of the opinion that the facts proved by plaintiff to the satisfaction of the jury were sufficient to sustain the cause of action and to entitle plaintiff to the damages awarded to her. In such a situation it follows that because of the error of which the appellants complain, a new trial should not be granted. Section 4½, art. 6, Const.

[3] On the trial of the action, for the purpose of establishing fraudulent acts on the part of the defendants which would have the effect of releasing plaintiff from her contract of indemnity, evidence was received to the effect that, at the time when the bond in question was executed, plaintiff was assured by the defendants that on a specified date the accused person would be placed on trial for the commission by him of the offense of which he was charged. When that date arrived and the said trial did not take place, plaintiff demanded that the said defendant be surrendered into court, and that she be released from her obligation on her bond. In response to such demand, the defendants assured plaintiff "that everything was all right and had been taken care of." In that regard, the evidence further showed that, without the knowledge or the consent of plaintiff, throughout an aggregate period of more than six months the trial of the criminal action was repeatedly postponed; that solely by and with the consent and financial aid of the individual members of the partnership, the defendant in the criminal action was permitted and encouraged to leave the jurisdiction of the trial court and go into the state of Missouri on the mutual or common business of said partnership and the said defendant; and that as well, without the knowledge or the consent of plaintiff, at least one postponement of the trial of said criminal action was secured during the time that the said defendant was thus outside the jurisdiction of the trial court of this state. In the

latter connection, the appellants contend that, in the absence of bad faith, the sureties on a bail bond do not lose their rights against their indemnitor by permitting the defendant in a criminal action to leave the jurisdiction wherein he is charged with the commission of a criminal offense. But since the question is only incident to the broader question here at issue, it is apparent that, even conceding (without deciding) the correctness of appellants' contention in that regard, the result could not affect the judgment. Besides, the trial court instructed the jury "that the defendant Springate while out on bond was at liberty to go where he pleased and when he pleased so long as he appeared in court when required." It therefore is apparent that, for the reasons assigned by appellants, they have no just cause for complaint.

[4] Appellants complain respectively of the giving by the trial court, as well as of its refusal to give to the jury, certain specified instructions. In none of such specifications of error do the appellants set forth all the other instructions given by the court which relate to the subject-matter of either the criticized instruction or the instruction which was refused. The instructions which were given by the court include 26 pages of the record in this appeal. In such circumstances it is too much to expect that this court will search such record for the purpose of discovering whether the several contentions of the appellants regarding the questioned instructions are, or either of them is, tenable. It need only be said that the manner of presentation of such asserted errors is in contravention of the rule of this court.

It is contended by appellants that plaintiff was not entitled to a jury trial; and for that reason, as well as from the fact that no findings of fact were made by the trial court, that the judgment should be reversed. In their brief appellants specifically admit that "on the face of the pleading the plaintiff was entitled to a trial by jury." But they assert that because on the trial of the action plaintiff proved that certain instruments relied upon by the defendants in defense of the claim of plaintiff were invalid by reason of the fraud of the defendants in obtaining the signature of plaintiff thereto, the nature of the action was so altered that the judge of the trial court only was qualified to render a judgment in the action.

In the case of Baird v. Pacific Electric Ry. Co., 39 Cal. App. 512, 515, 179 P. 449, the court expressed the rule to the contrary of that asserted by the appellants.

[5] As an additional reason why appellants' several points in that regard should not receive favorable recognition by this court, it appears that at no time during the trial did the appellants voice any objection to a jury trial. The action had been tried once before, and on the second trial the appellants were well aware not only of the issues of the action, but as well of the evidence which in all probability would be introduced. Nor on their motion for a new trial did appellants urge the objection which for the first time is here presented.

[6] In reliance upon their contention that the action was wholly equitable in its nature, appellants urge several objections to the judgment based upon the asserted laches of plaintiff in the commencement of the action. As hereinbefore has been indicated, the action was for the recovery of a judgment for damages. The implied cancellation of the several instruments by means of which plaintiff was either apparently originally defrauded, or which purportedly assisted the defendants in carrying their fraud to completion, was not the object of the action. Under and by reason of fraudulent misrepresentations of fact made by the defendants, plaintiff had been induced to pay, and actually did pay, to the defendants a certain sum of money, which she was seeking to recover. The action was one permitted by law, and was commenced within the statutory period prescribed for the commencement of such an action. That certain quasi equitable issues were later injected into the action could not affect the time following the accrual of plaintiff's rights within which the action was required to be commenced. The doctrine of laches was inapplicable to the situation.

Regarding the assumed arrangement purporting to have been evidenced by a written agreement between all the defendants on the one side and plaintiff on the other (but as to which agreement neither its execution nor the authority by the partnership to execute it on behalf of the bond company is admitted by the latter), by which, in consideration that plaintiff would not cause a court injunction to issue restraining the sale of plaintiff's property under the provisions of her deed of trust, a postponement of such sale was granted to plaintiff on the further condition that, at or before the date of the expiration of the thirty days' postponement, she would pay to the defendants the sum of $6,500, it is variously urged by the appellants that, with knowledge on the part of plaintiff of the prior fraud of the defendants in the transaction between the parties, plaintiff had no legal right either to place any reliance upon any present representations of the defendants, to enter into any new agreements with defendants with reference to the transaction in question, or to ask or to receive from the defendants any favor in connection therewith. But in the first place, the purported written agreement of the parties constituted no legal agreement between or among them. It was not signed by the defendants, or by any or either of them; they were not bound by its terms. Although at the time when said "agreement" was signed by plaintiff she had been informed of the falsity of some of the original inducing representations made by the defendants, she was then again misled by the plausible assurances of the defendants and the concealment of material facts by them respecting several of the important facts which dealt particularly with the disappearance of the defendant in the criminal action. The new "agreement" was exacted from plaintiff on the very day on which her property, the value of which was largely in excess of the amount of her bond, was noticed to be sold, and which agreement might be regarded as having been obtained by a species of duress. In the circumstances thus presented, taken in connection with the additional false representations made to plaintiff by the defendants, the so-called agreement may not be properly regarded as of that consequence as to carry with the act of plaintiff the results to which appellants have directed attention.

[7] Appellants also complain of the admission in evidence of a part only of a deposition of a witness presented by plaintiff. Since the refused portion of the deposition related directly not to the alleged facts of the case, but dealt only with the proposed impeachment of a witness for the defendants who had not then testified in the case, it is clear that the defendants had no right to insist that at the time the main portion of the deposition was offered in evidence that part which is the subject of the present objection be read to the jury. The impropriety of impeaching a witness before he testifies in a case is apparent.

[8] Prejudicial error is also predicated upon the refusal by the trial court to admit two items of evidence, each of which was favorable to the contention by the defendants regarding the date when plaintiff acquired knowledge of the falsity of some of the representations of fact previously made to her by the defendants. But assuming (without deciding) that the rejected evidence should have been admitted, it is inconceivable that, if admitted, its weight would have resulted in any way favorable to the defendants in the action. In such circumstances and for such a reason, a new trial should not be granted. Section 4½, art. 6, Const.

Each of the other alleged errors of which appellants complain being by the conclusion herein reached rendered immaterial, or being dependent upon a conclusion in their favor of one or more of the points hereinbefore ruled adversely to their contention, it becomes unnecessary to discuss either of such alleged errors.

The judgment is affirmed.

We concur: CONREY, P. J.; YORK, J.

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129 Cal.App. 365

BRIDGE v. NEW AMSTERDAM CASUALTY CO. et al.

Civ. 7456.

District Court of Appeal, Second District, Division 1, California.

Jan. 31, 1933.

1. **Principal and agent** ⚿116(1).

As between principal and third parties who, in good faith, in usual course of business, and on general appearances permitted to exist, deal with agent in ignorance of secret restrictions on his powers as expressed in contract between principal and agent, restrictions are not binding.

2. **Principal and agent** ⚿120(1).

In action by third party against principal, evidence of secret authority enlarging agent's powers, as expressed in contract with principal, is admissible.

3. **Principal and agent** ⚿124(1).

Whether agent, in dealing with third party, had secret authority enlarging his powers as expressed in contract with principal, is question of fact.

4. **Principal and agent** ⚿23(1).

Evidence showed that partnership acted as defendant's agent when, by false representations, it induced plaintiff to execute bond indemnifying defendant against loss on bail bond.

Appeal from Superior Court, Los Angeles County; A. C. Finney, Judge.

Action by Maude L. Barnes Bridge against the New Amsterdam Casualty Company and others. From a judgment in favor of plaintiff, named defendant appeals.

Affirmed.

Samuel H. Weissberg, of Los Angeles (Arthur T. Stollmack, of Los Angeles, of counsel), for appellant.

A. Brigham Rose, of Los Angeles, and Bernard Considine, for respondent.

HOUSER, Justice.

On the trial of this action in the lower court, New Amsterdam Casualty Company, a corporation, and James Cochran, Robert Seanor, and Milton Shafer, each as an individual, were the defendants. From the judgment which was rendered in favor of plaintiff, two separate appeals were taken; one by all the individual defendants, and the other by New Amsterdam Casualty Company. (Cal. App.) 19 P.(2d) 76. The pertinent facts as they appear from the record, together with a decision as to the law affecting the points which are applicable to all the defendants, are set forth in the opinion of this court filed in the appeal presented by the individual defendants Cochran, Seanor, and Shafer. The following opinion relates to those legal questions which arise from the facts of the case which concern New Amsterdam Casualty Company only.

It is first urged by this appellant that since it appears that its relationship with its agents Cochran, Seanor, and Shafer was evidenced by a written agreement, the entire scope of the agency was necessarily governed, restricted, and limited by the provisions of such agreement; and consequently, on the trial of the action, that it was prejudicial error on the part of the trial court to admit evidence which had a tendency to enlarge, or to modify, or in any wise to alter the scope of the powers of the agents, as expressed in the written agreement of the parties; and thereupon to instruct the jury with reference thereto.

[1-3] It may be that in the absence of the usual and ordinary exceptions to the rule which assumes that the provisions of a written contract correctly and finally express the agreement of the parties thereto, as between the immediate parties to a contract of agency, the principle of law for the application of which to the facts herein appellant contends, would be applicable. But as between the principal to such a contract and third persons, who, in good faith, in the usual course of business, and on general appearances permitted or encouraged to exist by the parties to the contract, may deal with the acknowledged agent in ignorance of the limitations or the restrictions on the powers of such agent, the general effect of the rule is that the secret provisions of any contract between the principal and the agent are of no consequence; nor have they any binding force. And so, in the absence of some special reason by which third persons who deal with the agent are required to make inquiry regarding the powers of the latter, it is firmly established in the law that, notwithstanding the existence of a written contract between the principal and the agent by the provisions of which the rights, powers, obligations, and duties of the respective parties thereto are carefully defined and strictly limited, in an action against the principal in which the rights of such third parties are involved or in issue, evidence is admissible which tends to broaden or to increase the power of the agent as expressed in the written contract, and thus create a liability on the part of the principal greater than that contemplated by the provisions of the written agreement respecting such agency. 2 Cor. Jur., 564, 920, and authorities there cited. Manifestly, in such circumstances, the question of the existence of alleged enlarged or more inclusive powers of the agent is one of fact; and when the issue with reference thereto is to be submitted to a jury for its determination, it becomes the imperative duty of the trial judge to instruct the jury as to the law governing the situation.

In the same connection, a question submitted by appellant as to whether in reality the so-called agents in fact were "independent contractors" is subject to similar observations. The legal relationship which exists between the parties primarily should be determined from the evidence as to the facts, subject to the application thereto of established principles of law.

[4] The remaining points presented by the appellant are founded upon the assumed insufficiency of the evidence to support the implied finding of fact by the jury that in the transaction which forms the basis for the action at bar, the individual defendants therein acted as the agents of the appellant. In that regard, among other details not herein set forth, there should be taken into consideration the pertinent facts which are mentioned in the companion appeal to which reference hereinbefore has been had, together with the following facts which also appear in the record of this appeal, to wit: That the appellant agreed to execute bail bonds at the request of the agents, provided that the total outstanding penalties on all such bail bonds should not exceed a ratio of four to one on the amount of cash collateral deposited by the agents with the appellant, varying according to the different types of cases; that the appellant reserved the right to refuse to execute any bail bond which it did not consider desirable business; that the agents agreed to collect premiums on the bail bonds and to remit the same to the appellant; that the agents further agreed to investigate the moral hazard of all applicants for such bail bonds, and guaranteed the payment of the premiums thereon; that as a matter of fact, the bond company furnished to the agents blank "executed" bail bonds, and gave to the agents authority to "fill in" the blanks in such bonds with the necessary names, amounts for which such bonds were given, dates of such bonds, etc.; that in and by the provisions of the indemnity bond of plaintiff by which appellant was indemnified from any loss, etc., which appellant might sustain in the premises, it was also provided "that this instrument shall protect in the name of the surety any and all surety or reinsurance companies which may assume reinsurance upon said bond or continuations or renewals thereof"; that coincident with the execution of the bond which plaintiff gave to this appellant, she also executed her promissory note and her deed of trust in favor of the agents of this appellant. At the same time and place, a so-called "collateral receipt" was executed by the agents and given to plaintiff. By the provisions of the instrument prepared by the agents, signed by the plaintiff only, and denominated a "mutual release," at least

the understanding on the part of the agents to the effect that throughout the entire transaction the agents were acting on behalf of this appellant and within the scope of their authority, is clearly made to appear.

When all the foregoing facts are given weight, together with such inferences as fairly are deducible therefrom, it is the opinion of this court that they formed a sufficient foundation upon which may legally rest the verdict of the jury and the ensuing judgment of which this appellant complains.

The judgment is affirmed.

We concur: CONREY, P. J.; YORK, J.

217 Cal. 415

DIXON LUMBER CO. v. PEACOCK.

Sac. 4592.

Supreme Court of California.
Feb. 21, 1933.

1. Fraudulent conveyances 🔑95(2).

After husband separated from wife, wife's release of her interest in husband's life policies in which she was named as beneficiary *held* valuable consideration for husband's assignment of mortgage to wife, as against husband's subsequent judgment creditor (Civ. Code, § 137).

> In her situation wife had right to institute action for maintenance of herself and daughter, and division of community property under Civ. Code, § 137, in which court could have assigned to her the mortgage and to him the policies with their accumulated cash value, and there was nothing which made it impossible for parties to agree on that which might have been done for them by court or which rendered the agreement void of consideration.

2. Husband and wife 🔑249.

Proceeds of life policy, premiums on which have been paid from community, are community property.

3. Husband and wife 🔑265.

As to husband's life policies in which wife is named as beneficiary and premiums on which have been paid from community, change of beneficiary without wife's consent and without valuable consideration is voidable as to her, since she may maintain action after husband's death to recover her one-half of community.

4. Fraudulent conveyances 🔑95(2).

Deserted wife's agreement to ask no support for herself or minor daughter in divorce action *held* sufficient consideration for husband's conveyance of homestead property to wife, as against husband's subsequent judgment creditor (Civ. Code, §§ 140, 3432).

5. Husband and wife 🔑294.

Deserted wife has right to maintenance for herself and daughter, which right, in court's discretion, may be protected and secured by appointment of receiver (Civ. Code, § 140).

6. Fraudulent conveyances 🔑115(1).

Debtor has right to prefer one creditor to another (Civ. Code, § 3432).

7. Fraudulent conveyances 🔑26(1).

Absolute, as distinguished from colorable, conveyance to creditor, in satisfaction of indebtedness of sufficient size to render consideration adequate, is not fraudulent (Civ. Code, § 3432).

8. Fraudulent conveyances 🔑297.

In judgment creditor's action to set aside debtor's conveyance to third party as fraudulent, writ of execution returned nulla bona, at least in county of judgment debtor's residence, makes out prima facie showing of insolvency.

9. Fraudulent conveyances 🔑297.

In judgment creditor's action against debtor's divorced wife to set aside transfer of property to her by husband, finding that husband was insolvent at time of transfer *held* supported by evidence.

In Bank.

Appeal from Superior Court, Solano County; W. T. O'Donnell, Judge.

Action by the Dixon Lumber Company against Lillian B. Peacock. From a judgment in favor of plaintiff, defendant appeals.

Reversed.

Brantley W. Dobbins, of Fairfield, and Leo C. Dunnell, of San Francisco, for appellant.

F. F. Marshall, of Dixon, and W. U. Goodman, of Fairfield, for respondent.

IRA F. THOMPSON, Justice.

This action was commenced by the plaintiff to set aside conveyances of certain property to the defendant by her husband, and the appeal is from a judgment entered in favor of the plaintiff.

The facts necessary to an understanding of the controversy are as follows: Appellant and her husband had been married thirty-seven years prior to the divorce which will shortly be mentioned. Some time before the conveyances of the property, according to the testimony of appellant, her husband was living with another woman. They separated February 27, 1928, although they had not lived together for a long time prior to that date. There were two insurance policies on F. I. Peacock's life in which his wife, the appellant, was named as beneficiary. During the latter part of May, 1929, he was desirous of realizing cash on the policies by a loan thereon. The agent for the insurance company advised Peacock that it would be necessary to have his wife's signature. In consideration of appellant executing an assignment of her interest in the policies, Peacock assigned to her a second mortgage on certain real estate known as the "Rattenbury mortgage," in the principal sum of $2,500, which in the brief of appellant is described as being of the value of about $2,000. Peacock received from the insurance company the sum of $1,890 about June 2, 1929. About the same time appellant told her husband that she was going to get a divorce and ask for everything he had in view of the fact "that this woman that he was living with was getting most of what he had or spending a great deal of it." Whereupon Peacock agreed with his wife to transfer to her the other property in litigation, their home at Dixon prior to separation, upon which they had declared a homestead, provided that such conveyance relieved him from "any further responsibility for caring" for her and their minor daughter. Accordingly, on June 3, 1929, F. I. Peacock executed a deed conveying the property to his wife, which was subsequently acknowledged and recorded. The home was declared to be of the value of approximately $20,000 when homesteaded, but subsequently sold for $11,500. We are furnished no other or clearer idea of its value. On August 2, 1929, the appellant signed and verified a complaint, which on account of her ill health was not filed until December 23, 1929, in which complaint she sought a divorce from her husband on the ground of desertion which started February 27, 1928. By the complaint she asked for the custody of their minor daughter, but asked for no support for herself or for their child. She also averred that there was no community property. The interlocutory decree was granted March 17, 1930, and the final decree March 27, 1931.

The respondent commenced an action on December 9, 1929, or six months after the transfer, to recover the sum of $1,930.33 from F. I. Peacock. Judgment was rendered in its favor January 13, 1930. A writ of execution was issued to the sheriff of Solano county on January 15th and returned unsatisfied by him on January 20, 1930. There is evidence, however, to the effect that F. I. Peacock was at the time of the execution and for two years or more prior thereto living and doing some business in Alameda county. The court made a finding which the appellant says is not justified by the evidence and which for convenience, following the briefs of both parties, we have divided so that it may be stated in three parts, as follows:

(1) The assignment of the "Rattenbury mortgage" was voluntary and without any valuable consideration passing from defendant to her husband F. I. Peacock; (2) the deed to the real property described in the complaint was voluntary and without any valuable consideration moving from the grantee to the grantor; and (3) F. I. Peacock was insolvent at the time of the assignment of the mortgage and deed of the realty, and the assignment and conveyance of the property hindered and defrauded the plaintiff, and left F. I. Peacock with no property not exempt from execution from which the claim of plaintiff could be satisfied.

[1-3] With respect to the first division the whole question is: Was the release by appellant of all her right, title, and interest in the insurance policies a valuable consideration for the assignment? It must be borne in mind that F. I. Peacock had separated from plaintiff before the assignment was discussed or executed. In her situation she undoubtedly had the right to institute an action for the maintenance of herself and daughter and a division of the community property. Section 137, Civ. Code. Had she submitted her predicament to the judicial tribunal and had it assigned to her the "Rattenbury mortgage" and to him the life insurance policies with their accumulated cash value, it seems fairly reasonable to assert that such action would have been beyond question. Is there anything which makes it impossible for the parties to agree upon that which might have been done for them by the judicial body, or renders the agreement void of consideration? The logical conclusion is the negative, as more fully appears from the following discussion. It has been determined that an insurance policy in legal contemplation is property and that the proceeds of a policy, the premiums on which have been paid from the community, are community property. New York Life Ins. Co. v. Bank of Italy, 60 Cal. App. 602, 214 P. 61; Blethen v. Pacific Mutual Life Ins. Co., 198 Cal. 91, 243 P. 431. It has also been held while the insured may have the right, by contract with the company, to change the beneficiary in such a policy without the wife's consent where she is originally named as such, yet any such change without her consent and without a valuable consideration is voidable as to her, as she may maintain an action after his death to recover her one-half of the community. New York Life Ins. Co. v. Bank of Italy, supra, and Blethen v. Pacific Mutual Life Ins. Co., supra. It thus becomes manifest that appellant's relinquishment of her rights in the policies amounted to the release by her of a valuable property right. The finding to the contrary is, therefore, unsupported.

[4-7] A very similar situation is presented by the second part of the finding. By agreement of the parties, the appellant relinquished her right to seek support for herself and also said she would ask for none for the minor daughter. It was not only her right, if deserted, to have maintenance for herself and daughter, but that right might, in the discretion of the court, have been protected and secured by the appointment of a receiver. Section 140, Civ. Code; Murray v. Murray, 115 Cal. 266–274, 47 P. 37, 37 L. R. A. 626, 56 Am. St. Rep. 9. Indeed, a deserted wife is so nearly in the position of a creditor that she may maintain an action to set aside a voluntary conveyance of his separate property made for the purpose and with the design of defeating her right to maintenance. Murray v. Murray, supra. A debtor has the right to prefer one creditor to another (section 3432, Civ. Code), and an absolute as distinguished from a colorable conveyance to him in satisfaction of the indebtedness of sufficient size to render the consideration adequate is not fraudulent (Saunderson v. Broadwell, 82 Cal. 132, 23 P. 36). The

deserted wife with her minor child was in a situation comparable to that of a creditor. While we are cited to no authority where the question has been considered in California, we are not without authority to support the conclusion to which we have come. The problem has been considered by the Supreme Court of Iowa. In the case of McNally v. Emmetsburg Nat. Bank, 197 Iowa, 602, 192 N. W. 925, 928, that court, after reviewing the circumstances thoroughly, says: "We are not concerned in this action with any question of the rights of the respective parties to such a contract as between themselves. The only question at this point is whether or not such a contract, when entered into with good faith between the parties and subsequently carried out by the institution of divorce proceedings and the procurement of a divorce and the transfer of the property as provided in the contract, will be upheld when fully executed as having been supported by a valuable consideration. It was not 'a voluntary payment' under these conditions. It is not void for want of a consideration which the law will recognize. In a sense it may properly be said that the wife was a creditor of her husband. She was entitled to all the rights of support that belonged to her under the marriage relation. Whether she had forfeited such rights was a matter for the determination of the divorce court, and not for inquiry in a collateral proceeding. The husband recognized his obligation to her in making the contract and paying her the money as he did. This he had a legal right to do, and there was a sufficient legal consideration to support such contract. In other words, it was not a voluntary gift without consideration." To the same effect is Parks v. Worthington, 101 Tex. 505, 109 S. W. 909.

Respondent argues, however, that appellant was in any event entitled to recover only one-half of the community in her action for divorce. We have already pointed out that the court had the right to take suitable action to protect and secure to her a proper maintenance; in addition to which it may be observed the record indicates very clearly that appellant was not confined to an action for desertion. When she and her husband came to terms over the furniture, she indicated to him very clearly, as she did on another occasion which we have already noticed, that she did not intend the "other woman" should have any of her things. It is altogether impossible for us to find support in the evidence for the second part of the finding. In this particular it should be mentioned that there is no finding that there was in fact an intent to defraud.

[8, 9] We therefore turn to examine the remaining portion of the questioned finding. Is there evidence to support the finding that F. I. Peacock was insolvent at the time of the transfer? Appellant bases her contention in this regard upon two things: First, she says that the proof establishes that at the time of the transfers F. I. Peacock was possessed of $1,890 realized from the insurance policies. Second, she claims that inasmuch as the writ of execution, which was returned wholly unsatisfied, was issued only to the sheriff of Solano county, whereas Alameda was the county of Peacock's residence at the time, the respondent failed to make out a prima facie case. However, some time prior to January 1, 1929, and probably before August 1, 1928, Peacock became indebted to the respondent in the sum of $1,500, which is included in the judgment. In December, 1928, Peacock wrote to the manager of respondent that he was unable to pay his account and did not know when he would be able to pay. It seems from the letter that there was no dispute concerning the amount of the bill, but its nonpayment was due simply to his inability to discharge the debt. For a year after that he was sent monthly statements, but did not or could not pay. Some property owned by Peacock in Piedmont, Alameda county, had been disposed of prior to the transfers and the proceeds applied to other obligations. A writ of execution returned nulla bona, at least in the county of the judgment debtor's residence, makes out a prima facie showing of insolvency. We think it unnecessary to determine whether an execution so returned by the sheriff of a county from which the judgment debtor had lately moved his residence, is sufficient to make out such a case for the reason that there is some independent evidence contained in the letter of Peacock and the efforts of respondent to collect to support the conclusion that the judgment debtor was unable to pay his debts when they became due. It is said in Re Ramazzina, 110 Cal. 488, 42 P. 970, 971: "A debtor, when he is unable to pay his debts from his own means as they become due, is insolvent." Washburn v. Huntington, 78 Cal. 573, 21 P. 305; Sacry v. Lobree, 84 Cal. 41, 23 P. 1088. To the same effect is Southwick v. Moore, 61 Cal. App. 585, 215 P. 704. The portion of the finding, now under examination, cannot be said to be without some support, but this cannot prevent a reversal of the cause.

Judgment reversed.

We concur: WASTE, C. J.; SHENK, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.; SEAWELL, J.

217 Cal. 410

LEWIS v. QUINN, Chief of Police.

S. F. 14319.

Supreme Court of California.

Feb. 21, 1933.

Rehearing Denied March 23, 1933.

1. Constitutional law 🔑81.

Businesses may be lawful and yet of such character as to be subject to restrictions and regulations necessary to protect society.

2. Evidence 🔑14.

It is common knowledge that honest secondhand shops are imposed upon by those who unlawfully appropriate property of others.

3. Licenses 🔑7(1).

Ordinance requiring those engaged in business of buying, selling, or exchanging secondhand furniture and household goods, to secure permit therefor and pay license fee, *held* constitutional.

4. Licenses 🔑16(11).

Members of furniture dealer's association engaged in business as retail dealers in "new" and secondhand furniture and household goods *held* subject to ordinance requiring those engaged in business of selling secondhand furniture and household goods either exclusively or in conjunction with some other business to secure permit therefor.

In Bank.

Appeal from Superior Court, City and County of San Francisco.

Action by Aaron Lewis, to restrain William J. Quinn, Chief of Police of the City and County of San Francisco, from making arrests for failure to pay certain license fees. From an adverse judgment, plaintiff appeals.

Affirmed.

Herbert Choynski and Sidney Rhein, both of San Francisco, for appellant.

John J. O'Toole and Walter A. Dold, both of San Francisco (John R. Golden, of San Francisco, of counsel), for respondent.

IRA F. THOMPSON, Justice.

The plaintiff brought this action to restrain the police from making arrests of any of the members of the "San Francisco Furniture Dealers' Association," for claimed violations of an ordinance requiring "every person, firm or corporation engaged in the business of buying, selling or exchanging secondhand furniture and household goods, either exclusively or in conjunction with some other business," to secure a permit therefor and pay a license fee of $10 per quarter year. Judgment went against him in the lower court, and he prosecutes this appeal therefrom.

The trial court found that plaintiff and the members of the association were "individually engaged in business as retail dealers in new and secondhand furniture and household goods at fixed places of business," in San Francisco, but concluded contrary to appellant's contentions, which are here reasserted, that the ordinance was within the bounds of the legislative authority of the city and county, and, further, that it applies to the appellant and his associates.

[1-3] While the appellant has stated thirteen different questions which he contends are involved on this appeal, they but serve to emphasize the two main contentions. For this reason we first turn to the problem of whether the ordinance is a proper, constitutional exercise of legislative authority. At the time the action was instituted subdivision 9 of section 1, chapter III, article VIII, of the Charter of the City and County of San Francisco empowered the board of police commissioners "to grant or refuse to grant permits to any person engaged or desiring to engage in business as a pawnbroker, peddler, junkshop keeper, *dealer in secondhand merchandise*, auctioneer and intelligence office keeper, and such other characters of business or callings as may hereafter be required by ordinance enacted by the Board of Supervisors to obtain permits from this board. * * *" In section 7, chapter IV, of the same article it is provided that the chief of police shall have the right to inspect the businesses enumerated in the quoted section including "dealers in secondhand merchandise," which shall include the right to examine the books and premises when in search of property feloniously obtained, or in search of suspected offenders, or evidence to convict any person charged with crime. It is also provided that all persons engaged in the designated callings must procure permits from the board of police commissioners. Also, the board of supervisors is empowered by the charter (article II, chap. II, § 1, subd. 15) as follows: "To impose license taxes and to provide for the collection thereof; but no license taxes shall be imposed upon any person who, at any fixed place of business in the City and County, sells or manufactures goods or merchandise, except such as require permits from the Board of Police Commissioners as provided in this Charter." It is apparent from these charter provisions that the board of supervisors possessed the power to impose a license fee upon "dealers in secondhand merchandise." Indeed, it is obvious that without action on the part of the board of supervisors, such dealers were required by the fundamental law of the city and county to procure a license before en-

gaging in such business. Unless the ordinance and the charter provisions contravene some constitutional provision, it is manifest that appellant, assuming, as we are at this juncture of the case, that he was a "dealer in secondhand merchandise," cannot complain. In several different ways, however, he asserts that he cannot be deprived of the right to engage in the business, which is lawful and which has no relation whatever to the "peace, good order, health, morality or security of the people." It is firmly established in our law that certain businesses may be lawful and yet be of such character as to be subject to restrictions and regulations necessary to protect and safeguard society. Brecheen v. Riley, 187 Cal. 121, 200 P. 1042. Very apt language from Merrick v. N. W. Halsey & Co., 242 U. S. 568, 37 S. Ct. 227, 61 L. Ed. 498, is quoted in the case of In re West, 75 Cal. App. 591, 600, 243 P. 55, 59, as follows: "We think the statute under review is within the power of the state. It burdens honest business, it is true, but burdens it only that under its forms dishonest business may not be done. This manifestly cannot be accomplished by mere declaration; there must be conditions imposed and prohibitions made for their performance. Expense may thereby be caused and inconvenience, but to arrest the power of the state by such considerations would make it impotent to discharge its function. It costs something to be governed." It is very clearly indicated by the charter provisions that the reason underlying the requirement that the enumerated businesses shall procure a license is to assist the police in preventing crime and apprehending those who have feloniously obtained and disposed of personal property. It is a matter of common knowledge that honest secondhand shops are imposed upon by these enemies of society who unlawfully appropriate the property of others, and it is fair to assume that without police inspection and supervision establishments would spring up, allied with those who seek to dispose of their ill-gotten wares, for the purpose of conducting "fences" therefor. It is urged, however, that the necessity which exists with respect to jewelry and merchandise of like character does not exist as to furniture. It must be conceded that there is some room for the argument advanced by appellant—and yet we do know that thievery of rugs and furniture does go on, and sufficiently so, at least, to invest the legislative authority with power to adopt reasonable regulations to prevent, so far as possible, its recurrence. Viewed in the light of that which prompted the enactment of these ordinances, it seems fair to assume that sincere establishments might welcome the co-operation of the law enforcement agencies even though at some expense and inconvenience to themselves. Thus is the present case distinguished from those cited by appellant, where the business was not only lawful, but regulation and supervision thereof was not in the interests of the public welfare. The provisions involved in the case at bar are supported by reasoning analogous to that employed in Re West, supra, where an ordinance regulating the sale of jewelry at public auction was upheld.

[4] The question remains whether the finding of the court is sufficient to bring appellant within the classification required to obtain permits. Specifically it reads, "and are individually engaged in business as retail dealers in new and secondhand furniture and household goods at fixed places of business in the" city and county of San Francisco. For the purpose of pointing out just how inclusive the finding is it may be well to ask the question: Is it possible to tell from the language of the finding whether the members of the association conduct the business of dealing in new and secondhand furniture under one roof and at one establishment, or whether some of them conduct two stores, one a secondhand store and the other for new business? From the discussion to this point it is apparent that if they conducted an establishment for the sale of secondhand goods exclusively it would be necessary for them to secure a permit. Can it be said that because two businesses are conducted under the same roof that the one which would ordinarily be subjected to regulation is by that means exempted therefrom, especially where the ordinance, in effect, says it is immaterial that the business is "in conjunction with some other business"? Or, to put it another way, suppose the words "in new and" were stricken from the finding, could it be said that appellant and those associated with him were not subject to the charter provisions and the ordinance? It seems plain that we are not here dealing with an incident to the business but with the business itself.

Judgment affirmed.

We concur: WASTE, C. J.; SEAWELL, J.; SHENK, J.; CURTIS, J.; LANGDON, J.; PRESTON, J.

217 Cal. 421

MODESTO LUMBER CO. et al. v. WYLDE et ux.

Sac. 4626.

Supreme Court of California.

Feb. 24, 1933.

1. Mechanics' liens ⚷239.

Materialman, knowing loan association was financing more than one building, and that contractor was constructing more than one building, was required, on receiving loan association's check delivered by contractor, to inquire of association regarding application of funds and to credit check to certain building account, rather than contractor's personal account.

2. Mechanics' liens ⚷115(1).

Loan association making building loan and guaranteeing that no claim would become lien on property, and agreeing not to pay contractor until labor and material claims were paid, *held* liable to owners, where association paid contractor more than amount of valid liens filed.

In Bank.

Appeal from Superior Court, Stanislaus County; L. W. Fulkerth, Judge.

Action by the Modesto Lumber Company and another against V. L. Bates, Lewis D. Wylde and wife and others, in which Lewis D. Wylde and wife filed cross-complaint against the Modesto Building & Loan Association. From the judgment, defendants Wylde and wife and the Building & Loan Association appeal.

Judgment modified, and, as modified, affirmed.

Dennett & Zion, of Modesto, for appellant Modesto Building & Loan Ass'n.

J. M. Walthall, of Modesto, for plaintiffs and cross-defendants and respondents Modesto Lumber Co. and Turner Hardware & Implement Co.

G. B. Hjelm and Harold L. Hjelm, both of Turlock, for defendants, cross-complainants, and appellants Lewis D. Wylde and Edna E. Wylde.

PRESTON, Justice.

Plaintiff corporations, the Modesto Lumber Company and Turner Hardware & Implement Company, furnished materials to V. L. Bates, a contractor, which materials were used by him in erecting a residence and garage upon the Modesto property of defendants Wylde and wife. The Modesto Building & Loan Association furnished, by way of a loan to the owners, the funds necessary to erect said structures, and agreed to disburse said funds in such a manner as to protect itself and them. This association had knowledge of the unrecorded but written building contract between said owners and said contractor, and said contractor had knowledge of the terms of the loan. The loan and the contract price were identical—the sum of $3,575. The owners received no money directly from the loan association, and hence paid none of the bills for materials or labor, and paid nothing to the contractor on account of his services. The materialmen asserted that they had not been paid in full for the materials furnished by them for building the structures, and accordingly they filed claims of lien for the balances due them, as follows: The Modesto Lumber Company, $504.12; Turner Hardware & Implement Company, $401.72. Thereafter they instituted the present action for the purpose of having their respective claims declared valid and impressed as liens upon the property and for a foreclosure and sale in satisfaction thereof. They made said owners of the property, said contractor, and said loan association defendants. The relief asked against the contractor was a personal judgment, and the relief asked against the loan association was that their liens be declared prior to the trust deed lien held by it upon the property.

The owners, Wylde and wife, answered the complaint, pleaded payment of the respective claims of plaintiffs, and at the same time they filed a cross-complaint making the loan association also a cross-defendant. In this behalf they alleged that the proceeds of said loan were accepted in trust by the loan association for the purpose of discharging all claims incident to construction of said buildings, and further that the loan association agreed to protect them against default on the part of said contractor in the payment of labor and materials furnished and used in said construction; that the loan association guaranteed that no claims would become a lien upon the property; furthermore, that defendant Bates, the contractor, was not to be paid until all claims for labor and material had first been satisfied. They further alleged that whatever sums were declared a lien on their property would result in damages to them, for which the loan association would be liable, and they prayed for relief accordingly.

The issues tendered by the cross-complaint were traversed by the cross-defendants, and the cause thereafter proceeded to trial. The court made findings and gave judgment upholding in toto the respective claims of plaintiffs, and in turn passed said amounts on as a personal judgment in favor of the owners and against the loan association. In other words, plaintiffs had plenary relief, both by personal judgment against the contractor and by establishment of their claims of lien, and the owners, defendants Wylde and wife, were likewise granted the incidental relief of a personal judgment against the loan association. Both the loan association and defendants Wylde and wife have appealed from said judgment.

The record presents but one serious question of law applicable to both plaintiffs and arising from the following facts: The contractor Bates had with each of the plaintiffs a general account and also special accounts identified by the ownership of the properties upon which buildings were being constructed by him. Accordingly, Bates was indebted to each of the plaintiffs in various capacities. On the 21st day of October, 1929, the loan association caused to be made out a check for $400 payable to the Modesto Lumber Company, and intrusted its delivery to said Bates, with instructions that it should be applied on account of the materials furnished for the construction of the buildings here in question on the property of Wylde and wife. Contrary to these instructions, Bates delivered the check with directions that it be applied on the payment of his personal account with the lumber company; he did not ask, as he was in honor bound to do, that it be applied upon the Wylde building account. About the same time also, and in the identical way, checks were made out by the loan association in favor of Turner Hardware Company, one for $200 and one for $225, and likewise intrusted to Bates for delivery, with instructions to have these sums credited to the Wylde building account. In violation of his trust in this particular, also, the said Bates requested the Turner Company to apply the proceeds of said checks on his personal account and did not mention the Wylde building account.

In other words, the situation is reduced to this: If the $400 check were applied to the indebtedness claimed by the lumber company, there would remain due on said indebtedness only the sum of $104.12, and, if the other two checks referred to were applied on the claims of the Turner Company, they would more than discharge that indebtedness in full. So the real controversy presented by this appeal is: Was it the duty of the lumber company as to the $400 check and of the Turner Company as to the other two checks to apply the proceeds thereof on the Wylde account instead of on the personal account of Bates? This brings to the foreground an interesting question of law that has not been thoroughly settled in this jurisdiction, although it has received extended consideration elsewhere.

The majority rule seems to be that, where the materialman is furnishing at the same time materials to a contractor for the construction of buildings upon the property of different owners, the materialman may, in the absence of notice of the source of the funds, accept the same from the contractor and apply them upon any agreed account or as specified by law, even if in such case it develops that the contractor has violated his trust while using the funds of A to pay for materials used on the property of B. See note, Ann. Cas. 1917C, page 588; note, L. R. A. 1916D, page 1259. But it seems equally clear that, where the materialman does have knowledge of the source and ownership of the funds delivered to him by the contractor, he may not apply them on the account of any other than the true owner, even though the contractor may have consented to their application elsewhere. See authorities just cited and also Hanson v. Cordano, 96 Cal. 441, 31 P. 457. The concurring opinion of Mr. Justice McKee in the case of Goss v. Strelitz, 54 Cal. 640, 644, asserts a doctrine as against the materialman even stronger than the above rule.

[1, 2] But in the case before us we have a situation somewhat different from either the general rule or the exception thereto above noted. Here the materialman had notice that the loan association was financing more than one building, and it knew, of course, that the contractor Bates was also constructing more than one structure being so financed. With this knowledge, and with a check payable directly to it and not to the contractor, how could the materialman escape the duty of inquiring of the loan association as to the application of the funds? The check not being made to the contractor was notice to the materialman that the contractor was without authority to determine finally the application of the funds. The agency conferred upon the contractor by intrusting the check to him was merely that of a messenger.

In the case of Pacific Finance Corp. v. Bank of Yolo (Cal. Sup.) 10 P.(2d) 68, 70, a finance corporation intrusted to a party with whom it was dealing a check payable to defendant bank. The bank allowed the messenger to open a private account and receive the proceeds of the check to his credit. The funds were thus lost to the maker of the check. The bank was held liable, and we there approved the doctrine of Sims v. U. S. Trust Co., 103 N. Y. 472, 9 N. E. 605, as follows: "One Sims delivered to Crowell his $5,000 check drawn on the People's Bank and made payable to defendant trust company, with verbal instructions to deposit it to his credit with defendant. Instead of so doing, Crowell delivered the check to defendant and requested and received from it a certificate of deposit payable to himself as trustee for Sims; shortly thereafter he drew the money thereon and converted it to his own use. The main question was whether defendant had authority to make the said payment to Crowell. The court said: 'The check upon its face imported the ownership of the moneys represented in it by Dr. Sims, and his desire that its custody should be transferred from the People's Bank to the defendant. This certainly did not warrant the defendant in supposing that Dr. Sims thereby intended to pay $5,000 to Crowell, or place him for any purpose in possession of the fund. If he had so intended, the check would have been made payable to Crowell's order, and there would have been no need of the agency of the defendant in the transaction. The use of the defendant's name as payee of the check indicated the drawer's intention to lodge the moneys in its custody and place them under its control, and nothing further than this was inferable from the language of the check.'

"The court there further said: 'The defendant could have refused to receive the deposit, or act as Dr. Sims' agent in transferring the funds from one custodian to another, but having accepted the office of so doing, it was bound to keep Dr. Sims' moneys, until it received his directions to pay them out. The language of the check making the funds payable only upon the order of the defendant imposed upon it the duty of seeing that they were not, through its agency, improperly disbursed after it had received them They could not safely pay out such funds except under the direction of their lawful owner.' To the same effect are the following cases: Apostoloff v. Levy, 186 App. Div. 767, 174 N. Y. S. 828; Bjorgo v. First National Bank, 127 Minn. 105, 149 N. W. 3, L R. A. 1915B, 287; Bowles Company v. Clark, 59 Wash. 336, 109 P. 812, 31 L. R. A. (N. S.) 613."

We likewise find a situation quite similar in principle to the case before us in Petersen v. Shain et al., 4 Cal. Unrep. Cas. 122, 125, 33 P. 1086. There Shain, a contractor, sublet to Petersen & Co., as subcontractors, a portion of the construction work of a building. Mooser, a materialman, furnished materials to Petersen & Co., used on this building, and at the same time had other accounts with Petersen & Co. for similar work at other places. Shain, as part of his settlement with Petersen & Co., for the work done, made two checks payable to that company but delivered them, not indorsed, to Mooser, who in turn procured their indorsement by Petersen & Co., and cashed them, applying the proceeds to other accounts than those in which Shain was interested. It was held that Mooser could not do this to the prejudice of Shain, and that in law said proceeds were to be credited to the Petersen job in which Shain was interested.

In the case of Bowles Co. v. Clark, 59 Wash. 336, 109 P. 812, 813, 31 L. R. A. (N. S.) 613, we have almost an exact parallel to the case before us. There the proceeds of a check drawn by the owner in favor of the supply house for the estimated cost of plumbing supplies was by the payee applied as follows: A part to cover the cost of supplies already furnished, a part to balance an older account against the contractor and the remainder of the money was paid to the contractor himself. The supply house later furnished additional materials and filed a lien. It claimed to have received the check in due course. The fact that the check was drawn by a stranger to the supply house was held to be enough to show a property in the check in the drawer. The court there said: "But we think it too much to say that these circumstances were of such a nature as to warrant the belief that the property in the check was the property of Fraser [the contractor]. The check itself contained a distinct warning to the contrary. It was made payable to the respondent [the supply house], a stranger to the drawer, and not to Fraser, and it is not reasonable to suppose that Fraser would have accepted payment of an obligation due himself in a form which he could not use without the consent and co-operation of a third person." The above ruling was expressly approved in Hughes & Co. v. Flint, 61 Wash. 460, 112 P. 633, 634.

It follows that plaintiffs, as materialmen here, were required to credit the respective checks received by them to the Wylde building account. When so applied, the claim of the hardware company is discharged in full; but $104.12 is left due the lumber company, for which its lien is valid. As for the liability of the loan association to the owners for the amount due the materialmen, we think the evidence sufficient to show that the loan association accepted a trusteeship to disburse these funds first to the laborers and materialmen and the balance to the contractor. It fairly appears that the loan association paid sums direct to the contractor that, if used to pay for materials, would more than offset the small balance now found due the lumber company. We are not disposed to disturb the court's findings in this behalf.

The judgment is modified by striking therefrom all relief as to plaintiff, Turner Hardware & Implement Company, a corporation; the claim of the Modesto Lumber Company, a corporation, is reduced from $504.12 to $104.12. The judgment against Modesto Building & Loan Association, a corporation, is likewise correspondingly reduced to said amount, $104.12. As so modified, the judgment is affirmed, appellants Wylde and wife to recover costs against respondents, and, under the remaining aspects of the appeal, neither party to recover costs.

We concur: **WASTE, C. J.; CURTIS, J.; SEAWELL, J.; SHENK, J.; TYLER, Justice pro tem.**

217 Cal. 429

AGGELER et al. v. DOMINGUEZ, City Clerk.

L. A. 13722.

Supreme Court of California.
Feb. 24, 1933.

1. Officers 🔑49.

Where constitutional provision prescribing term of public office is uncertain or doubtful, interpretation which limits term to shortest time will be followed.

2. Judges 🔑7.

Under statute regarding municipal judges' term of office and time appointee to fill vacancy should hold office, judges appointed by Governor to fill new positions in municipal court held office for unexpired term, not for six-year term from date of appointment (St. 1925, pp. 650, 654, 655, §§ 4, 15, 17; Const. art. 5, § 8, and art. 6, §§ 11 and 23 as amended in 1924).

St. 1925, p. 654, § 15, fixes the term of office of a judge of the municipal court at six years, while St. 1925, p. 655, § 17, provides that any person appointed to fill a vacancy in such office should hold the same until the expiration of the term of the office to which he was appointed.

3. Statutes 🔑181(2).

Where meaning of statute is doubtful, any construction which would lead to absurd results should be rejected.

In Bank.

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Suit by Leo Aggeler and others against Robert Dominguez, City Clerk of the City of Los Angeles. From an adverse judgment, plaintiffs appeal.

Affirmed.

Overton, Lyman & Plumb, of Los Angeles, for appellants.

Erwin P. Werner, City Atty., Frederick von Schrader, Asst. City Atty., and G. Ellsworth Meyer, Deputy City Atty., all of Los Angeles, for respondent.

CURTIS, Justice.

Plaintiffs are municipal judges of the city of Los Angeles, having been appointed to such offices by the Governor of this state pursuant to the authority vested in him by an act of the Legislature creating four additional municipal judges in the municipal court of the city of Los Angeles. Statutes of 1931, p. 1537. Said act became effective on August 14, 1931, and thereafter plaintiffs' appointment followed and commissions of appointment were issued to them providing that they should hold office as municipal judges of the city of Los Angeles for the term prescribed by law. The defendant is the city clerk of said city of Los Angeles, and this action is brought by the plaintiffs to have it adjudged and decreed that the plaintiffs' terms of office are for the period of six years after and from the date of the creation of said offices, and that the defendant be restrained and enjoined from preparing or issuing nomination petitions for plaintiffs' said offices, or from receiving or filing nomination petitions affecting said offices, or from expending any funds of the city of Los Angeles in any of said matters, or in connection with any other matter affecting plaintiffs and their said offices prior to the 14th day of August, 1937. The action was tried in the superior court, and judgment was therein rendered against the plaintiffs, from which they have appealed.

Municipal courts are established under the authority of section 11, article 6 of the Constitution of this state, adopted November 4, 1924. In this section it is provided that the manner in which, the time at which, and the term for which the judges of municipal courts shall be elected or appointed shall be prescribed by the Legislature.

[1] The adoption of this constitutional amendment was followed by the enactment in 1925 of an act of the Legislature authorizing the establishment of municipal courts in the city of Los Angeles and in other cities of the state. Statutes of 1925, p. 648. By this act it was provided that cities of the class to which the city of Los Angeles belonged should have twenty-four judges of this municipal court (St. 1925, p. 651, § 7). This was in 1927 increased to twenty-six. Statutes of 1927, p. 129. In 1931 it was increased to thirty. Statutes of 1931, p. 1537, § 1. By section 15 of said act (St. 1925, p. 654) the term of office of each judge of a municipal court was fixed at six years, or until his successor is elected and qualifies. Section 17 of said act (page 655) provides that "any vacancy in the office of a judge of a municipal court shall be filled by appointment by the governor, and any person so appointed shall hold office until the expiration of the term of the office to which he was appointed, and until his successor is elected and qualified." There is no express provision in the Constitution, nor in said act of 1925, authorizing the governor, or any other officer or official body, to appoint the judges of the municipal courts, after the establishment of said court, under said constitutional amendment and said act of the Legislature of 1925. It was, however, provided by section 4 of said act of 1925 (page 650) that in each city or city and county in which a municipal court was established there should not be any other inferior court

(except a court of small claims) and that all such inferior courts would be superseded by said municipal courts and that the judges, justices, and other officers of said inferior courts should become the judges, justices, and officers of said municipal courts. At the time of the amendment of section 11, article 6 of the Constitution, section 23 of said article was also amended, which provided that no person should be eligible to the office of judge of a municipal court unless he should have been admitted to practice law before the Supreme Court of this state for a period of five years immediately preceding his election or appointment. Under this provision of the Constitution in at least one instance, one of the judges of an inferior court of the city where municipal courts were established was ineligible to the office of judge of the municipal court, by reason of the fact that he had not been admitted to practice law for the required time. In such case it was held that a vacancy existed in that particular municipal court, and that such vacancy could, under the authority of section 17 of the act, which we have quoted above, be filled by appointment by the governor of the state. Wallace v. Payne, 197 Cal. 539, 241 P. 879. Acting under the authority of said section 17, as construed by this court in the case just mentioned, the Governor of the state appointed plaintiffs judges of the municipal court of the city of Los Angeles to fill the four positions in said court created by the statute of 1931. It is plaintiffs' contention that they are each appointed to a full six-year term as judges of said court and that their terms of office will not expire until August 14, 1937. Accordingly, by this proceeding they seek to have the law so declared as holding that they are each appointed for a full term of six years and the defendant, as the clerk of said city, be restrained from taking any steps towards preparing for an election prior to the year 1937 for the four offices of which they are now the occupants.

Plaintiffs ground their argument upon section 15 of the act, which fixes the term of office of a judge of the municipal court at six years, and on section 17, which provides that any person appointed to fill a vacancy in such office shall hold the same "until the expiration of the term of the office to which he was appointed." In other words, plaintiffs contend that whenever a person is appointed to fill a vacancy in the office of judge of the municipal court he is appointed for a full term of six years. If plaintiffs' interpretation of the law is correct, then no matter when the vacancy occurs, or for what cause it happens, the appointee to fill the same holds office under the appointment for six years. The precise words relied upon in support of plaintiffs' contention are those found in second 17, which read as follows: "Any person so appointed shall hold office until the expiration of the term of the office to which he was appointed." In analyzing these words, it will be noted in the first place that they do not purport to expressly fix the term for which the appointee shall hold the office. On the other hand, the term is vaguely stated to be for "the term of the office to which he was appointed." Had the Legislature intended to fix the appointees' terms at six years, the length of the regular term of said office, surely it could have employed much simpler and more direct language in which to express such intent. It would have been an easy matter for the Legislature to have said that any person so appointed should hold office for the full regular term of six years, had it intended to so fix the term of appointment. The fact that it did not express its intent in some such clear and simple language casts a grave doubt as to just what the Legislature did intend by the use of these words. "Where a constitutional provision prescribing the term of a public office is uncertain or doubtful in its construction, that interpretation will be followed which limits the term to the shortest time." Mechem on Public Officers, § 390. The same doctrine is approved by Throop on Public Officers, § 308, where it is stated: "But, other considerations being equal, that construction of a doubtful provision of a statute or the constitution will be followed which limits the term of office to the shortest time." In People v. Brenham, 3 Cal. 477, 487, we find the following statement of the law: "We should not extend official terms beyond the time clearly defined, but rather by implication, if necessary, shorten the duration of a term, than prolong it."

[2] We hardly think it is necessary to resort to implication in the present action to determine that the Legislature never intended that an appointee of the governor to the office of municipal judge should hold for the full term of six years. We think that a reasonable construction of section 17 is that the appointee should hold the office to the expiration of the term for which he was appointed. The section does not purport to fix the length of the term for which he was appointed, and we must, therefore, look elsewhere for the law upon this subject. This is found in section 8 of article 5 of the Constitution, which provides that where a vacancy exists and no mode is provided for filling it, "The Governor shall have power to fill such vacancy by granting a commission, which shall expire at the end of the next session of the Legislature, or the next election by the people." While in the case before us there is provided a mode of filling the vacancy, that is, by appointment by the Governor, there is no provision of the act fixing the term. Under these conditions we may resort to section 8 of article 5 of the Constitution for the mode of fixing the term of the office, which section, as we have already seen, provides for the expiration of

said term at the next election of the people in the city where said municipal court is held.

[3] It is well established that: "Where the language of a statute is reasonably susceptible of two constructions, one which, in application, will render it reasonable, fair and harmonious with its manifest purpose, and another which will be productive of absurd consequences, the former construction will be adopted. In other words, where the meaning is doubtful, any construction which would lead to absurd results should be rejected * * * since absurd results are not supposed to have been contemplated by the legislature." 23 Cal. Jur. pp. 766, 767.

Let us apply this rule of construction to the sections of the act under discussion. As we have already stated, a reasonable construction of section 17 of said act is that the appointee to the office of municipal judge shall hold the office to the expiration of the term for which he was appointed without fixing the length of this term. Then under the constitutional provision last referred to, the term is fixed so that it ends at the next general election by the people. Under this interpretation of the act in case there are two or more appointees during the biennial intervening between two city elections, each holding a vacancy appointment occurring on different dates, the term of office of said appointees would each expire on the same date. The date of the election to fill all such vacancies would be the city election next following said appointments. Under the construction contended for by plaintiffs, the appointees of the Governor would each be entitled to a full term, and their offices would expire six years after the respective dates of their appointment. The four plaintiffs under this plan would hold office until August 14, 1937. Perhaps a vacancy may have occurred in another one of said thirty offices in the following month of September, still another in the month of October, and so on during the whole two-year period, one each month. In the election to be held in June, 1937, these vacancies would all be filled, but some of those elected to such office would assume their duties in the month of August, others in the month of September, and down through the months of the entire two-year period until the last one would take office. To hold the Legislature responsible for legislation producing such unsatisfactory results would be a reflection upon its members to which, we think, they are not entitled. We much prefer to believe that they intended the orderly and harmonious procedure first above outlined rather than the absurd method which we have just described. We think this reason alone amply justifies the construction which we have placed upon the sections of the act in question.

Plaintiffs, and defendant also, call to our attention the provisions of the Constitution governing the filling of vacancies in the Supreme Court, the District Court of Appeal, and the superior court, but for entirely different purposes. In none of these provisions of the Constitution is an appointee to a vacancy in either of these courts entitled to hold office for a full term, but with slight exception, only until the next election. Plaintiffs draw the conclusion that the Legislature had these provisions of the Constitution before it when it enacted the Municipal Court Act and designedly framed said act as to make the rule governing municipal courts different from those fixed by the Constitution regarding the higher courts in respect to the term of office of an appointee to a vacancy. On the other hand, defendant asks, if the policy of the state is to provide for short terms for appointees to the three higher courts, why should the Legislature when it came to municipal courts provide that appointees to vacancies therein be given the longest term provided by law? We think we have already answered plaintiffs' argument advanced in this debate. If the Legislature had before it the provisions of the Constitution providing for the filling of vacancies in the three courts with which it deals when the Municipal Court Act was drawn, and it was the deliberate intention to frame the act fixing the tenure of vacancy appointees in municipal courts diametrically different from that of appointees of the other courts as fixed by the Constitution, we think that the framers of said act would have used much more direct and explicit language evidencing their deliberate intention than that found in the sections of said act. On the other hand, if the Legislature deliberately intended to depart from the policy of the state as expressed in the Constitution fixing the term of appointees at practically the shortest possible tenure, we are at a loss to understand the reason for this change of front of the legislative branch of our government. In our form of government, particularly in local matters, we have from time immemorial left to the people of any particular locality the right to choose their officers and in many instances, and especially in more recent years, to enact laws governing their affairs. Why should the people of our cities be deprived of the right to elect the members of their municipal courts, when they enjoy the privilege of selecting those who shall preside in the other courts of the state? We know of no answer to this question. It has been asked, and plaintiffs have failed to make a satisfactory answer to it. As we have said before, we do not believe that it was ever the intention of the Legislature by the enactment of the Municipal Court Act to so provide. In our opinion, plaintiffs' appointment to their present positions will expire in the current year and their successors will, according to section 16 of said act, take office at the same time as the municipal officers take office who are to be elected at the municipal election of this year. Provision should, therefore, be made by the proper officer for an election to these four offices at the municipal election of the present year.

The judgment is affirmed.

We concur: WASTE, C. J.; PRESTON, J.; LANGDON, J.; SEAWELL, J.; SHENK, J.; THOMPSON, J.

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129 Cal.App. 721

MERION v. SCHNITZLEIN et al.

Civ. 7527.

District Court of Appeal, Second District, Division 2, California.
Feb. 20, 1933.

1. Landlord and tenant 🔑169(11).

Whether gas heater constituting only means of heating apartment and connected with gas pipes in building was "stationary" within ordinance requiring vent, so as to render landlord liable for monoxide gas poisoning, *held* for jury.

2. Landlord and tenant 🔑169(11).

Whether absence of vent on gas heater in apartment caused release of monoxide gas causing illness of tenant's daughter *held* for jury.

3. Landlord and tenant 🔑169(11).

Whether loss of health of tenant's daughter resulted from poisoning from monoxide gas escaping from heater in apartment building *held* for jury.

4. Appeal and error 🔑994(2), 1002.

Where evidence is conflicting, reviewing court cannot determine witnesses' credibility and resolve conflicts in proof.

Appeal from Superior Court, Los Angeles County; Percy Hight, Judge.

Action by Jeane Merion, an infant, by Gladys Merion, her mother and guardian ad litem, against Fred Schnitzlein and others. From a judgment for plaintiff, defendants appeal.

Affirmed.

Denio, Hart, Taubman & Simpson, of Long Beach, for appellants.

Cameron & Perkins, of Long Beach, for respondent.

ARCHBALD, Justice pro tem.

On November 30, 1928, plaintiff was living with her mother in a furnished apartment located in an apartment house in Long Beach operated by defendants and rented from them. Installed in each apartment of the establishment, including that occupied by plaintiff and her mother, was a small Humphrey radiant fire heater No. 20. On the date mentioned the mother lighted the heater in the morning, dressed, had breakfast, and departed to her work, returning at noon for lunch. She knocked on the door of the apartment but received no answer. "I commenced hammering, pounding on the door. I heard her (the daughter) fool with the door, and she opened it and just fell back on the floor." The mother then telephoned Dr. Newman, who in turn, thinking the girl might have been overcome by monoxide gas, requested the pulmotor squad of the fire department to go at once to the apartment. This they did, finding the girl unconscious. After working on her for forty-eight minutes, consciousness was restored. The lieutenant in charge testified that he had been a member of the squad for several years, and had treated at least a hundred cases; that plaintiff's breath at the time had the smell distinctive of cases wherein people were overcome by monoxide gas. Dr. Newman testified that prior to November 30 he had known plaintiff for about two years and that she "was a normal, healthy girl of her age"; that he treated her at the apartment for a month after that date, and that she then came to his office with her mother the latter part of December and in January, 1929; that later he advised the mother to "try a change of climate" for the girl; that he did not see her again until April, at which time she had not recovered her health; that in his opinion her condition was the result of monoxide gas poisoning.

This action was brought by plaintiff through her mother as guardian ad litem, the complaint charging negligence in installing the heater without venting it as required by city ordinance, and that the heater was negligently "adjusted and left by said defendants in such a condition that monoxide gas was produced when said heater was burning." Trial before a jury resulted in a verdict of $5,000 against defendants. Motion for new trial was denied on condition that plaintiff accept $2,000 damages in lieu of the amount awarded by the verdict of the jury. Such election was filed by plaintiff, and defendants appeal from the judgment entered. The sole question raised by the appeal is as to the sufficiency of the evidence to support the judgment.

In addition to the evidence already set out, plaintiff introduced an ordinance of the city of Long Beach, No. B-269, section 6 of which provides that "every person, firm or corporation installing any * * * stationary house heater of any form or type shall effectively and fully vent the same to the outside of the building in which it is installed within thirty days after installation." Section 4 of the same ordinance reads: "The word 'install' shall mean to * * * adjust any appliance already connected." The evidence also shows that the heater in question was connected in 1923 and had been in use since installation.

[1] It is urged by appellants that the heater was not "stationary" and was therefore not covered by the ordinance. This question was left to the jury by appropriate instructions. The evidence demonstrates that it was the only means of heating the living room, hall, bathroom, and bedroom of the apartment, with the exception of such heat as might come into the living room from the kitchen. It was further shown that the heater was connected up with cast-iron pipes to the gas pipes in the building; that it had stood in the same place since the building was constructed, and that it had no vent. J. H. Grayson, a manufacturer of gas appliances of many years' experience, testified that a heater so connected, in his personal opinion, "would be stationary." Such witness also testified that a good vent would have eliminated the poisonous gas by carrying it "off into the open air." There is also evidence that the mother had complained to defendant Grover C. Sumner that every time they turned the heater on they "would get severe headaches," and "asked him to fix it or get it fixed," and that Mr. Sumner had "taken it all apart" and "fixed it."

[2-4] We have stated enough to show that there is substantial evidence from which the jury might well conclude that the heater in question was "stationary," and also that, because it was not vented as required by ordinance, monoxide gas was released in the room, causing the illness of which respondent complained. It is true there is very substantial evidence in direct conflict with that of Dr. Newman as to the condition of the girl being due to monoxide poisoning, and also as to the condition of the heater on the date mentioned. That, however, is a conflict which it was the province of the jury to settle in the first instance. The jury having done so, appellants appealed for relief to the trial judge, who heard the evidence, saw the witnesses, and who refused to set the verdict aside when the judgment entered thereon was reduced. The evidence presenting as it does such a sharp conflict on nearly every material point, "we cannot usurp the function of the jury and the trial court, who finally passed upon the weight, effect and sufficiency of the evidence and the credibility of witnesses, and determine in place of these arbiters of fact the credibility of witness and resolve conflicts in proof." Bennett v. Chanslor & Lyon Co., 204 Cal. 101, 105, 266 P. 803, 804.

Judgment affirmed.

We concur: WORKS, P. J.; CRAIG, J.

NEVADA LAND & INV. CORPORATION v. SISTRUNK et ux.*

Civ. 4782.

District Court of Appeal, Third District, California.

Feb. 20, 1933.

As Modified on Denial of Rehearing March 22, 1933.

Hearing Granted by Supreme Court April 20, 1933.

Ejectment 🔑26(3).

Where executory land contract was terminated for purchaser's default in installments, purchaser could not defeat possessory action of ejectment by claim for damages alleged, in answer and cross-complaint, to be result of fraud in procuring execution of contract (Code Civ. Proc. § 438, as amended by St. 1927, p. 1620).

Such claim for damages was no defense, since case was not based upon contract, but was based upon cancellation of contract for default in performance of its terms, and was independent action of ejectment for mere possession of premises, and under such circumstances equitable defense to action for ejectment may not be founded on contract which defendant had failed to perform.

Appeal from Superior Court, Sutter County; Eugene P. McDaniel, Judge.

Action by the Nevada Land & Investment Corporation against Z. R. Sistrunk and wife. From a judgment in favor of plaintiff, defendants appeal.

Affirmed.

A. G. Bailey, of Woodland, for appellants.

Rich, Weis & Carlin, of Marysville, for respondent.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

The defendants have appealed from a judgment of ejectment which was rendered against them pursuant to the terms of an executory contract for the purchase of real property, for failure to pay stipulated installments of the purchase price thereof. In an answer and cross-complaint the defendants sought to justify their default by claiming damages sufficient to offset the unpaid installments resulting from fraud alleged to have been exercised in procuring the execution of the contract. A demurrer to the allegations of fraud which were contained in the answer was sustained. The cross-complaint was stricken

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🔑For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 30 P.2d 389.

from the cause. A written stipulation was then filed acknowledging the truth of all the allegations of the complaint, except the claim for damages for detention of the property, and consenting to a judgment for restitution of the premises.

The complaint alleges: That Garden Highway Orchard Company, a corporation, entered into a written contract with the defendants on April 23, 1925, to sell ten acres of farm land in Sutter county, for the sum of $4,700; that the defendants immediately took and still retain possession thereof; that at the time of the execution of the contract the sum of $940 was paid on account of the purchase price; that the balance was to be paid in seven equal annual installments, beginning April 23, 1930, and continuing thereafter each year until the entire consideration, together with taxes and 6 per cent. interest per annum on all deferred payments, are fully satisfied; that by the terms of the agreement, title to the real property remained in the seller, who reserved an option to declare all payments forfeited, to terminate the contract, and to repossess the premises, after written notice thereof, for default in payment of any installment of the purchase price or interest; that for a valuable consideration the land and contract for sale thereof were sold and conveyed November 16, 1927, to the plaintiff, Nevada Land & Investment Corporation, which thereupon became and now is the owner thereof; that on January 8, 1932, the defendants were in default in the payment of two annual installments of the purchase price of the land, together with taxes and accrued interest aggregating the sum of $1,775.81; that on account of said default the plaintiff exercised its option and notified the defendants in writing on the last-mentioned date that their payments were forfeited and the contract terminated, and thereupon demanded immediate possession of the property, which was refused. The complaint prays for restitution of the premises, an adjudication of a forfeiture of the payments which were made, cancellation of the contract, and a decree quieting title to the land in plaintiff.

The answer denies the essential allegations of the complaint, except that the execution of the contract, the terms thereof, defendants' possession of the premises, and the nonpayment of delinquent installments, were admitted. A cross-complaint was also filed. The answer and cross-complaint allege facts constituting fraud with which the defendants are charged with exercising in procuring the execution of the contract, resulting in damages aggregating the entire amount of unpaid installments. The cross-complaint prays for damages as alleged, and for a decree satisfying all unpaid installments and quieting title to the land in the defendants. A demurrer to the answer was sustained. The cross-complaint was stricken from the record. A stipulation signed by respective counsel was filed, in which it is conceded that all of the allegations of the complaint are true, except the claim for damages for detaining the property, and in which it is further agreed: "Plaintiff may have judgment against the defendants for the restitution of the lands and premises described in plaintiff's complaint, for the cancellation of the agreement for the sale of said lands and premises to defendants, and that the title to plaintiff's lands be quieted in plaintiff." Judgment was rendered accordingly. From this judgment the defendants have appealed.

The appellants contend that one "who has been induced to execute a contract by reason of plaintiff's fraud (may) set up that fraud and its resultant damages as a defense and also as a counterclaim, in an action of ejectment to recover the possession of the premises described in the contract, when the damages caused by the alleged fraud are equal to, or greater than, all of the balance alleged to be unpaid on the contract."

When an executory contract for sale of real property provides for the termination thereof and for recovery of possession of the land by the seller in the event of failure to pay installments on the purchase price as stipulated, the buyer in possession, who is in default of the express provisions of the contract, may not defeat the seller's action in ejectment by a claim for damages alleged in an answer or cross-complaint to be the result of fraud in procuring the execution of the contract. Verbeck v. Clymer, 202 Cal. 557, 261 P. 1017, 1018; Hincksman v. Delacour, 47 Cal. App. 416, 190 P. 832; Watkins v. Warren, 122 Cal. App. 617, 10 P.(2d) 500. A defense to the possessory action of ejectment, when the delinquent installments are not sought to be recovered, may not be based upon unliquidated damages resulting from alleged fraud in procuring the execution of the contract. Under such circumstances, an equitable defense to an action for ejectment may not be founded on a contract which the defendant has failed to perform. Gervaise v. Brookins, 156 Cal. 103, 103 P. 329; Mayer v. West, 96 Cal. App. 31, 273 P. 849; Haile v. Smith, 128 Cal. 415, 60 P. 1032; Los Molinos Land Co. v. MacKay, 175 Cal. 305, 165 P. 926.

The cases of Verbeck v. Clymer, Hincksman v. Delacour and Watkins v. Warren, supra, were suits in ejectment, to recover possession of real property after breach and cancellation of the contract. The circumstances in those cases were exactly like the situation in this case. Those cases, therefore, appear to be determinative of the present action.

In the case of Verbeck v. Clymer, supra, a contract for sale of real property was executed which acknowledged an initial payment of $5,000 on the purchase price of the land. It provided for the payment of further installments. The defendant held possession premises, but defaulted in the payment of installments. The plaintiff brought suit for ejectment. The defendant filed an answer and cross-complaint admitting his failure to pay two installments of the purchase price when they were due, but alleging damages as a result of fraud exercised by the plaintiff in procuring the contract exacting usurious interest in a sum equal to the amount of all delinquent installments. Upon motion, a judgment on the pleadings was awarded plaintiff ejecting the defendant from the premises. The court said:

"The action of the court in granting judgment for plaintiffs on the pleadings is clearly correct. We find no equity on the face of the answer. * * *

"Where a vendee in possession under a contract of purchase has failed to perform his part of the contract and is in default with respect thereto, without excuse he cannot maintain an equitable defense in an action of ejectment by the vendor. Connolly v. Hingley, 82 Cal. 642, 23 P. 273; Howard v. Hewitt, 139 Cal. 614, 73 P. 414. 'A purchaser cannot remain in possession of lands under a contract and at the same time refuse to pay the purchase price. * * *' Rhorer v. Bila, 83 Cal. 54, 23 P. 274, 275; Gates v. McLean, 70 Cal. 49, 11 P. 489; Gervaise v. Brookins, 156 Cal. 106, 103 P. 329. The essence of the rule is that, where the legal title to the property is in the plaintiff and that fact is admitted by the defendants, defendants cannot successfully defend against an action in ejectment unless they make out a complete equitable title in themselves with the right of possession thereunder. Wallace v. Maples, 79 Cal. 433, 21 P. 860; Flint v. Conner, 53 Cal. App. 279, 200 P. 37."

The appellants in the present case contend that the grounds of defense which are authorized by the provisions of section 438 of the Code of Civil Procedure to be pleaded by means of a counterclaim, are greatly enlarged since the decision in the case of Hincksman v. Delacour, supra, was rendered. That section was amended in 1927 (St. 1927, p. 1620) by eliminating the requirement that the cause of action must arise from the same "transaction set forth in the complaint." The statute now authorizes the counterclaim to be filed when the cause merely tends "to diminish or defeat the plaintiff's recovery." Both the case of Verbeck v. Clymer and Watkins v. Warren, supra, were decided after the amendment became effective. We may not assume that the amendment to the section was overlooked by the court.

In the present case the purchaser of land seeks to satisfy delinquent installments under the contract, with an unliquidated claim for damages. Defendants stipulate in the contract that it may be canceled for failure to pay installments at specified times. For this default the contract was canceled, as provided by the terms of the agreement. This suit in ejectment is not based upon the contract, nor upon the assumption that it is valid. There is no effort in this suit, or otherwise, to collect delinquent installments under the contract. There may be good reason to hold it is too late after a contract has been canceled pursuant to agreement for a purchaser to claim an offset for delinquent installments by setting up damages which might be recovered on account of fraud.

In the case of Paolini v. Sulprizio, 201 Cal. 683, 258 P. 380, upon which the appellants rely, the seller of land brought suit to collect delinquent installments. By the very nature of that action the plaintiff affirmed the validity of the contract. It was not rescinded. Both parties affirmed the contract. In a cross-complaint the defendant admitted his failure to pay one final installment of $2,000, but affirmatively alleged that payment was satisfied by damages sustained as a result of fraud with respect to representations regarding the nature and adaptability of the soil. The trial court refused to receive evidence of that fraud, and rendered judgment in favor of the plaintiff for the balance of the stipulated purchase price. The Supreme Court held that the defendant was not required to disaffirm or rescind the contract before he could maintain an action for fraud. The case was decided on that point. That was not a possessory action. In effect the defendant denied the asserted indebtedness by his allegations in the cross-complaint, which amounted to partial failure of consideration or a decrease of the represented valuation of the land. The authorities support that procedure in a suit upon contract for unpaid installments. In the present case the contract has been rescinded. The delinquent installments are waived. The suit is not founded on the contract. It is a mere suit of ejectment for possession of the premises. This furnishes a clear distinction between these cases.

Other cases relied upon by the appellants may be likewise distinguished.

Finally, we are cited by the appellants to the case of Elm v. Sacramento Suburban Fruit Lands Co. (Cal. Sup.) 17 P.(2d) 1003. This is a suit by the purchaser of land for specific performance of the contract. It was alleged that the entire purchase price had been paid. The answer asserted that $640 of the purchase price was not paid. A judgment for $1,940, which was previously recovered by the plaintiff in a different action between the same parties for damages for fraud exercised by the land company in the sale of the same real property was received in evidence upon the trial of this case. Judgment was rendered in favor of the plaintiff, requiring specific performance of the contract. The judgment in the fraud case was competent evidence in the suit for specific performance, as an offset to show satisfaction of the alleged unpaid installment, entitling the purchaser of the property to a deed of conveyance pursuant to the contract. It tended to prove he was not indebted to the defendant for unpaid installments, or otherwise. The Supreme Court does say that defendants' failure to plead the unpaid installment on the purchase price of the land as a counterdemand in the other suit for damages for fraud, constitutes a waiver of that claim, on the principle that "the judgment operates as res judicata, not only in regard to the existence of the plaintiff's cause of action, but as to the nonexistence of the defense which was not pleaded." This is not in conflict with the foregoing determination that prospective damages for fraud in procuring a contract for sale of real property may not properly be pleaded as a defense to a suit for ejectment after the contract has been rescinded. The Elm Case, supra, is based upon an affirmance of the contract by all the parties concerned. The present case is based upon a cancellation of the contract for default in the performance of its terms, and an independent suit of ejectment for mere possession of the premises.

For the reasons that the fraud alleged in the answer and cross-complaint furnishes no defense to the suit for ejectment in this case, the judgment must be affirmed. It is so ordered.

We concur: PULLEN, P. J.; PLUMMER, J.

On Application for Rehearing.

PER CURIAM.

On petition for rehearing it is conceded by respective counsel that it was their intention that the stipulation of facts upon which this appeal was heard and determined was not to bar the right of appeal on its merits. Pursuant to this stipulation the opinion is hereby modified by striking therefrom the paragraphs beginning with the language: "The stipulation of facts" found in line 10 from the bottom of page 880, volume 72, California Appellate Decisions, to and including line 15 from the top of page 881 thereof. The following language is also stricken from the succeeding paragraph, to-wit: "and because the right of appeal was waived by consenting to the decree."

With this modification the petition for rehearing is denied.

NEVADA LAND & INVESTMENT CORPORATION (a Corporation), Plaintiff and Respondent, v. V. E. MUSSER and May Musser, His Wife, Defendants and Appellants. *

Civ. 4781.

District Court of Appeal, Third District, California.

Feb. 20, 1933.

Rehearing Denied March 22, 1933.

Hearing Granted by Supreme Court April 20, 1933.

Appeal from Superior Court, Sutter County; Eugene P. McDaniel, Judge.

A. G. Bailey, of Woodland, for appellants.

Rich, Weis & Carlin, of Marysville, for respondent.

PER CURIAM.

This is a suit in ejectment for possession of land after cancellation of a contract for the sale thereof because of default in the payment of stipulated installments.

The record on appeal in this case is similar to that which is involved in Nevada Land & Investment Corporation v. Z. R. Sistrunk et al., 19 P.(2d) 245, in which an opinion of this court was this day filed. This appeal involves the same isues which were determined in that case.

Upon the authority of that case, the judgment is affirmed.

*For subsequent opinion see 30 P.2d 392.

129 Cal.App. 668

WACKER v. GRAUBERGER.

Civ. 7302.

District Court of Appeal, Second District, Division 2, California.

Feb, 17, 1933.

1. Appeal and error ⚿173(2).

Contention that judgment for plaintiff on note should be reversed because plaintiff's counsel were at one time legal advisers of both parties, and because of undue influence, could not be sustained, where such matters were not pleaded.

2. Bills and notes ⚿49.

Contention that accommodation signer of commercial paper was not liable thereon *held* untenable.

3. Jury ⚿25(2).

Defendant *held* not entitled to jury trial where counsel did not ask therefor in compliance with rules of trial court.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by John Wacker against Lena R. Grauberger. Judgment for plaintiff, and defendant appeals.

Affirmed.

Edwin J. Miller, of Los Angeles, for appellant.

Light & Lane and J. E. Light, all of Los Angeles, for respondent.

WORKS, Presiding Justice.

This is an action to recover on two promissory notes. Judgment was for plaintiff, and defendant appeals.

[1] Appellant contends that a reversal of the judgment should occur, for the reason that counsel for respondent were at one time the legal advisers of both parties. The contention is idle, for neither the amended answer nor the amendment thereto, upon which the action was tried, presents any such issue. Moreover, the trial court found that all the allegations of the two pleadings were untrue, and it is not made a point here that the findings are not supported by the evidence.

A claim is made that undue influence was exerted by respondent over some matters relating to the question whether appellant should pay the notes, and touching upon other matters extraneous to the real points in the cause. This point is settled by the situation referred to in the disposition of the point just considered.

[2] Counsel next makes the point that an accommodation signer of commercial paper is not liable upon it. This point is untenable.

[3] The last point advanced is that appellant was denied a jury trial. She was not entitled to one, for the reason that her counsel did not ask for it under compliance with the rules of the trial court upon the subject.

Readers of this opinion may perceive that appellant has suffered sufficiently already, and that we should not increase her burdens by imposing a fine for the frivolous appeal prosecuted here by her counsel. At any rate, that is the conclusion we have reached in the premises.

Judgment affirmed.

We concur: CRAIG, J.; ARCHBALD, Justice pro tem.

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129 Cal.App. 720

PEOPLE v. HAWKINS.

Cr. 2251.

District Court of Appeal, Second District, Division 1, California.

Feb. 20, 1933.

Burglary ⚿41(3).

Evidence that accused was in house without knowledge of householder and that when discovered threatened householder with death if she made outcry sustained implied finding of entry with intent to commit larceny.

Appeal from Superior Court, Los Angeles County; William C. Doran, Judge.

Elmo Hawkins was convicted of burglary, and he appeals.

Affirmed.

Gladys Towles Root, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Alberta Belford, Deputy Atty. Gen., for the People.

YORK, Justice.

This is an appeal by defendant from a judgment of conviction of the crime of burglary, and from an order denying motion for a new trial.

The defendant appeals upon the ground that there was no evidence that the defendant entered "with intent to commit theft, larceny or any felony of whatsoever nature." "That there was no evidence that while defendant was in said house he did commit theft, larceny or any felony whatsoever." There was evidence that the defendant was discovered in the house that was occupied by the complaining witness and her family; that he was there without her consent and without her knowledge until he disclosed his presence by making a noise; that upon her hearing a noise on the stairs in her house, she looked to see who it was and saw the defendant and that the defendant said to her. "Don't make any noise; don't holler, God damn it, or I will kill you."

The evidence in this case against the defendant is amply sufficient to sustain the implied finding of the jury that his entry into the house of the complaining witness was an entry made with intent to commit the crime of larceny. People v. Espalian, 92 Cal. App. 610, 268 P. 702.

The judgment is affirmed. The order denying motion for new trial is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

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130 Cal.App. 15

In the Matter of Application of Al CASTUERAS for a Writ of Habeas Corpus.

Cr. 2345.

District Court of Appeal, Second District, Division 1, California.

Feb. 23, 1933.

Application for writ of habeas corpus prayed to be directed to the Sheriff of Santa Barbara County to secure release of petitioner on the ground of illegal detention.

Petitioner discharged.

W. J. Galbraith, of Santa Barbara, for petitioner.

Percy C. Heckendorf, Dist. Atty., of Santa Barbara, for respondent.

CONREY, Presiding Justice.

It appearing from a consideration of the petition for the writ, and from the return to the writ heretofore issued herein, that the complaint filed in the justice's court did not state facts sufficient to constitute a public offense, and it further appearing that, for the reason above stated, the commitment under which petitioner is held in custody is void, it is ordered that the petitioner be discharged from custody. Penal Code, § 647, subd. 7.

I concur: HOUSER, J.

YORK, Justice (dissenting).

I dissent for the reason that the complaint herein alleges that the defendant "was then and there an idle person and did then and there lodge in an outhouse of the Biltmore Hotel, without the permission of the owner." There was no demurrer interposed, and it is my opinion that the allegation that it was without the permission of the owner would presume, in the absence of a demurrer, that it was without the permission of the person entitled to possession, by reason of the fact that the owner, unless the contrary is alleged or proved, is entitled to the possession of property. It would take evidence to show that the owner of property was not entitled to possession of property owned.

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129 Cal.App. 694

SMITH et al. v. WAGNER.

Civ. 822.

District Court of Appeal, Fourth District, California.

Feb. 17, 1933.

Appeal and error ⟹794.

Stipulation as to when briefs of parties should be filed *held* abandonment by appellees of prior motion to dismiss appeal.

Appeal from Superior Court, Kern County; Allan B. Campbell, Judge.

Action by Ben Smith and another against Frank Wagner. From judgment for plaintiffs, defendant appeals. On respondents' motion to dismiss appeal.

Motion denied.

Borton & Petrini, of Bakersfield, for appellant.

Walter W. Hoye, of Los Angeles, for respondents.

MARKS, Justice.

On December 21, 1932, respondents filed a notice of motion to dismiss this appeal, or affirm the judgment, on the ground that the appeal is taken for delay only, and that the questions on which the decision of the case depends are so unsubstantial as not to require further argument. The motion was made and argued before this court on January 10, 1933.

We find that on January 26, 1933, counsel filed in the office of the clerk of this court the following stipulation: "It is hereby stipulated by and between the parties hereto that the appellant may file a supplemental opening brief in the above appeal within fifteen days after decision upon respondents' motion to dismiss. The respondents may have thirty days thereafter within which to make any supplement to their reply brief, and that the appellant have fifteen days thereafter within which to file his closing brief."

We construe this stipulation, in effect, a virtual abandonment of the motion. It is apparent the appellant intends to file a supplemental opening brief. We do not deem it necessary to search the record for any errors not now argued in order to determine whether there may be substantial grounds not presented in the opening brief upon which he may ask a reversal of the judgment.

The motion to dismiss is denied.

We concur: BARNARD, P. J.; JENNINGS, J.

ARON v. LEAVY, Controller. *

Civ. 8727.

District Court of Appeal, First District, Division 2, California.

Feb. 20, 1933.

Hearing Granted by Supreme Court March 20, 1933.

Appeal from Superior Court, City and County of San Francisco; C. J. Goodell, Judge.

On rehearing.

Rehearing denied.

Prior opinion, 18 P.(2d) 428.

John J. O'Toole, City Atty., and Frank L. Fenton, both of San Francisco (Vincent W. Hallinan, Michael Riordan, W. Earl Shafer, and C. K. Bonestell, all of San Francisco, of counsel), for appellant.

M. James McGranahan, of San Francisco, for respondent.

PER CURIAM.

In the petition for rehearing, appellant calls our attention to the fact that in the opinion heretofore filed, a portion of subsection 2 of subdivision B of section 11 of article XIII of the charter was set forth but that another portion of said subsection was omitted. Said subsection in its entirety reads as follows: "2. Persons employed in the operating service of any public utility acquired by the city who have been so employed for not less than one year; and such persons so employed at the time a public utility is acquired by the city shall continue in their positions." In our opinion, neither said subsection nor any part thereof has any bearing on the question before us. It is found in article XIII, which is entitled "Civil Service," and which prescribes the general civil service regulations together with certain exemptions and preferences. The mandatory provisions of section 2 of article XVI, which are quoted in the opinion, apply to all persons, with certain exceptions found in said section, regardless of whether said persons are exempted from or given preference under the general civil service provisions found in said article XIII.

The petition for rehearing is denied.

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129 Cal.App. 610

PACHECO et al. v. SOUTHERN PAC. CO. et al.

Civ. 8552.

District Court of Appeal, First District, Division 2, California.

Feb. 15, 1933.

1. Street railroads ⚷117(8).

Evidence of negligent operation of suburban electric train at street intersection *held* insufficient to take case to jury.

There was no evidence that train was being operated at a negligent rate of speed, that equipment was defective in any respect, or that engineer was incompetent or careless in any manner, and evidence disclosed that whistle and bell on train were operated from a distance of a block or more from intersection at which collision with automobile truck occurred.

2. Street railroads ⚷99(12).

Motorist who, after stopping at intersection in obedience to arterial stop sign where he could not see approaching suburban electric train, proceeded to cross tracks without again stopping, *held* contributorily negligent as matter of law.

3. Street railroads ⚷99(12).

Motorist's duty to stop, look, and listen requires that stop be made at point where approaching train may be seen, and was not fulfilled by merely stopping at arterial street sign where train could not be seen.

4. Street railroads ⚷113(7).

Exclusion of evidence that motorist was not dead when picked up from under train *held* not error as against contention that such evidence showed continued negligence in failing to stop train sooner.

Proof disclosed that deceased had been carried about 350 feet from point of collision and that he died as result of collision, and plaintiffs suing for his death argued that, if they could have shown that deceased was not dead at very moment when he was taken from under train, this would have been evidence of continued negligence on part of defendant in operating train and would have tended to

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⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 27 P.2d 377.

show that, if train had been stopped sooner, deceased might not have been killed. Exclusion of such testimony was not error because question whether deceased would not have been killed if train had been sooner stopped was purely conjectural.

Appeal from Superior Court, Alameda County; E. C. Robinson, Judge.

Action by Joaquin Pacheco and others, minors, by their guardian ad litem, Mary Pacheco, and others, against the Southern Pacific Company and another. From a judgment of nonsuit, plaintiffs appeal.

Affirmed.

George Ingraham, of Oakland, for appellants.

Elliott Johnson, of San Francisco, for respondents.

NOURSE, **Presiding Justice.**

Plaintiffs sued as heirs of Antonio Pacheco, deceased, for damages for his death caused in a collision with a train operated by defendants. At the close of plaintiffs' case a nonsuit was granted. Plaintiffs appeal upon typewritten transcripts.

[1, 2] Deceased was operating an automobile truck southerly on Grove street at the intersection with Seventh street in the city of Oakland. Defendants were operating an electric suburban train westerly on Seventh. Seventh street is 60 feet wide. Grove is 45 feet wide. Both streets were paved with asphalt and were practically level. The day was clear and the streets were dry. At the point of collision the railway company had maintained a double track system for more than fifty years, operating thereon both steam and electric trains. The approach of these trains was visible for more than a mile easterly of the intersection. Before the collision the city authorities had made Seventh street an arterial and red "stop" signs were maintained at the appropriate corners. As deceased approached the intersection he stopped or slowed down before entering the arterial, but from that point on continued without stopping and without change of speed directly in front of the approaching train, which collided with his truck and carried him about 350 feet before the train was brought to a stop.

The motion for nonsuit was based upon two grounds—failure to prove negligence on the part of the defendants, and proof of contributory negligence on the part of the deceased. The order granting the motion was sound upon both grounds. There was no evidence that the train was being operated at a negligent rate of speed, that the equipment was defective in any respect, or that the engineer was incompetent or careless in any manner. The evidence disclosed that the whistle and bell of the train were operated from a distance of a block or more from the intersection.

[3] The evidence of contributory negligence brings the case squarely within the rule of Koster v. So. Pac. Co., 207 Cal. 753, 761, 279 P. 788, and Young v. Pac. Elec. R. Co., 208 Cal. 568, 577, 283 P. 61. There is some confusion in the arguments of counsel relating to the evidence as to deceased's stopping at the arterial. Appellants assume that if they had shown a stopping at that point their case was complete. But the duty to stop at the arterial was in response to a state regulation relating to vehicular traffic in general. The duty to stop before crossing the railway tracks was in response to a well-settled rule of conduct covering such crossing. This duty to "stop, look, and listen" requires that the stop be made at a point where the approaching train may be seen—at a point where the driver may ascertain whether the crossing can be made in safety. If, as is conceded here, the approaching train could not be seen by one stopping before entering the arterial, then it was his duty to stop at some point in the intersection where the approaching train could be seen. The evidence is undisputed that no such stop was made. Hence, we have a case of contributory negligence as matter of law, upon which Hughes v. Atch., T. & S. F. R. Co., 121 Cal. App. 271, 8 P.(2d) 853, is directly in point.

Respondents present their case chiefly on the theory that the last clear chance doctrine is involved. In their reply brief the appellants insist that they do not rely upon that doctrine. We are satisfied that the evidence is insufficient to warrant an application of that doctrine.

[4] Objection is made to the ruling of the trial court sustaining the objection to appellants' effort to prove that deceased was not dead when picked up from under the train. Proof had been made that the deceased had been carried over 300 feet from the point of the collision and that he died as a result of the collision. Appellants argue that, if they could have shown that deceased was not dead at the very moment when he was taken from under the train, this would have been evidence of continued negligence on the part of respondents and would have tended to show that if the train had been stopped sooner deceased might not have been killed. We find no error in the ruling because we could concede that deceased was not dead at the time in question and still appellants' theory would be purely conjectural.

The judgment is affirmed.

We concur: **STURTEVANT, J.; SPENCE, J.**

129 Cal.App. 734

ALLEN v. POLICY HOLDERS' LIFE INS. ASS'N.

Civ. 8688.

District Court of Appeal, Second District, Division 1, California.

Feb. 21, 1933.

Dismissal and nonsuit 🔑6.

Dismissal of plaintiff's action without prejudice was proper, notwithstanding at close of plaintiff's case defendant had made motion for judgment on pleadings and for nonsuit, and court had taken motion under advisement (Code Civ. Proc. § 581, subd. 4).

Appeal from Superior Court, Los Angeles County; Guy E. Bush, Judge.

Action by Ruth Allen against the Policy Holders' Life Insurance Association. From order dismissing plaintiff's action without prejudice, defendant appeals. On respondent's motion to dismiss appeal or affirm order.

Appeal dismissed, and order affirmed.

Hugh Martin Young, Charles D. Warner, and Thomas W. Hughes, all of Los Angeles, for appellant.

S. S. Hahn and W. O. Graf, both of Los Angeles, for respondent.

HOUSER, Justice.

Motion to dismiss appeal or to affirm order or judgment from which appeal is taken.

The appeal is "from an order dismissing the plaintiff's action upon motion made therefor by plaintiff's counsel."

As stated by appellant in its brief herein: "The only question involved on this appeal is: Can the plaintiff, after she has closed her case, and after a motion for judgment on the pleadings and a motion for nonsuit has been submitted by the defendant to the court, and such motion has been argued and taken under advisement, dismiss her action without prejudice, and thus defeat the defendant's right to have the trial judge rule explicitly and directly upon the previous motions of the defendant?"

Subdivision 4 of section 581 of the Code of Civil Procedure, under the provision of which the order in question was made, in effect is as follows: "An action may be dismissed, or a judgment of nonsuit entered * * * by the court, when, upon the trial and before the final submission of the case, the plaintiff abandons it. * * *"

Although in some of the jurisdictions of the United States the position assumed by the appellant may be the accepted rule, by the preponderance of authority, and especially by the weight thereof in this state, the power of the trial court in the premises to order the dismissal of the action is fully attested by the follownig cases: Franks v. Cesena, 192 Cal. 1, 218 P. 437; Westbay v. Gray, 116 Cal. 660, 48 P. 800; Strupelle v. Strupelle, 59 Cal. App. 526, 211 P. 248; Menotti v. Marchesi, 63 Cal. App. 49, 218 P. 439, and see note in 79 A. L. R., pages 690 et seq.

The appeal is dismissed, and the order or judgment is affirmed.

We concur: CONREY, P. J.; YORK, J.

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129 Cal.App. 592

WATSON v. KELLOGG et al.

Civ. 4470.

District Court of Appeal, Third District, California.

Feb. 14, 1933.

1. **Frauds, statute of** 🔑56(9).

Partnership to deal in realty may be created by parol.

2. **Partnership** 🔑53.

In action for accounting between partners, evidence *held* to sustain finding that plaintiff and defendant entered partnership agreement to deal in realty.

3. **Partnership** 🔑328(3).

In action for accounting between partners who had entered partnership agreement to deal in realty, evidence *held* to support finding that specified lot taken in name of defendant's daughter which sold for profit was partnership affair.

4. **Partnership** 🔑328(3).

In action for accounting between partners, evidence *held* to justify finding as to amount due plaintiff from sale of a lot.

5. **Partnership** 🔑344.

In action for accounting between partners, money judgment was properly rendered against defendant for plaintiff's share of profits from defendant's sale of lot, notwithstanding "paper items" received on purchase price had not been reduced to cash.

> Money judgment was properly rendered against defendant, notwithstanding the "paper items" received as part of purchase price had not been reduced to cash, where there was nothing in record to indicate that such paper was not worth its face value, and where there remained no

partnership property to liquidate; the "paper" mentioned being the personal property of defendant and not partnership profits.

6. Partnership ⚷344.

Generally, personal judgment cannot be rendered against one of partnership until partnership property has been converted to cash.

7. Partnership ⚷333.

In action for accounting between partners, interest on money not turned over to plaintiff when it should have been *held* properly allowed.

8. Partnership ⚷342.

In action to dissolve realty partnership for which no definite term was specified, refusing dissolution where lots purchased pursuant to partnership agreement had not been sold *held* not prejudicial to plaintiff (Civ. Code, § 2425, subd. 1 (b).

Refusing dissolution in such case was not prejudicial to plaintiff, since, when such lots should be sold, plaintiff could have a further accounting, and since partnership for which no definite term was specified could be dissolved, under provisions of Civ. Code, § 2425, subd. 1 (b), at any time by the express will of either partner.

9. Partnership ⚷342.

In action for accounting between partners who were realty dealers, refusing plaintiff relief as to unsold lots which defendant took in daughter's name to evade paying plaintiff his due *held* proper, notwithstanding defendant might hold lots indefinitely.

Facts disclosed that under the terms of the partnership agreement plaintiff was to use his knowledge of realty and to locate and to recommend to defendant parcels of realty for purchase by partnership, that defendant was to furnish money for such purpose, and that plaintiff and defendant were to divide profits equally when lots were sold, so that partnership was only interested in any profits made from a resale thereof, the lot acquired not being the property of the partnership but the individual property of defendant.

Appeals from Superior Court, Los Angeles County; Marshall F. McComb, Judge.

Action by Thomas D. Watson against F. W. Kellogg and others. From the judgment rendered, plaintiff and named defendant appeal.

Affirmed.

Jones, Stephenson, Palmer & Moore, of Los Angeles, for plaintiff and appellant.

W. Joseph Ford, J. F. Moroney, and Patrick F. Kirby, all of Los Angeles, for defendant and respondent.

TUTTLE, Justice pro tem, delivered the opinion of the court.

This is an action for an accounting between partners, and also to have certain real property, held in the names of third parties, adjudged to belong to the partnership. A dissolution of the partnership was also prayed for. The judgment of the court established the partnership, and the sum of $2,777.57 was awarded to plaintiff as his share of the profits. As to the real property held by the third parties, it was found that the partnership had no interest therein. Plaintiff and defendant F. W. Kellogg was each dissatisfied with the outcome, and each has appealed from the judgment.

The following findings of the court are assailed as not supported by the evidence:

"III. That on or about the 8th day of October, 1921, in the city of Glendale, California, said plaintiff and said defendant F. W. Kellogg formed and entered into a verbal partnership agreement for the buying, handling and selling of real estate in the city of Glendale, California; that at the time said partnership agreement was formed, plaintiff was a resident of the city of Glendale, California, and the defendant F. W. Kellogg was a resident of the city of Altadena, California; that under the terms of said partnership agreement plaintiff was to use his knowledge of values of real estate and to get the aid of others who knew the values of real estate in said city of Glendale and to locate and recommend to the defendant F. W. Kellogg pieces of real property in said city of Glendale for the purchase of the same by said partnership; that said plaintiff was to use his knowledge of realty values and give his time and his labor in connection therewith, and said defendant F. W. Kellogg was to finance with his money or his credit, or both, the purchase and handling of such pieces of real estate, so found and presented by the plaintiff to him, and which were deemed by the plaintiff and defendant F. W. Kellogg to be good properties to be purchased and handled for profit by the said partnership; that under the terms of said partnership agreement said plaintiff and said defendant F. W. Kellogg were to divide equally when the properties were sold all profits derived from the sale or sales.

"IV. That on or about said 8th day of October, 1921, plaintiff and said defendant F. W. Kellogg, as such partners and not otherwise, commenced to carry on in said city of Glendale said real estate business of said partnership."

[1, 2] A partnership, such as is described in this finding, may be created by parol. Ar-

nold v. Loomis, 170 Cal. 95, 148 P. 518. An examination of the evidence shows that there is abundant evidence to sustain the finding. For instance, plaintiff testified as follows: "Mr. Kellogg said, 'Captain Watson, what do you think about us going into a partnership for the purchase of several business properties, preferably on Brand Boulevard?' * * * Then I replied that I would like to very much, and asked him what I would have to do in it. He said, 'You procure the properties, use your knowledge of real estate and find out where the properties are and submit them to me and we will talk them over and if we decide they are good buys we will buy them and I will furnish the money—either the money or the credit.' And I asked Mr. Kellogg again how about the profits, and he says, 'We will divide the profits between us fifty-fifty.'"

Two days after this conversation, the plaintiff had a conversation with the defendant F. W. Kellogg in an automobile in front of the Glendale Press building, as follows: "I told Mr. Kellogg of two properties, lots 43, which was listed with Mr. Kelly by Mrs. Orff— * * * Lot 43 in the Glendalia Park tract and another property which Mr. Kelly had listed belonging to Lawson and Becker, Edna M. Lawson and Morea M. Becker— * * * Lot 46 and the north half of Lot 45. * * * I told him the price; the price of lot 43 was $10,000 at that time, and the price of the 25 feet of lot 45 and 50 feet of lot 46 was $15,000. And I told him that I considered the properties very good buys and he agreed with me they were good buys and for me to see what I could do about buying them * * * for the partnership."

Again plaintiff testified as follows: "I told Mr. Kellogg that the purchase was made with the understanding that the street bonds should be taken care of, and that was all at that time. So when we went up to the escrow Mr. Kellogg told Mr. Kelly that under no circumstances would we stand the street bond, and Mr. Kelly turned to me and he says, 'Watson, why don't you stand it?' And Mr. Kellogg says, 'What difference does it make whether he stands it or I stand it? It is the same thing, because we are partners in this purchase.'"

Witness Baker also testified that defendant Kellogg told him that Capt. Watson and he were partners.

The trial court found that under this partnership agreement the parties bought and sold lot 43 in Glendalia Park tract, Los Angeles county, and lot 46 in the same tract, and that plaintiff was entitled to receive, as one-half of the net profit from the sale of lot 43, the sum of $1,214.13, and also the sum of $1,563.44 as one-half of the net profit from the sale of lot 46.

[3] Appellant Kellogg contends that there is no evidence to support the finding that lot 43 was purchased by the partnership, or that it was sold at any profit. The court found that this lot was purchased by the partnership, and that the net profit resulting from said sale was $2,428.26, and that plaintiff was entitled to judgment for one-half thereof, or $1,214.13. The evidence is sufficient to support such findings. The title to this property was taken in the name of defendant Kellogg's daughter, Dorothy McKellar, and appellant Kellogg contends that it was not a partnership affair. The trial court held otherwise, upon sufficient evidence. It is shown beyond dispute that plaintiff first brought the purchase of this property to the attention of Kellogg, and arranged the terms of purchase. In the presence of the escrow clerk in the bank and of plaintiff, Kellogg stated, in answer to a question by the clerk as to who should stand certain expenses, either himself or plaintiff: "What difference does it make whether he stands it or I stand it? It is the same thing, because we are partners in this purchase." There is evidence to the effect that the property was taken in the name of the daughter in order to facilitate the financing of the deal upon the part of Kellogg. The trial court evidently concluded that the taking of the property in the name of Kellogg's daughter was a mere subterfuge, and this would appear to be correct. It was conceded that the property was bought for $10,500 and sold for $13,500. This leaves a gross profit of $3,000. The computation of expenses is not disputed, and there is ample evidence to sustain a finding that the amount of net profit due plaintiff was $1,214.13.

[4] The next contention is that the evidence is not sufficient to support a finding that the share of net profits due plaintiff from the sale of lot 46 was $1,563.44. The evidence shows without dispute that this property, together with the adjoining half of lot 45, was purchased by the copartnership for $15,000. Thereafter lot 46 was sold for $13,500. It was stipulated that the market value of lot 46 was $10,000. As these two parcels were bought for $15,000, and it was agreed that the market value at that time of lot 46 alone was $10,000, the court found that the gross profit from the sale was $3,500. In other words, in the absence of direct evidence of the cost of this lot 46 alone, the court inferred that the cost was its market value at the time of the purchase. These two lots were adjacent and had a combined frontage of 75 feet. The price paid for both was $15,000, or $200 a front foot. Lot 46 had a frontage of 50 feet. There is nothing in the record to indicate that there was any difference in value, per front foot, between these two lots. We believe that the method of arriving at the cost of lot 46 was proper, and that the evidence supports the finding upon this point.

[5, 6] The chief complaint made by appellant Kellogg in respect to the finding as to the profit made upon this sale is that Kellogg did

not receive cash, but took, as the purchase price, the north half of lot 45, a mortgage for $8,000 upon lot 46, stock in the Glendale Press worth $700, and some cash. Mr. Kellogg put some $9,000 in cash in the deal, they state, and had less than $500 in cash when the deal was concluded. Of $7,500 paid to Kellogg in escrow, $6,000 was devoted to paying off two mortgages. After the payment of expenses he had some $500 remaining. It is appellant Kellogg's contention that the court erred in rendering a money judgment against him for plaintiff's share of the net profits ($1,563.44); that no such judgment could be rendered until the "paper items" received as part of the purchase price were reduced to cash, and that, until that was done, there was no "profit" whatever to any one. He argues that one partner is given cash, while the other is compelled to take "paper," which included an $8,000 mortgage upon the lot. There is nothing to indicate, in the record, that this "paper" was not worth its face value, and the trial court was justified in assuming that it was. To say that a portion of the profit was not in cash, but was in "paper" which was worth its face value in cash, is an attempt to draw a distinction which is too finely spun for the conduct of ordinary business affairs, nor should even a supertechnical judiciary lend its ear to such a plea. Here appellant Kellogg repudiated the partnership, and retained all profits for himself, and even attempted to put the transaction through in the name of his daughter in order to evade liability. He may possibly have to liquidate some of his "paper" to pay the judgment, but that is no hardship compared to the situation of plaintiff if this argument is to prevail. The latter would have to wait, possibly years, to secure his profit, if no payments were legally due until this "paper" matured. It is true, as appellant Kellogg states, that "as a general rule a personal judgment cannot be rendered against one of the partners until the partnership property has been converted to cash." 47 C. J. p. 1266. But the "paper" mentioned is the personal property of Kellogg, and not partnership property. The partnership was formed for the buying and selling of real property, and Kellogg was to furnish the capital. The transaction in buying and selling was a partnership affair, and any profits arising therefrom were to be equally divided. The rule does not apply, because not only was the equivalent of cash received by Kellogg, but because there was no partnership property to liquidate.

[7] Interest upon the amount found due was properly allowed, as the money was not turned over to plaintiff at the time it should have been paid, and consequently the withholding was wrongful. 33 C. J. p. 203.

Other questions are raised by appellant, but they do not merit extended discussion.

[8] Taking up the appeal of plaintiff Watson, he complains because the court did not order a dissolution of the partnership. In his complaint he charged that two other lots, Nos. 44 and 45, were acquired by the partnership, and now stand in the name of Florence Scripps Kellogg. He asked that she be declared to hold said property in trust for him. The court found that these lots were never partnership property, and that they had not been sold or turned into profits. The evidence supports this finding. The court also found that these lots were purchased pursuant to the partnership agreement, and the evidence supports this view. We believe that the trial court acted properly in refusing to dissolve the partnership. When these lots are sold, a further accounting may be had. The partnership should be held open until such time. We cannot see that any prejudice has resulted to plaintiff through the failure of the court to order a dissolution. In fact, it would appear that such action would benefit plaintiff. Furthermore, this being a partnership where "no definite term or particular undertaking is specified," it can be dissolved at any time by the express will of either partner. Civ. Code, § 2425, subd. 1 (b).

[9] Plaintiff complains of the action of the court in failing to give him any relief in respect to lot 44 and the south half of lot 45. It must be remembered that this action is for an accounting, and, as these lots had not been sold, there were no profits from this transaction. It may be true that defendant can hold these lots indefinitely, but this contingency cannot affect the situation. If the action were for damages occasioned by a conspiracy between Kellogg and his daughter, some other character of relief might be available. 47 C. J. p. 811, par. 261. The title to these lots was taken in the name of the daughter, and the court found that Kellogg proposed to erect a building thereon to house a newspaper published by a corporation in which he was the principal stockholder. From the findings of the trial court, the conclusion may be readily drawn that Kellogg was again using his daughter as a sham to evade paying plaintiff what was justly due him for his efforts in assisting Kellogg in acquiring the property. No cause of action predicated upon such facts is set forth by plaintiff.

The trial court properly held that plaintiff had no right, title, or interest in lot 44 and the south half of lot 45. Under the partnership agreement, Kellogg was to pay for any property acquired. The partnership was only interested in any profits made from a resale thereof. The land acquired was not the property of the partnership, but the individual property of Kellogg, and the finding of the court which we have quoted, establishing the partnership, should be so construed.

Appellant Watson, at the conclusion of his brief, requests this court to take additional testimony, under section 956a of the Code of Civil Procedure. Relief under this section can only be secured through a motion made pursuant to rule XXXVIII of the rules of the Supreme Court and the District Courts of Appeal. The request must be denied.

Other points raised by appellant Watson have been considered. Most of them have been disposed of in the consideration of other questions, and the remainder are without merit.

The judgment is affirmed.

We concur: **PULLEN, P. J.; R. L. THOMPSON, J.**

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129 Cal.App. 660

PEOPLE v. O'BRIEN.

Cr. 2244.

District Court of Appeal, Second **District,** Division 1, California.

Feb. 17, 1933.

Hearing Denied by Supreme Court March 17, 1933.

1. Criminal law ⚿192.

Defendant, returned to superior court for determination of degree of crimes, as ordered by appellate court, *held* not again put in jeopardy.

The superior court's first judgment, sentencing defendant to penitentiary on his pleas of guilty to charges of robbery, was entered without considering evidence on question of degree of crimes.

2. Criminal law ⚿1180.

Question of defendant's insanity, not properly raised in trial court after remittitur from appellate court, cannot be raised on second appeal.

Appeal from Superior Court, Los Angeles County; B. Rey Schauer, Judge.

Harry H. O'Brien pleaded guilty to robbery counts in two informations, and, from a judgment fixing the degree of the crimes, he appeals.

Affirmed.

Chas. B. Hazlehurst and Webster Hazlehurst, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Alberta Belford, Deputy Atty. Gen., for the People.

YORK, Justice.

Appellant pleaded guilty to one count in each of two informations which charged him with the crime of robbery. He also entered his plea of not guilty by reason of insanity. The two cases were tried together before the court upon the issue of insanity at the time of the commission of the alleged offenses; trial by jury having been waived. The court found that the appellant was sane, and denied his application for probation in both cases. The court also denied appellant's motions for new trial, and sentenced him to the state penitentiary for the crime of robbery for the period prescribed by law. Appellant took an appeal from the judgment of the court, maintaining that he was substantially prejudiced in his rights, because the trial court in its determination of the degree of his crimes considered no evidence of any kind. On March 25, 1932, judgment of this court was made and entered as follows: "In each appeal it is ordered that the order denying the motion for a new trial be and it is affirmed. Each of the judgments is affirmed, subject, however, to further determination of the degree of the several crimes. It is further ordered that defendant appear before the superior court for the purpose of having determined the degree of each of the crimes of which he pleaded guilty, and thereafter that in each action a new judgment be pronounced against him." People v. O'Brien, 122 Cal. App. 147, 159, 9 P.(2d) 902, 906.

Appellant was brought back from the state prison, and when the cases were called in the superior court, appellant by his counsel moved to file a plea of once in jeopardy, which motion was by the court denied. Thereafter, on June 1, 1932, new judgments were pronounced in accordance with the order of this court; the superior court fixing the crimes as robbery of the first degree, sentences on the two counts to run concurrently.

Upon this appeal, appellant maintains that the trial court committed error upon the second hearing when it denied him the right to enter a plea of former jeopardy and not guilty by reason of insanity.

[1] We are of the opinion that the first judgment rendered was merely irregular, and that the appellate court pursued the proper remedy when it ordered the appellant returned to the superior court for determination of the degree of his crimes and for sentence, and that therefore he was not again in jeopardy. In re Lee, 177 Cal. 690, 171 P. 958; In re Fritz, 179 Cal. 415, 177 P. 157; In re McCready, 179 Cal. 514, 177 P. 459; People v. Marshall, 209 Cal. 540, 289 P. 629.

[2] We are also of the opinion that the question of insanity of appellant at the time he was brought before the trial court after the remittitur from the appellate court was not properly raised, if at all, in the trial court, and therefore cannot be raised upon this appeal. See Rep. Transcript, p. 430.

The judgment appealed from is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

⚿For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

In re BROAD'S ESTATE.

BROAD v. WELLS FARGO BANK & UNION TRUST CO. et al.

Civ. 8642.

District Court of Appeal, First District, Division 2, California.

Feb. 17, 1933.

Hearing Denied by Supreme Court April 17, 1933.

1. Wills ⚷55(3).

Findings adverse to widow contending that testator had insane delusions regarding her property, character, and fidelity *held* supported.

2. Appeal and error ⚷502(1).

Judge cannot be charged with error in denying new trial, where record fails to show that affidavits set forth in clerk's transcript were called to judge's attention.

3. New trial ⚷102(1).

Failure to show ordinary diligence before trial to obtain evidence set forth in affidavits supporting motion for new trial is fatal.

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Separate petitions by Louise M. Broad and another to revoke the probate of the will of Alfred Fry Broad, deceased, opposed by the Wells Fargo Bank & Union Trust Company, as executor, and Gerald Jackson and others, legatees. From an adverse judgment or order, the named petitioner appeals.

Affirmed.

See, also, 14 P.(2d) 315.

Milton Marks, of San Francisco, for appellant.

Francis V. Keesling and Garton D. Keyston, both of San Francisco, for respondent Wells Fargo Bank & Union Trust Co.

Harry G. McKannay, of San Francisco, for respondents Harriet Kemp, legatees, etc.

STURTEVANT, Justice.

After the death of Alfred Fry Broad, his holographic will was admitted to probate. Thereafter his surviving widow, Louise M. Broad, filed a petition to revoke the probate of the will, and two days thereafter Ethel Broad Jackson, a daughter by a former marriage, filed a similar petition. After issue joined, a trial was had and findings were made against the petitioners. From the judgment duly entered on said findings the surviving widow has appealed.

[1] She contends that the evidence establishes that the deceased was possessed of insane delusions as to her character, fidelity, and financial possessions, and that he made a harsh, cruel, and unnatural will as a result of these delusions. Therefore she asserts that the findings are not supported by the evidence. At the time of making his will the decedent was about sixty years of age. He had been married twice. By his first wife he had a daughter, Ethel, one of the petitioners above named, but who has not appealed. Whether his first wife died or he was divorced from her has not been called to our attention. However, it appears that in 1922 he married Louise M. Broad, the other petitioner. Prior to their marriage Mrs. Broad had been the secretary and manager of the decedent in his business, which was that of a photographer and printer. She had accumulated at that time $4,000, or more, and had it on deposit in savings accounts. At the time of his death the decedent had accumulated $20,000, or thereabouts, which was his separate property. He wrote the will July 30, 1924.

In support of their petitions, the contestants introduced evidence tending to show that the decedent was under the delusion that individuals unknown were attempting to rob him and to poison him; that he was under the delusion that his wife was not true to her marriage vow, and that she was mercenary and quarrelsome; that he was under the delusion his wife was amply provided for by properties which she owned in her own right or by reason of certain expectancies; and that his sister, one of the defendants, was in poor circumstances. The defendants introduced evidence tending to show that the opinions entertained by the decedent were not insane, but were founded, at least in part, on existing facts. In support of their case, the petitioners called thirteen witnesses as intimate acquaintances, and each testified as to his opinion as to the mental sanity of the decedent. Some of those witnesses based their opinions on events not closely related in point of time to the date of the execution of the will. Some of them gave evidence as to the relations that existed between the decedent and his wife. Much of that evidence was negative; that is, it was to the effect they had never heard the wife quarrel with her husband. The petitioners also called one alienist and propounded to him a long hypothetical question. In reply that witness testified that the decedent at the time he executed the will was suffering from paranoic psychosis. On cross-examination the witness frankly admitted that, if certain facts assumed in the hypothetical question were not shown by the evidence, his opinion would be otherwise. The defendants called two intimate acquaintances. One, Mr. Howe, had known the decedent for many years, had done a great deal of business with him, and the two met frequently at lunch, and their communications one to the other were very intimate. The other witness, Mr. Maddux, had also known the decedent many years, had frequently visited at his home, and had camped with him on many occasions on hunting and fishing excursions which lasted from one to six weeks. The matters discussed by the two extended over a wide range of subjects. Both of these witnesses testified the decedent was of sound mind when they first knew him, and that there was no change in that condition. That the decedent was an eccentric person appeared from the testimony of several witnesses, but the most that can be said regarding the evidence is there was a conflict. By no means may it be said there was not some evidence to support the findings.

[2, 3] It is also claimed the trial court erred in denying petitioners' motion for a new trial. Our attention is directed to certain affidavits which are set forth in the clerk's transcript. It will suffice to state that the record does not disclose that the affidavits were called to the attention of the trial court. However, it should also be stated there was no showing on the part of the petitioners that, before the trial, they had exercised ordinary diligence to obtain the evidence set forth in said affidavits. Failure to make that showing is fatal to a motion for a new trial. Spiegelman v. Eastman, 95 Cal. App. 205, 217, 272 P. 761.

The order is affirmed.

We concur: SPENCE, Acting P. J.; GOODELL, Justice pro tem.

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130 Cal.App. 1

NIXON v. TORRANCE BRICK CO. et al.

Civ. 8763.

District Court of Appeal, First District, Division 1, California.

Feb. 23, 1933.

Hearing Denied by Supreme Court April 24, 1933.

1. Corporations ⚷123(5).

Evidence *held* to show pledge of corporate shares as collateral security for debt before levy of attachment.

2. Corporations ⚷149.

Mere addition of word "trustees" after name of person to whom stock is transferred raises no implication that he has no authority to sell or hypothecate it in usual course of business.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by S. E. Nixon against the Torrance Brick Company and others. From judgment for plaintiff, defendant Gem State Lumber Company, Incorporated, appeals.

Reversed.

Martineau & Stratton, of Los Angeles, for appellant.

Doyle, Clark, Thomas & Johnson, of Long Beach, for respondent.

BURROUGHS, Justice pro tem.

This is an action in equity brought by the California First National Bank of Long Beach, a corporation, through its assignee, S. E. Nixon, to compel the defendant Torrance Brick Company, a corporation, to issue its stock certificate for 115 shares of its capital stock to plaintiff and to quiet title to said stock as against the defendant Gem State Lumber Company, a corporation.

Plaintiff claims title by virtue of an attachment levied May 8, 1929, and an execution sale had in March, 1930, on a judgment rendered against the defendant William G. Reed.

Defendant Gem State Lumber Company claims a lien upon said stock by virtue of certain pledges thereof made by William G. Reed to said company until the debt secured thereby has been paid. Defendant William G. Reed defaulted. Defendant Torrance Brick Company disclaimed any interest in the subject-matter of the controversy. Judgment went for the plaintiff, and the defendant Gem State Lumber Company has appealed.

As stated by both the appellant and the respondent in their respective briefs, the sole question to be determined on this appeal is one of fact, viz.: Whether or not the defendant William G. Reed did before the 8th day of May, 1929 (the day plaintiff's attachment was levied thereon), pledge 115 shares of the capital stock of the defendant Torrance Brick Company to the defendant Gem State Lumber Company as security for a debt.

The evidence discloses without conflict that on the 18th day of May, 1928, said William G. Reed was indebted to the Gem State Lumber Company, a corporation, hereinafter called the lumber company, in the amount of $9,000 as follows: $4,000, money borrowed for personal purposes, and $5,000, money borrowed for the specific purpose of buying stock in a corporation then being organized. On the same day he gave a promissory note for the $4,000 debt, and executed a pledge for the payment of this debt. In the latter instrument, it is stated, he pledged as security four certificates of the capital stock of the Torrance Brick Company and recited the delivery of them as of that date. These four certificates were described therein as "118 shares of stock of the Torrance Brick Company, a corporation, evidenced by certificate #28 for fifteen shares, certificate #32 for three shares, certificate #25 for fifty shares and certificate #24 for fifty shares which said shares of stock were originally issued to the Beverly Building & Security Company, * * * and each certificate endorsed in blank and delivered to the undersigned and this day delivered to the said Gem State Lumber Company." After words of warranty the following direction occurs: "* * * and hereby authorizes and directs the said Gem State Lumber Company to deliver said certificates to the Torrance Brick Company and to accept new certificates either in its own name or in the name of the undersigned, as it shall elect." The instrument was dated May 18, 1928, and signed William G. Reed.

There was another pledge agreement executed by which 50 shares of the capital stock of the Reed Construction Company was pledged as security for the payment of the $5,000 note above referred to, but this pledge is not in controversy here.

The stock certificate No. 32 for three shares of the Torrance Brick Company's stock, above referred to, is not included in this suit, and need not be further referred to.

There was also a third pledge bearing date of May 18, 1928, whereby all of the above-named shares of stock of the Torrance Brick Company were pledged as security for the payment of the two notes above referred to in the total sum of $9,000. Defendant Reed testified that he signed this last-mentioned pledge agreement, but that it was signed by him on the 26th day of May, 1930, which was after the sale of the stock under the writ of execution in the suit, through which the plaintiff claims title. Other witnesses testified that this last pledge agreement was made and delivered on May 18, 1928. The court found that it was actually made at the time testified to by Reed. We see nothing in the record that renders the evidence given by Reed inherently improbable, and therefore the evidence discloses a substantial conflict upon which the finding of the trial court last referred to is based. Under well-settled rules of law we cannot disturb a finding so made.

The court found as a fact that on May 18, 1928, the defendant Reed executed and delivered to the Gem State Lumber Company the $4,000 note herein referred to, but that he did not contemporaneously or at any other time indorse or deliver to the said company the four certificates of stock of the Torrance Brick Company; the court also found that the Gem State Lumber Company had no right, title, or interest in said stock. The negative portions of these findings are attacked by appellant on the ground that they are without support in the evidence.

Evidence upon this subject is as follows: Mr. Merrill (attorney for Gem State Lumber Company) testified that he received these four certificates on the 18th of May, 1928, and on the same day inclosed them in a letter addressed to the Torrance Brick Company, at Torrance, Cal., asking that they be transferred on the books of the corporation to William G. Reed and immediately returned to the Gem State Lumber Company. Mr. Pullman, secretary of the Torrance Brick Company in 1928, identified the letter above referred to as having been received by said company, and it was produced from their files. It reads as follows: "(Letterhead of) Merrill & Merrill, Counselors and Attorneys at Law, Pocatello, Idaho, May 18th, 1928. Mr. Victor Pullman, General Manager, Torrance Brick Company, Torrance, California. Dear Mr. Pullman: We are enclosing herewith four certificates of stock being numbers 24, 25, 28 and 32 for a total of 118 shares of the capital stock of your company. You will find these certificates all endorsed. Please issue a new certificate for the total number of these shares to the order of William G. Reed and send same to us immediately. Sincerely yours, Merrill & Merrill. [Signed] A. L. Merrill, By F."

It was stipulated that the books of the Torrance Brick Company introduced in evidence show as follows: That certificates Nos. 24, 25, and 28 have each been torn from the book and subsequently repasted to the stubs; that certificate No. 24 for 50 shares was issued to the Beverly Building & Securities Corporation on May 14, 1927; that the purported assignment reads: "For value received I hereby sell, transfer and assign to Wm. G. Reed, Trustee, 50 shares, with the authorization to V. T. Pullman, Secretary, to transfer same." That the assignment is dated the 25th day of May, 1928, and signed, "Beverly Building & Securities Corporation, by E. Roy Davis, Secty. & Treasurer, witnessed by Catherine L. Davis"; that certificate No. 25 for 50 shares shows issuance to the same company, May 14, 1927, and shows the same assignment as No. 24; that neither the stubs nor the certificates show cancellation or receipts for the original issue of the stock; that the stub of certificate No. 36 for 115 shares shows that it was issued to William G. Reed, Trustee, May 25, 1928, and transferred from Beverly Building & Securities Corporation May 25, 1928; that the numbers of the original certificates were: 24 for 50 shares, 25 for 50 shares, 28 for 15 shares. And that certificate No. 36 for 115 shares was received the 25th day of May, 1928; that it was signed William G. Reed, and underneath the signature is the word "Trustee" in different ink from the words, "William G. Reed," and on the upper portion of the stub in red ink appears, "Pledge to Gem State Lumber Company per letter of June 5, 1928." Mr. Pullman testified in relation to this indorsement: "Yes, I have seen that writing on there; do not know whose writing; saw it first about a year ago; that was the first time I saw it because I didn't look into the books; I am out in the yard all the time; I was secretary in 1928." He testified further that he had no recollection of signing certificate No. 36, which was issued in lieu of the pledged shares, but recognized the signature as his; that he was not in the habit of writing any part of the stubs or certificates himself; that Miss Johnson and Mr. Davis did that type of work and these last-named employees left about a year ago; that he did not know if it was written by either Davis or Johnson—he did not know the handwriting of either of them. That no part of either stub or certificate was in his handwriting. In relation to this indorsement Mr. Sheldon, treasurer of the Gem State Lumber Company, testified that on the 5th day of June, 1928, he dictated a letter addressed to Torrance Brick Company, and he offered a carbon copy thereof in evidence. Mr. Pullman, secretary of Torrance Brick Company, produced the original letter from the files of the Torrance Brick Company, which is as follows: "(Letterhead of the Gem State Lumber Company) June 5, 1928. Torrance Brick Co., Torrance, Calif. Gentlemen: Attention Mr. V. S. Davis, Auditor This is to certify that Certificate No. 36 of the capital stock of the Torrance Brick Company for 115 shares, made payable to Wm. G. Reed, Trustee, has been pledged to us as collateral security. Please make a note of this upon your records. Very truly yours, Gem State Lumber Company per [Signed] A. O. Sheldon, Treasurer." Mr. Pullman testified that the letter came from the files of the Torrance Brick Company.

"Q. Was that received at your office in the regular course of business? A. Well, that I cannot say, because it was sent to our auditor; I didn't see it.

"Q. * * * All you know is that it appears in your files, in the files of the Torrance Brick Company? A. Oh, yes.

"Q. In the correspondence files? A. Yes."

Mabel Craig testified that she was a stenographer in the office of the Gem State Lumber Company and was such on June 5, 1928; that the letter last referred to was dictated to her by Mr. Sheldon; that she wrote it on the day of its date, and also mailed it on the same day. Defendants' Exhibit W is a letter taken from the files of the Torrance Brick Company. It is on the letterhead of the Gem State Lumber Company, dated May 28, 1929, and addressed to "Mr. V. S. Davis, Auditor, Torrance Brick Co., Torrance, Calif. Dear Sir: We are returning with this letter our letter of June 5th on which we overlooked placing a signature. Thanks for calling this to our attention. Yours truly, Gem State Lumber Company, per [Signed] A. O. Sheldon, Treasurer."

Respondent argues from this that the letter of June 5, 1928, was not sent until in May, 1929, after the attachment had been levied, and that the letter of May 28, 1929, supports this contention; that the letter of June 5, 1928, showed that it had been folded twice or three times and mailed more than once; that this condition of the letter supports their contention that there had been no pledge prior to May 8, 1929. We find no word in the evidence as to the condition of this letter as stated by counsel in his brief. His reasoning would, however, seem to us to confirm the idea that it had been mailed at the time of its date, remanded to sender to be signed and again mailed in May, 1929, after the attachment was levied, and we would logically infer that the Torrance Brick Company might have placed the red ink notation on the certificate immediately after the receipt of the letter, even though it was returned to sender for signature. The letter of May 28, 1929, in which the June 5th letter was returned to the brick company after the signature, obviously could not have reached the brick company before the levy of attachment, which was on the 8th day of May, 1929. However, it must be presumed to have been there for the greater part of a year before the sale took place in March, 1930. In November, 1930, Mr. Pullman testified (see supra) that he first saw it there about a year ago; that was the first time he saw it because he did not look into the book. This would mean that he first saw the red ink notation about four or five months before the execution sale under which the plaintiff claims title.

Defendant placed in evidence the original certificate No. 36, showing: No. 36 for 115 shares issued to William G. Reed and dated the 25th day of May, 1928. "(Seal: 'The Torrance Brick Company, Long Beach, California * * *') Attest V. T. Pullman, Secretary. William G. Reed, President." It was assigned to Gem State Lumber Company, "1st day of June, 1928. [Signed] William G. Reed. Witnessed by (signed) A. O. Sheldon." Mr. Sheldon testified that the assignment of certificate No. 36 was made on the date given therein. Mr. Reed admitted his signature, but asserts that he signed it in May, 1929, some time after the 8th day of May, 1929. He further testified that at the time of signing the certificate it was in the possession of the Gem State Lumber Company; that said certificate No. 36 was never in his (Reed's) custody; that it was sent when issued to Gem State Lumber Company. The testimony of Mr. Pettit, secretary and general manager of the Gem State Lumber Company, substantiates that of Mr. Merrill (supra) as to the actual delivery of the shares as recited in the pledges on the 18th day of May, 1928, and their delivery to Mr. Merrill to be sent to California. He also testified that the $9,000 pledge was signed May 18, 1928, in the afternoon, and that all three pledges were kept by the company as assets thereof, and that the two certificates, Nos. 32 and 36, were at all times kept in the custody of the company.

[1] Resolving all conflicts in favor of respondents, we must find that the evidence

shows without dispute that on May 18, 1928, Reed being owner and holder (through assignment *in blank* from the Beverly Building & Securities Corporation) of the three stock certificates, Nos. 24, 25, and 28, totaling 115 shares of stock in the Torrance Brick Company, and owner and holder of stock certificate No. 32 for 3 shares of the same stock (assigned to him, Reed, by V. Davis), did deliver physically to the officers of the Gem State Lumber Company these four certificates of stock (on May 18, 1928); that these certificates were sent to the Torrance Brick Company and thereafter the date of "25th of May, 1928" was added to the assignment on the back of each certificate; that these certificates were repasted to the stubs and that certificate No. 36 was then and there issued and immediately thereafter mailed to the Gem State Lumber Company; that while it was in their custody, Mr. Reed transferred this certificate No. 36 by assignment to Gem State Lumber Company on the 26th day of May, 1930, after the levy of attachment had been made. It further appears without conflict that the pledge of the original stock security for the $4,000 debt had been made and the exchange of the original three certificates for certificate No. 36 had also been made before May 8, 1929, and the pledge for the $4,000 debt and certificate No. 36 were both in the custody of Gem State Lumber Company at the time of the levy of the attachment. Conceding that certificate No. 36 had not been assigned at that time, and that the notice contained in the letter of June 5, 1928, was not transmitted until May 28, 1929, it is evident that the notification of the pledge was put upon the stub of No. 36 in the company books before the sale took place in March, 1930. Therefore appellant Gem State Lumber Company was on the 8th day of May, 1929 (when the levy of attachment was served), the holder and in the actual possession as pledgee of certificate of stock No. 36 for 115 shares of stock of the Torrance Brick Company as security for the $4,000 debt, and before the time of the sale in March, 1930, the notice of its claim as pledgee of this certificate No. 36 was placed upon the books of the Torrance Brick Company, and certificate No. 36 had been assigned to the Gem State Lumber Company by Mr. Reed.

As to the claim that the $4,000 pledge had been absorbed by the $9,000 pledge made after the attachment had been levied, we think there is nothing in the record upon which to base such a conclusion. The only evidence on the subject is given by the officers of the Gem State Lumber Company who claim to have kept all three pledges as assets of the company.

We are of the opinion that the evidence introduced by respondent to the effect that the Gem State Lumber Company did not inquire and knew nothing of the value of the stock cannot be accepted as substantial evidence that the pledge was not given and accepted. Respondent also claims that a conversation between Pettit and McCook, held on May 6, 1929, is an inference that no such indebtedness existed, and therefore there could be no pledge. This evidence, we think, is correctly analyzed by appellant as follows: "Pettit, the manager of Gem State Lumber Company, testified that McCook, president of California First National Bank of Long Beach, referring to Reed, asked: 'Does he owe you anything?' And that he, Pettit, replied, 'No.' That in answering McCook in the negative, he meant only that Reed was not indebted to him personally and that he had no reference to Gem State Lumber Company. McCook, on the other hand, apparently took Pettit's reply to mean that Reed was not indebted to Gem State Lumber Company, but he testified that he could not recall whether he 'specified particularly the Gem State' when asking about Reed's debts. The most that can be said for this testimony is that the two gentlemen obviously misunderstood each other."

The foregoing evidence, referred to by respondent, does not raise a substantial conflict, nor, as we view it, even an inference, as against the uncontradicted testimony of the other witnesses as above set forth, and the finding of the court that the $4,000 debt from Reed to the Gem State Lumber Company was incurred on May 18, 1928; that the promissory note and the pledge agreement to cover the same were executed and delivered together with the stock certificates properly indorsed on the same date. This view is supported by the following decisions: Field v. Shorb, 99 Cal. 661, 34 P. 504; Estate of Baldwin, 162 Cal. 471, 123 P. 267; 10 Cal. Jur. p. 1173, § 384, and cases therein cited.

[2] Respondent claims that on May 18, 1928, defendant Reed was not the owner of the certificates of stock of the Torrance Brick Company because they were not assigned to him until the 25th day of May, 1928, by the Beverly Building and Securities Corporation. It is a sufficient answer to say that the uncontradicted evidence shows that on the 18th day of May, 1928, the certificates, indorsed in blank, were in the possession of Reed, which was sufficient to place the title in Reed as of that date. Dover v. Pittsburg Oil Co., 143 Cal. 501, 77 P. 405; Cahlan v. Bank of Lassen County, 11 Cal. App. 533, 105 P. 765; Mancini v. Setaro, 69 Cal. App. 748, 232 P. 495; 6 Cal. Jur. p. 790, § 195. It is also contended that the assignment was to Reed as "Trustee." The mere addition of the word "Trustee," after the name of a person to whom stock is transferred, raises no implication that he has no authority to sell or hypothecate it in the usual course of business. Brewster v. Sime, 42 Cal. 139; Thompson v. Toland, 48 Cal. 99; Fletcher v. Kidder, 163 Cal. 769, 127 P. 73;

Northwestern P. C. Co. v. Atlantic P. C. Co., 174 Cal. 308, 163 P. 47.

The judgment must be, and it is hereby, reversed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

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129 Cal.App. 707

LUCKE v. PACIFIC ELECTRIC RY. CO. et al.

Civ. 604.

District Court of Appeal, Fourth District, California.

Feb. 18, 1933.

1. **Negligence 🔑136(9).**

Contributory negligence is question of fact for trial court's determination and becomes issue of law only when facts are clear and indisputable, and no other inference than that of contributory negligence can be drawn.

2. **Automobiles 🔑211.**

Motorist, having view of intersecting street obstructed by buildings, parked automobiles, and double parked truck, *held* not contributorily negligent in failing to see approaching street car before he entered intersecting street.

3. **Automobiles 🔑173(2).**

Driver leaving truck double parked in street in violation of ordinance, resulting in motorist's collision with street car, *held* negligent.

4. **Automobiles 🔑245(62).**

Proximate cause of motorist's collision with approaching street car when he attempted to get around double parked truck *held* for trial court.

5. **Automobiles 🔑201(9).**

Concurring negligence of motorists directly behind and ahead of motorist colliding with street car could not relieve defendants from liability of their driver's negligence in double parking truck in street so as to cause collision.

6. **Automobiles 🔑244(36).**

Evidence sustained finding motorist's collision with street car was caused by double parking of defendant's truck, and not by parking of motorists directly behind and ahead of injured motorist.

Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

Action by Everett Lucke against the Pacific Electric Railway Company, the Texas Company, Ralph De Armond, and others. From a judgment for plaintiff, the Texas Company and Ralph De Armond appeal.

Affirmed.

Edward C. Mills, of Los Angeles, for appellants.

Fred A. Wilson, of San Bernardino, for respondent.

JENNINGS, Justice.

This is an appeal by certain defendants from a judgment in plaintiff's favor and from the order of the trial court denying a motion of said defendants for a new trial. The action was instituted by plaintiff to recover from four defendants compensatory damages for personal injuries sustained and property damage incurred as the result of a collision which occurred in the city of San Bernardino between an automobile operated by plaintiff and a street car owned and operated by the defendant Pacific Electric Railway Company in said city, and which, at the time of the collision, was under the physical control of the motorman, defendant F. E. Lord. Upon the conclusion of the trial, judgment was rendered in plaintiff's favor as aforesaid against the defendants, who have taken this appeal, and in favor of defendants Pacific Electric Railway Company and F. E. Lord.

The collision occurred on D street in the city of San Bernardino at a point which was between 30 and 40 feet north of the northeast corner of the intersection of Fourth and D streets. Fourth street extends from east to west and D street from north to south. The two streets intersect at right angles. Both streets are paved. Fourth street is 54 feet in width and D street is 55 feet wide. A single line of street car tracks extends from north to south in the middle of D street. The space between the rails is 5 feet wide. The width of that portion of the street east and west of each rail is 25 feet On the northeast corner of the intersection there is a lot having a frontage of 150 feet on D street and 60 feet on Fourth street. This lot is occupied by an automobile service station.

At 10 o'clock a. m. of July 13, 1929, plaintiff was driving a Chrysler automobile along the north side of Fourth street proceeding in a westerly direction at a speed of approximately 12 or 15 miles per hour. When he arrived at the northeast corner of the intersection he turned to the north into D street. At this time he observed that four automobiles were parked parallel and near to the east curb of D street, and that to the left of the automobiles thus parked a truck of defendant, the Texas Company, was standing in the street, and to the rear of the truck a small automobile was likewise double parked in the street. After plaintiff had turned the corner and had straightened the wheels of his automobile so that he was headed in a northerly direction, he observed for the first time that a street car of the Pacific Electric Railway Company was moving south on D street. At the time he made this observation the street car was distant from him approximately 100 feet. He thereupon turned his automobile as far to his right as was possible, and caused its front wheels to be placed under the body of the truck immediately behind its fenders. He then brought his automobile to a stop and shifted into reverse gear for the purpose of backing out of the place of danger in which he found himself. At this time, however, another automobile approached the rear of his automobile from the south and rendered it impossible for him to escape by backing out as he intended. The motorman of the street car applied the air brakes in an endeavor to prevent collision with plaintiff's automobile. In this effort he was not successful, and as the body of the street car projected out for some distance over the rails sufficient clearance between the street car and plaintiff's automobile was not available, and a collision occurred as a result of which plaintiff suffered certain personal injuries and damage to his automobile.

The truck of defendant, the Texas Company, was a Reo truck having a flat body and side racks. It was 20 feet in length and the bed was "7 feet 14 inches" in width. It was used for the purpose of transporting barrels of oil. At the time the collision occurred a 50-gallon drum of lubricating oil was being carried in the bed of the truck. The driver of the truck caused it to be parked in the manner indicated for the purpose of delivering to the service station 20 gallons of lubricating oil which he transferred from the drum in the bed of the truck by means of 5-gallon containers. The truck was so parked that there was a space of approximately 9 feet from the east rail of the street car track to the nearest edge of the truck. At the time the collision occurred the truck was unattended; its driver being then occupied in making delivery of the oil as above narrated.

It is indisputed that the truck driver, in parking the truck in D street in the manner hereinabove described, violated an ordinance of the city of San Bernardino, which forbids double parking of vehicles in the city streets.

In their appeal from the judgment herein, appellants state that they specify the same grounds urged by them upon their motion for a new trial, and the additional reason that the court erred in denying the motion for a new trial. It is, however, apparent that the single reason for reversal relied upon by appellants is that the judgment is not supported by the evidence which was produced during the trial of the action.

The case was tried by the court without a jury, and at the conclusion of the trial the court made findings of fact from which it drew certain conclusions of law, and, from the findings made and the conclusions drawn therefrom, rendered judgment. Appellants have not seen fit to specify in what particulars the findings are lacking in evidentiary support, except as will hereafter be noted.

Appellants contend that the evidence produced by respondent shows that he was guilty of contributory negligence which was the proximate cause of the collision, and that the negligence of appellant De Armond, the truck driver, if it be conceded that he was guilty of negligence, was not the proximate cause of the collision. In support of the contentions thus advanced a portion of the testimony given by respondent is set forth in appellants' brief.

[1-3] It appears to be the contention of appellants that respondent was guilty of contributory negligence as a matter of law in failing to see the approaching street car prior to the time he turned north on D street. It is conceded that it is the general rule that contributory negligence is a question of fact for the determination of the trial court, and that it is only when the facts are clear and indisputable, and when no other inference than that of contributory negligence can be drawn from such facts, that the issue becomes one of law. McQuigg v. Childs, 213 Cal. 661, 663, 3 P.(2d) 309. While there was some evidence that there were certain points along the route followed by respondent as he approached the intersection from which he would have had an unobstructed view of D street north of the intersection for distances varying from 50 feet to 200 feet, there was also evidence that for the greater part of the route respondent's view of D street north of the intersection was obstructed by the various buildings and structures of the service station, and that immediately prior to his entering D street, and as he made the turn into said street, his view to the north was particularly obstructed by the automobiles that were parked parallel to the east curb of said street, and more particularly by the truck of appellant, the Texas Company, and the small automobile to the rear of it, both of which were standing well out in D street to the left of the automobiles that were parked alongside the east curb of said street. The indisputed testimony of respondent showed that he approached the intersection and entered it at a speed of from 12 to 15 miles per hour. The above narrated evidence not only entirely negatives the contention of appellants that respondent was guilty of contribu-

tory negligence as a matter of law, but leads to the conclusion that the court was amply justified in finding that the driver of the truck was clearly negligent in parking the vehicle in the manner described in violation of the city ordinance forbidding such double parking.

[4-6] It is further contended that, conceding that the truck driver was negligent in parking the truck in D street as above described, nevertheless such negligence was not the proximate cause of the collision because: First, respondent was negligent in proceeding north when he should have seen the street car approaching him from that direction and should have thereupon immediately stopped his automobile and backed out from the place of danger; second, the driver of the automobile which was standing in D street immediately to the rear of the truck was negligent in thus parking his automobile, and the negligence of this driver was the direct cause of respondent being compelled to drive his automobile too near to the east street car track to allow clearance for the approaching street car; third, the act of the driver of the automobile which came up immediately behind plaintiff's automobile after he had come to a stop and was preparing to back out, in thus approaching so near to respondent's automobile as to prevent his extrication from the place of danger was the wrongful act of a third person which broke the chain of causation. It is a sufficient answer tc the threefold contention thus advanced to observe that the question of the proximate cause of the collision which resulted in respondent's injuries was a question of fact to be determined by the trial court from the evidence which was submitted during the trial. Mardorf v. Penniman, 68 Cal. App. 696, 230 P. 12. It may be further observed that the truck driver was admittedly guilty of negligence in parking the truck as he did and that if it be conceded that the driver of the automobile in the rear of the truck was also negligent in parking his vehicle as he did and the driver of the second automobile which approached too near to the rear of respondent's automobile was likewise negligent in so doing, so that there is presented a case of the negligence of three different individuals concurring and co-operating in causing the collision, nevertheless appellants are not thereby relieved from liability for the obvious and admitted negligence of the truck driver. Assuming that either or both of the drivers of the two automobiles were negligent, it was for the trial court to discover from the evidence presented to him whether the negligence of either or both of such automobile drivers was the proximate cause of the collision. The court found that it was the negligence of the truck driver, appellant De Armond, an employee of appellant, the Texas Company, which was the proximate cause of the collision and respondent's resulting injuries. The record contains ample evidence to support the court's finding in this regard.

The judgment and order from which this appeal has been taken are therefore affirmed.

We concur: BARNARD, P. J.; MARKS, J.

129 Cal.App. 724

NOBLE et ux. v. MILES et al.

Civ. 4748.

District Court of Appeal, Third District, California.

Feb. 20, 1933.

1. Appeal and error 🔑882(1).

Parties cannot seek reversal for errors which they committed or invited.

2. Appeal and error 🔑882(12).

Appellant cannot allege error in giving of instruction requested by him unless trial judge imported therein some new and distinct error prejudicial to appellant.

3. Appeal and error 🔑216(2).

Where general instruction is deficient merely because of its generality, injured party may complain upon appeal only if he requests charge be made more specific and request is denied.

4. Appeal and error 🔑216(2).

Giving instruction that violation of any provisions of statute constituted negligence as matter of law, without considering amendment thereto, could not be complained of by appellant not offering instruction incorporating amendment (St. 1923, p. 553, § 113(d), as amended by St. 1931, p. 2120, § 34).

5. Appeal and error 🔑1064(1).

Where instructions improperly stated law, to obtain reversal it must appear error would justify reversal unless it is probable result of trial would have been different if instruction had been otherwise.

6. Appeal and error 🔑1170(9).

Speed of truck *held* not controlling element where truck carrying coupé upset when striking post while swinging around curve causing coupé to fall and strike car of plaintiffs; hence alleged erroneous instruction on statutory speed did not require reversal, since not resulting in miscarriage of justice (Const. art. 6, § 4½; St. 1923, p. 553, § 113(d), as amended by St. 1931, p. 2120, § 34).

7. Appeal and error ⚷1170(9).

To justify reversal, it must appear from consideration of all evidence that error in giving or refusing instructions resulted in miscarriage of justice (Const. art. 6, § 4½).

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action by Cornelius Noble and wife against J. C. Miles, individually and doing business under the name and style of the Peninsula Construction Company, and others. From a judgment for plaintiffs, defendants appeal.

Affirmed.

Ray W. Hays, of Fresno, for appellants.

Conley, Conley & Conley, of Fresno, for respondents.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This is an action by plaintiffs arising out of a collision between the automobile of plaintiffs and a truck belonging to certain of the defendants, and driven by Oftedal, also a defendant herein. The issues were submitted to a jury, who found for plaintiffs. The question of law involved as framed by appellants is: "Did the court commit prejudicial error in instructing the jury that the violation of any statute constituted negligence as a matter of law, without taking into consideration the amendment of section 113 (d) of the California Vehicle Act of 1931?"

The following instruction was given by the court at the request of the plaintiffs: "If you shall find from the evidence that defendant, Oftedal, or the driver of the truck following his, prior to and at the time of the collision were violating any provision of the California Vehicle Act referred to in these instructions, then such truck driver was guilty of negligence as a matter of law, and if such negligence solely and proximately caused the collision, your verdict must be in favor of the plaintiffs, John Stenovich, Cornelius Noble and Pansy H. Noble."

The following instruction was given by the court at the request of the defendants: "You are instructed that the California Vehicle Act in force and effect at the time of the happening of this accident, in reference to speed of motor vehicles, provided: Fifteen miles an hour in traversing or going around curves or corners of a highway when the driver's view is obstructed within a distance of two hundred feet along such highway in the direction in which he is proceeding."

Counsel do not question the correctness of these instructions standing alone, and as abstract principles of law, but appellants do claim the two instructions, when read together, were erroneous in view of an amendment to section 113, subdivision (d), of the California Vehicle Act, which was amended in 1931 (St. 1931, p. 2120, § 34), to read as follows: "In any civil action the driver of a vehicle who has operated such vehicle at a speed in excess of the miles per hour set forth in subdivision (b) applicable at the time and place shall not be deemed to have been negligent by reason thereof as a matter of law but in all such actions the burden shall be upon the opposing party to establish that the operation of such vehicle at such speed constituted negligence."

As to this appellants cannot be heard to object. It was at their request the instruction relative to the speed limit was given.

[1] "Parties must abide by the consequences of their own acts and cannot seek a reversal of a case upon appeal for errors which they had committed or invited. One who by his conduct induces the commission of some error by the trial court, or, in other words, who has invited error, is estopped from insisting that the action of the court is erroneous." 2 Cal. Jur. p. 846.

[2] And also quoting from the same text: "An appellant cannot allege error in the giving of instructions requested by him, unless the trial judge imported into them some new and distinct error prejudicial to him. A judgment will not be reversed for contradictory instructions where those favorable to the appellant and given at his request are erroneous."

[3, 4] Appellants did not offer an instruction incorporating subdivision (d) of section 113 of the Vehicle Act: "It is unquestionably the law that where a general instruction is given which is correct as far as it goes, being deficient merely by reason of its generality, the injured party may complain upon appeal only in case he requests that the charge be made more specific, or asks for other qualifying instructions, and his request is denied." 24 Cal. Jur. p. 796.

[5] Conceding also that the instructions did not properly state the law, it must nevertheless appear that such error would not justify a reversal of the judgment unless it is probable that the result of the trial would have been different if the instruction had been otherwise.

[6] We have read the transcript of the evidence, and we are of the opinion that the findings of the jury would have been the same irrespective of any instruction relative to statutory speed limit. As a matter of fact the speed of the cars involved was not particularly stressed and had to do only with the defense of contributory negligence. No contention is made that the verdict was unsupported by the evidence. Defendants were

moving a fleet of seven auto dump trucks from the town of Santa Clara by way of Pacheco Pass, to Fresno. The particular car in question was third or fourth in the line of travel. It was not equipped with any horn or other warning device and traveling at a speed estimated from twenty to thirty miles per hour. In the truck in question was a Ford coupé, which was not secured in any way to the truck, but was merely blocked in. As the truck was rounding a turn in the act of meeting the automobile of plaintiffs, it swung inward and struck a post near a concrete culvert, on the side of the road, upsetting the truck and causing the coupé to fall from the truck and strike the car of plaintiffs, which caused the injuries complained of. In view of the manifold evidence of negligence on the part of defendants, we cannot say that the question of speed was a controlling element in the case.

[7] A judgment will not be reversed because of the giving or refusing of instructions which do not harm the appellant. To justify a reversal under the Constitution it must appear, from a consideration of all the evidence, that any error in this respect resulted in a miscarriage of justice.

Under section 4½ of article 6 of the Constitution, it is our duty to examine the evidence for the purpose of discovering whether a miscarriage of justice has resulted before ordering a reversal. In our opinion, the presence or absence of the particular instruction makes little difference, and no miscarriage appears.

The judgment is affirmed.

We concur: PLUMMER, J.; R. L. THOMPSON, J.

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129 Cal.App. 793

John STENOVICH, Plaintiff and Respondent, v. J. C. MILES, Individually, and Doing Business under the Name and Style of Peninsula Construction Company, Peninsula Construction Company, Mrs. J. C. Miles, Peninsula Paving Company (a Corporation), and S. L. Oftedal, Defendants and Appellants.

Civ. 4749.

District Court of Appeal, Third District, California.

Feb. 20, 1933.

Appeal from Superior Court, Merced County, E. N. Rector, Judge, in an action for damages for personal injuries resulting from an automobile accident.

Ray W. Hays, of Fresno, for appellants.

Conley, Conley & Conley, of Fresno, for respondent.

PER CURIAM.

This is a suit for injuries sustained in an automobile collision.

The record on appeal in this case is similar to that which is involved in Cornelius Noble and Pansy H. Noble, Husband and Wife, v. J. C. Miles, etc., et al., 19 P.(2d) 265, in which an opinion of this court was this day filed. This appeal involves the same issues which were determined in that case.

Upon the authority of that case the judgment is affirmed.

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129 Cal.App. 663

REA et ux. v. SECURITY TRUST & SAVINGS BANK et al.

Civ. 7593.

District Court of Appeal, Second District, Division 1, California.

Feb. 17, 1933.

Hearing Denied by Supreme Court April 18, 1933.

1. Vendor and purchaser 🔑335.

Where purchasers defaulted in payment, contract providing time was essence of agreement, they were not entitled to damages or return of money paid whether there was forfeiture or not, and statutes respecting invalidity of contracts fixing damages were inapplicable (Civ. Code, §§ 1670, 1671).

2. Vendor and purchasers 🔑335.

After purchaser's default in payment, vendor, still resting on contract, may retain moneys paid by purchaser.

3. Vendor and purchaser 🔑335.

Where purchaser defaults, vendor's right to retain payments made is independent of express clauses in contract respecting forfeiture or liquidated damages.

4. Vendor and purchaser 🔑86, 102.

Vendors giving notice of forfeiture pursuant to terms did not abandon contract or attempt rescission.

Appeal from Superior Court, Los Angeles County; Hugh J. Crawford, Judge.

Action by W. H. Rea and wife against the Security Trust & Savings Bank, D. Jamieson, and another, in which defendant Jamieson filed a counterclaim. From the judgment, plaintiffs appeal.

Affirmed.

James Donovan, of Los Angeles, for appellants.

Faries & Williamson, Kenneth E. Ramsay, and Edward W. Lloyd, all of Los Angeles, for respondents.

CONREY, Presiding Justice.

In the month of July, 1926, defendant Security Trust & Savings Bank was the owner of a tract of land described as Tract No. 9033 in the county of Los Angeles, including lots 135 and 136 thereof. The bank arranged for subdivision of the property into blocks and lots, and engaged defendant J. B. Ransom Corporation as its agent in selling the lots. At the time of the transactions referred to herein, defendant D. Jamieson was a sales agent for the Ransom Corporation. On July 5, 1926, Jamieson solicited the plaintiffs to purchase lot 135, and succeeded in persuading them to buy said lot. Plaintiffs in their complaint alleged that in this transaction Jamieson was agent both for the bank and the Ransom Corporation. The court found, upon sufficient evidence, that he was acting for only the Ransom Corporation. Pursuant to these negotiations a contract of sale of said lot, dated July 16, 1926, was entered into between the bank and the plaintiffs. The sale price was $2,375, of which plaintiffs at that time paid $593.75 and agreed to pay the balance of the principal sum at the rate of $47.50 per month, with interest as stated in the contract.

In like manner and through the same agency, in the following year, the plaintiffs purchased lot 136 of said tract, and a contract in writing therefor was entered into, dated May 28, 1927, between the bank and the plaintiffs, whereby the plaintiffs agreed to buy said lot 136 at the stated price of $2,708, of which the plaintiffs paid $679.50 and agreed to pay the balance of the principal sum in monthly installments of $54.16 with interest as stated in the contract.

By complaint filed May 8, 1929, the plaintiffs commenced this action. In their complaint they set forth certain alleged facts whereby they claimed that they were fraudulently induced to enter into these contracts, and also that a subsequent agreement was made whereby the original agreements were abandoned. It was alleged that the plaintiffs in order to save lot 136, and at the suggestion of Jamieson, assigned and set over to defendant Ransom Corporation said lot 135, to be resold by the defendants and the proceeds of the sale thereof applied on the purchase price of said lot 136; that on or about November 9, 1928, the defendants caused said lot 135 to be sold at a price greater than the price of the sale thereof to plaintiffs, but failed to apply the money so received to payments on lot 136, but appropriated the sum to their own use in violation of their said agreement; that at the same time the defendants proceeded to foreclose the rights of said plaintiffs to both lots and appropriated to their own use the money so received on the purchase price of each lot, and declared the contracts of the plaintiffs forfeited; that the plaintiffs demanded of the defendants that they perform their said agreements with the plaintiffs, but they refused so to do; that thereupon plaintiffs demanded of the defendants that they repay to the plaintiffs all of the moneys so paid by the plaintiffs on the purchase price of both of said lots, with which demand defendants refused to comply. By reason of the aforesaid alleged facts plaintiffs claim to be damaged in the total sum of $1,274.91 with interest from the dates of payments as above set forth. Upon issues raised by the complaint and the answers thereto, the action was tried and judgment entered in favor of the defendants, including a judgment in favor of defendant Jamieson upon his counterclaim in the sum of $175 and interest, based upon a promissory note of the plaintiffs to the defendant Jamieson.

The findings of the court, with reference to the representations and promises alleged to have been made by the defendants, are against the plaintiffs both as to the original transactions and with relation to the alleged agreement for resale of said lot 135, and disposition of the proceeds thereof. In substance and effect the court's findings are that the plaintiffs failed to make their installment payments as provided in the contracts, and that by reason of such default the defendants exercised the options agreed upon in said contracts to declare forfeiture of the buyers' rights thereunder. Plaintiffs appeal from the judgment.

The cause is before us on a transcript of the judgment roll, with a bill of exceptions. There is no specification of insufficiency of the evidence to sustain the findings. Nor do appellants complain of any ruling of the trial court in relation to evidence offered or received. The grounds of appeal are thus confined to those matters wherein it is contended that the findings do not support the judgment.

[1] Appellants' first contention, as set forth in the brief (without the "appropriate heading, showing the nature of the question to be presented, or the point to be made," as required by rule VIII), is that the provisions in each of the contracts, providing for the forfeiture of the buyers' rights, are in violation of sections 1670 and 1671 of the Civil Code. The point is not applicable to this appeal. We have here, in each instance, a contract for payments to be made by the purchaser; a provision that "time is of the essence of the agreement"; and failure of the buyers to make payments which had become due. Whether there was a forfeiture or not, in either event it remains true that the facts found do not entitle the plaintiffs to judg-

ment as for damages, or for return of the money which they had paid as part of the purchase price. With one exception (the amount of Jamieson's counterclaim), the judgment grants no affirmative relief. It is merely a judgment that the plaintiffs take nothing.

The second point stated is that there was a "rescission of the original contracts." Appellants have not brought to our attention any finding of facts showing such rescission, either by virtue of the alleged new agreement, or at all; although, by their third point, they insist that the findings do not support the judgment, in this, that certain findings mentioned have the effect of a finding of a new agreement, amounting to a rescission of the original contract. We think the listing-for-sale memorandum mentioned in finding 6 is not effective to produce the consequences for which appellants contend.

[2-4] The fourth point suggested by appellants (Brief, p. 34 et seq.) is by way of a further contention, which assumes that the affirmative matters pleaded in the answer of defendants are of the nature of a cross-complaint and that the judgment is a judgment declaring and enforcing a forfeiture. Since we think that these assumptions are without foundation, we deem it unnecessary to discuss the questions which might arise if the pleadings and judgment had been such as appellants describe. The case made by the record comes within the rule stated in Glock v. Howard & Wilson Colony Co., 123 Cal. 1, at page 10, 55 P. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17, where it is said that after the vendee's breach of the covenant to pay, the vendor, still resting upon the contract, may remain inactive, yet retain to his own use the moneys paid by the vendee. See, also, Winter v. Kitto, 100 Cal. App. 302, 309, 279 P. 1024. In finding 9 it is said that it is true that, the buyers being in default, the defendants elected to, and did, "exercise the option agreed upon in the contract, to declare a forfeiture of all of the buyers' rights under the contract." But the right of the seller to retain the amount of payments which had been made is independent of any express clause in the contract for the forfeiture of rights or the retention of payments as liquidated damages; such clauses being but declarations of what would have been the legal rights of the vendor without such provisions. When the defendants gave notice of forfeiture, they were acting pursuant to the terms of the contract, and they did not thereby abandon or attempt to rescind the contract. In Glock v. Howard & Wilson Colony Co., 123 Cal. 1, at page 15, 55 P. 713, 718, 43 L. R. A. 199, 69 Am. St. Rep. 17, the court quoted with evident approval from Merrill v. Merrill, 103 Cal. 287, 292, 35 P. 768, 37 P. 392, where Commissioner Temple said: "Nor do I think it was held in any of the cases cited that a rescission was effected simply by the act of a vendor in claiming a forfeiture. * * *" In Cleary v. Folger, 84 Cal. 316, 24 P. 280, 18 Am. St. Rep. 187, it was simply held that the vendor was also in default, in that he did not tender a deed on the very day it was due on the contract. Both being in default, either could treat the contract as rescinded. It was not here held that when a vendor refuses to complete performance because of a breach on the part of the vendee, and claims damages as stipulated in the contract, he thereby rescinds or consents to a rescission.

The judgment is affirmed.

We concur: HOUSER, J.; YORK, J.

MONSON et al. v. FISCHER.*

Civ. 8626.

District Court of Appeal, First District, Division 2, California.

Feb. 17, 1933.

Hearing Granted by Supreme Court April 17, 1933.

1. **Appeal and error** ⚷934(1).

Where bill of exceptions on plaintiffs' appeal from order taxing costs does not show that judgment was ordered for defendant, appellate court must assume that no such judgment was entered (Code Civ. Proc. §§ 1024, 1033).

2. **Appeal and error** ⚷82(4).

Order taxing costs in superior court before entry of judgment is not appealable.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by Olof Monson and another, copartners, etc., against Martha W. Fischer. From an order taxing costs after reversal of a judgment for plaintiffs, they appeal.

Appeal dismissed.

Leicester & Leicester and Norman A. Eisner, all of San Francisco, for appellants.

Percy E. Towne, Richard tum Suden, and Peter A. Breen, all of San Francisco, for respondent.

STURTEVANT, Justice.

This is an appeal by the plaintiffs from an order taxing costs. In their transcript they have inserted a bill of exceptions and a notice of appeal. The bill of exceptions contains a copy of the defendant's memorandum

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⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 26 P.2d 6.

of costs, of plaintiffs' notice of motion to tax, the order taxing costs, and the plaintiffs' exception.

[1] Heretofore the action was tried on its merits and thereafter an appeal was taken to this court and the judgment in favor of the plaintiffs was reversed. Monson v. Fischer, 118 Cal. App. 503, 5 P.(2d) 628. From the transcript the following facts appear. After the remittitur went down, the defendant filed one memorandum of costs including costs on appeal and costs incurred on the trial in the superior court. The plaintiffs made a motion to tax costs and objected to all items of costs incurred in the trial court because no judgment had been entered in favor of the defendant. Code Civ. Proc. §§ 1024 and 1033. The trial court overruled the objection and taxed such items in the sum of $116. From that specific portion of the order the plaintiffs have appealed and present in this court the same contention. The defendant replies that it will be presumed in favor of the order appealed from (nothing to the contrary appearing on the face of the record) that a judgment had been ordered in favor of the defendant. That reply is countered by the plaintiffs who contend that, if such had been the fact, the defendant would have seen to it that the bill of exceptions contained recitals showing such facts. In Hyde v. Boyle, 89 Cal. 590, at page 591, 26 P. 1092, the court said: "The settlement of a bill of exceptions is one of the duties imposed upon a judge by virtue of his office, and is to be performed by him under the sanction of his official oath. It is not to be presumed that he will in any instance so far violate his official obligation as either willfully or knowingly to insert in the bill any matter that is not properly there, or exclude therefrom any matter that should be inserted." In the case of Bedan v. Turney, 99 Cal. 649, 34 P. 442, the respondent contended that the bill of exceptions on its face did not purport to be inclusive and exclusive and therefore certain presumptions would be entertained in support of the judgment. On page 652 of 99 Cal., 34 P. 442, the court said: "This bill of exceptions forms a part of the judgment roll and of the court's record of its own acts, and for the purpose of determining whether this record contains any error only the record itself can be examined. When an appeal from a judgment is heard upon the judgment roll alone, nothing can be assumed or considered that does not appear upon the face of that roll. If that discloses error, we can no more assume that it was cured by some matter which does not appear therein than we can consider matters outside of the roll for the purpose of impeaching the correctness of the judgment. In each case the record must be judged by itself alone." Therefore, in the instant case, we must assume that after the remittitur went down no further proceedings were had and that no judgment was entered in favor of the defendant.

[2] The defendant opposes the foregoing conclusion but she states that if such conclusion is to stand then it follows that the appeal must be dismissed. In this behalf she states that an order taxing costs in the superior court made before judgment entered is not an appealable order. There are numerous authorities supporting the contention. 7 Cal. Jur. 298, 299; In re Kling, 48 Cal. App. 739, 192 P. 453. The plaintiffs reply by citing Markart v. Zeimer, 74 Cal. App. 152, 239 P. 856. It is not helpful. It involved an order taxing costs on appeal and did not in any way involve an order taxing the costs of the trial in the superior court.

It follows that the appeal should be dismissed. It is so ordered.

We concur: SPENCE, Acting P. J.; GOODELL, Justice pro tem.

WATSON v. CITY OF ALAMEDA et al.*

Civ. 8078.

District Court of Appeal, First District, Division 2, California.

Feb. 15, 1933.

Hearing Granted by Supreme Court April 14, 1933.

1. Municipal corporations ⚷791(1).

Statutory "knowledge or notice" of defective condition of street, within statute fixing liability of public corporation, may be implied or constructive (St. 1923, p. 675, § 2).

2. Municipal corporations ⚷821(20).

Contributory negligence of pedestrian who slipped upon wet paint laid at intersection to define pedestrians' lanes *held* for jury in action against city (St. 1923, p. 675, § 2).

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Action by Iris D. Watson against the City of Alameda and others. Judgment for plaintiff, and defendants appeal.

Affirmed.

Prior opinion, 13 P.(2d) 993.

Breed, Burpee & Robinson, of Oakland, for appellants.

Ford & Johnson, and Fletcher A. Cutler, all of San Francisco, for respondent.

H. A. Postlethwaite, of San Francisco, as amicus curiæ.

⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 26 P.2d 286.

NOURSE, Presiding Justice.

Plaintiff sued for damages for personal injuries. The cause was tried with a jury, and plaintiff had a verdict against the city of Alameda for $9,000. From the judgment on the verdict, defendant has appealed on typewritten transcripts.

Acting upon instructions from the chief of police, employees of the city of Alameda were engaged in marking out pedestrian lanes at the four crosswalks at the intersection of Park street and Santa Clara avenue in the downtown business section of the city; these lanes were being marked by painting eight-inch lines upon the street pavement defining each lane nine feet in width. At about ten o'clock a. m. on February 21, 1930, the lane crossing Park street on the northerly side of Santa Clara had been completed, and while these employees were marking a similar lane across Santa Clara, and while the first lines of paint were still wet, the plaintiff crossed this lane over Park street, and as she reached a point near the easterly curb of Park street she stepped upon the line of wet paint. She slipped upon this paint and fell to the pavement. For the injuries resulting from this fall, she seeks to hold the city under the provisions of the act of 1923, page 675 (Deering's General Laws, 1931, Act 5619).

On the appeal from the judgment the defendant emphasizes two points; that plaintiff was guilty of contributory negligence as matter of law in stepping outside of the marked lane and upon the lines defining the pedestrian traffic, and that she failed to prove notice of the condition, as required by the act of 1923.

[1] On the former hearing we reversed the judgment, holding that there had been a failure of proof as to such notice; but a rehearing was granted to give further consideration to that point. Section 2 of the act of 1923 places a liability for negligence upon counties, cites, and school districts "in all cases where the governing or managing board of such county, * * * or other board, officer or person having authority to remedy such condition, had knowledge or notice of the defective or dangerous condition of any such street, * * * and failed or neglected, for a reasonable time after acquiring such knowledge or receiving such notice, to remedy such condition or failed and neglected for a reasonable time after acquiring such knowledge or receiving such notice to take such action as may be reasonably necessary to protect the public against such dangerous or defective condition."

Appellant argues that a sound construction of the act, when applied to injuries resulting from actual construction of public streets, buildings, parks, and similar improvements, is that liability should not attach to the public corporation unless the board, officer, or person "having authority" had notice of the danger, and also had reasonable opportunity to protect the public against such condition. Respondent argues for a liberal interpretation of the act which would hold the public corporation liable if any of its servants or employees, with or without "authority," is negligent in the performance of any duty in the construction, maintenance, or operation of any such public improvements. In support of the judgment, respondent cites Rafferty v. City of Marysville, 207 Cal. 657, 665, 280 P. 118; Hook v. City of Sacramento, 118 Cal. App. 547, 5 P.(2d) 643; and Brooks v. City of Monterey, 106 Cal. App. 649, 290 P. 540. To these the recent case of Black v. Southern Pac. Co. et al. (Cal. App.) 12 P.(2d) 981, has been added. The rule of these cases is that the statutory "knowledge or notice" may be implied or constructive, and that actual knowledge or notice on the part of one having authority to remedy the condition need not be shown. It has been frequently said that the effect of these decisions has been to make these public corporations insurers of the safety of all those who may use these public improvements, and to establish against such corporations "liability without negligence." But, if the provisions of this act have been construed too liberally, the remedy must lie either in the Supreme Court or in the Legislature. So far as this case is concerned, these decisions are controlling, and the judgment must therefore be affirmed.

[2] On the question of contributory negligence little need be said. It is appellant's contention that the painted lines delineated the area within which pedestrians were required to walk under the terms of a local ordinance, and that, when respondent stepped upon one of these lines, she was outside the pedestrian area, and hence guilty of contributory negligence. We do not find any evidence showing that the painted lines were outside the "crosswalk" within the meaning of the ordinance. Hence the issue of contributory negligence was one of fact for the jury.

The judgment is affirmed.

We concur: STURTEVANT, J.; SPENCE, J.

129 Cal.App. 703

DIXON et al. v. FREDERICKS et al.

Civ. 4743.

District Court of Appeal, Third District, California.

Feb. 18, 1933.

1. Mechanics' liens 🔑**61.**

Mechanic's lien filed before owner secures knowledge of labor performed on building is ineffectual (Code Civ. Proc. § 1192).

2. Mechanics' liens 🔑**77.**

Owner may ratify contract for improvements on building by failure to repudiate liability within 10 days after he secures knowledge thereof (Code Civ. Proc. § 1192).

3. Appeal and error 🔑**909(3).**

On appeal from judgment imposing mechanic's lien on building for painting it under contract with lessee, presumption exists that evidence conclusively shows that owners knew of contract at time of its performance, absent evidence of when they first secured knowledge thereof (Code Civ. Proc. § 1192).

4. Mechanics' liens 🔑**271(7).**

Owners' lack of knowledge of building improvements is matter of defense, and need not be alleged in complaint to foreclose mechanic's lien (Code Civ. Proc. § 1192).

5. Mechanics' liens 🔑**77.**

Mechanic's lien for painting building under contract with lessee, filed 20 days after acknowledgment of liability therefor by owners who filed no notice of nonresponsibility, *held* valid (Code Civ. Proc. § 1192).

Appeal from Superior Court, Los Angeles County; Walter Guerin, Judge.

Action by R. G. Dixon, doing business as the Sherwin Williams Paint Store, and another, against Jay G. Fredericks and others. From a judgment in favor of plaintiff, defendants, except named defendant, appeal.

Affirmed.

Arthur T. Stollmack and L. M. Cahill, both of Los Angeles, for appellants.

John J. Dillon, of Culver City, for respondents.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

This is an appeal from a judgment imposing a mechanic's lien upon the premises of the owners thereof to secure the payment of a claim for painting the building. The contract for the work was made with the lessee of the premises. It is contended the property is not subject to lien because the painting was not done with the knowledge of the owners.

The appellants own lots 35–82, tract 3874, in Los Angeles, together with the building which is situated thereon. The premises were leased to the defendant Fredericks. November 9, 1928, the lessee entered into a contract with the respondents to paint the interior of the building. This contract was completed November 17, 1928. The reasonable value of the services is $374. December 17, 1928, the appellants signed a written acknowledgment of their liability for the claim and agreed to pay the bill. January 7, 1929, the respondents filed their claim of lien pursuant to statute against the appellants' property to secure the debt. The appellants failed to file or record a notice of nonresponsibility for the claim as provided by section 1192 of the Code of Civil Procedure. The court adopted findings in accordance with the foregoing statement of facts. Judgment was rendered against the appellants for the sum of $374, together with interest thereon and costs. The decree imposes a lien upon the property to secure the debt. From this judgment the defendants Bessolo, Bessolo & Gualano, Inc., and R. E. Hennessey have appealed.

The appellants claim the judgment is not supported by the findings; that their property is not subject to lien, for the reason that the painting was not done with their knowledge or consent. We think this contention is without merit. Section 1192 of the Code of Civil Procedure provides in part: "Every building or other improvement or work mentioned in any of the preceding sections of this chapter constructed, altered or repaired upon any land with the knowledge of the owner or of any person having or claiming any estate therein, and the work or labor done or materials furnished mentioned in any of said sections with the knowledge of the owner or persons having or claiming any estate in the land, shall be held to have been constructed, performed or furnished at the instance of such owner or person having or claiming any estate therein, and such interest owned or claimed shall be subject to any lien filed in accordance with the provisions of this chapter, unless such owner or person having or claiming any estate therein shall, within ten days after he shall have obtained knowledge of such construction, alteration or repair or work or labor, give notice that he will not be responsible for the same by posting a notice in writing to that effect in some conspicuous place upon the property, and shall also, within the same period, file for record a verified copy of said notice in the office of the county recorder of the said county in which said property or some part thereof is situated."

[1] The preceding section makes two major declarations: First, it states that all work, labor or materials, construction, alterations, or repairs which are made, performed, or furnished on any building "with the knowledge

of the owner" shall be deemed to have been "constructed, performed or furnished at the instance of such owner." Secondly, the section declares that "such interest [in a building] owned or claimed, shall be subject to any lien filed in accordance with the provisions of this chapter, unless such owner" files a notice of nonresponsibility therefor "within ten days after he shall have obtained knowledge of such construction, alteration or repair or work or labor." This section clearly means that, when work is performed or materials furnished with the knowledge of the owner, it is deemed to have been at his personal instance and request. This creates a liability without question. Then the section proceeds to declare that, regardless of knowledge on the part of the owner of the building at the very time the work is performed or the materials furnished, his interest in the structure is subject to a lien for any construction, alteration, repair, labor or materials furnished or performed thereon, unless he files a notice of nonresponsibility within ten days after he secures the knowledge thereof. This section renders all buildings upon which labor is performed or materials furnished subject to lien whether the work is done or the materials furnished at the instance of the owner or with or without his knowledge, except that it grants him ten days after he has obtained knowledge thereof in which to specifically disaffirm his liability by filing the prescribed notice therefor. Since an owner may disaffirm his liability within ten days after he becomes aware of the transaction, it necessarily follows that a lien which is filed before the owner secures the knowledge is ineffectual.

[2] The imposing of a lien does not necessarily depend upon the owner's personal contract for the labor or materials, or even upon his knowledge thereof at the very time of performance. An owner may ratify a contract for improvements upon his building by failure to repudiate his liability within the time allowed by law after he secures knowledge thereof. In the case of Coombs v. Green Mill, Inc., 107 Cal. App. 204, 290 P. 620, 622, the property of an owner was held to be subject to lien to secure the contract price of a structure which was erected on his premises by a lessee, because he failed to file a notice of nonresponsibility after he secured knowledge thereof. The court says: "The owner may relieve his land from the burden of a lien for a specific building, structure or improvement 'of which he has knowledge.' Even though he may be absent when the work is done he may protect his land by giving notice of exemption from liability within ten days of the time he obtains information of the improvement."

[3-5] In the present case the appellants failed to exempt themselves from liability and failed to relieve their land from the lien by neglecting to give the notice of nonresponsibility as required by statute. It does not affirmatively appear when they first secured knowledge of the painting of their building. The evidence is not before this court. In support of the judgment, the presumption would therefore be indulged that the evidence conclusively shows the owner had full knowledge of the contract at the very time of its performance. A lack of knowledge of the improvements on the part of the owner is a matter of defense. It was unnecessary to allege in the complaint such lack of knowledge. It does, however, appear without conflict that the appellants did have actual knowledge of the entire transaction twenty days before the lien was filed. The court found that on December 17, 1928, they "acknowledged in writing the claim of plaintiff and agreed to pay the same." Instead of repudiating the obligation, they deliberately admitted their liability and agreed to pay the debt. This constitutes a ratification of the contract and an acknowledgment of liability. The judgment is adequately supported by the findings. The lien is valid.

The judgment is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

ÆTNA LIFE INS. CO. et al. v. INDUSTRIAL ACCIDENT COMMISSION et al.*

Civ. 4844.

District Court of Appeal, Third District, California.

Feb. 10, 1933.

Rehearing Granted March 11, 1933.

Master and servant ⚷385(15).

For temporary total disability, where building wrecker injured on first day's employment in 1932 had worked irregularly 86 days in 1931, receiving at least $4 daily, commission properly awarded $12.35 weekly based on average weekly earning capacity of $4 daily for five-day week (St. 1917, p. 836, § 9 (b), subd. 2 (1), as amended by St. 1929, p. 420, § 1; p. 842, § 12 (a) (3, 4), as amended by St. 1929, p. 553).

> St. 1917, p. 836, § 9 (b), subd. 2 (1), as amended by St. 1929, p. 420, § 1, provides that, if injury causes temporary total disability, disability payment shall be 65 per cent. of average weekly earnings; and St. 1917, p. 842, § 12 (a) (3, 4), as amended by St. 1929, p. 553, provides that, if earnings be irregular, average weekly earnings shall be 95 per cent. of average

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⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*Superseded by opinion 20 P.(2d) 372.

earnings during such period of time as may conveniently be taken to determine average weekly rate of pay, and that, where employment is for less than five days a week or is seasonal, average weekly earnings shall be taken at 95 per cent. of such sum as shall reasonably represent average weekly earning capacity.

Proceeding under the Workmen's Compensation Act by R. W. Billings, claimant, opposed by R. M. Stokesberry, doing business as the Stokesberry Lumber & Wrecking Company, employer, and the Ætna Life Insurance Company, insurance carrier. The Industrial Accident Commission granted an award, and the employer and insurance carrier bring certiorari.

Affirmed.

Redman, Alexander & Bacon and R. P. Wisecarver, all of San Francisco, for petitioners.

A. I. Townsend, of San Francisco, for respondents.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

In this petition for a writ of certiorari, the insurance carrier of an accident policy contends the award of the Industrial Accident Commission in favor of an injured employee of the insured person is unreasonable and illegal. It is asserted the average weekly wages of the laborer, which were accepted by the commission as the basis for its award, are not estimated according to the rule prescribed by section 12 of the Workmen's Compensation Act.

R. W. Billings, the claimant, was employed by the insured, Stokesberry Lumber & Wrecking Company, as a laborer, at a wage of $4 a day. He was engaged in helping to wreck structures. His employment was not regular. He was paid a daily wage while the work lasted. He was not hired by the week or month or job. On the first day of his employment, March 18, 1932, a scaffold upon which he was working broke, causing him to fall to the ground, fracturing a rib and several vertebræ. A claim for compensation was duly presented. At the hearing it appeared he had been hired by the Stokesberry Company in the same character of work as a wrecker for three previous years. He was not employed at any work during the year 1932, prior to the day of his injury. In 1931, he worked as a wrecker for the Stokesberry Company eighty-six days on irregular occasions. He was paid $408 for this service. This would amount to a rate of $4.75 a day. In response to the question, "How was he employed?" Mr. Stokesberry testified, "By the day, or any length of time we might need him, by the day, $4.00 a day." Mr. Billings testified that, in addition to his services as a wrecker, he sometimes drove a truck for Stokesberry Company for which he also received $4 a day. There is no evidence indicating that he worked more than eighty-six days the year previous to his injury. It does appear that the second year prior to the time of his injury he did work occasionally sewing sacks for the Globe Mills Company for a compensation of from $4 to $7.50 a day.

The commission found that the claimant was injured in the course of his employment, and that it "caused temporary total disability continuing from March 18, 1932, to and including August 19, 1932, and indefinitely, entitling the employee to $12.35 a week during said time, exclusive of the waiting period of seven days. * * * The foregoing weekly benefit is based upon wages of $4.00 a day for employment five days a week." An award of $89.46, and the further sum of $12.35 a week, beginning August 20, 1932, until the termination of disability, was accordingly rendered against the insurance carrier. This award is challenged as erroneous and excessive.

We think this award conforms to the requirements for estimating average earning ability declared by sections 9 and 12 of the Workmen's Compensation Act of California. Stats. 1917, p. 831, and amendments; 2 Deering's Gen. Laws, 1931, p. 2272, Act 4749. The commission found that the claimant suffered "temporary total disability." This finding is not questioned. Section 9 (b), subd. 2, provides: "The disability payment shall be as follows: (1) If the injury causes temporary total disability, sixty-five per cent of the average weekly earnings during the period of such disability, consideration being given to the ability of the injured employee to compete in an open labor market."

Section 12(a) (3) provides that: "If the earnings be irregular or specified to be by the week, month, or other period, then the average weekly earnings mentioned in subdivisions (1) and (2) above shall be ninety-five per cent of the average earnings during such period of time, not exceeding one year, as may conveniently be taken to determine an average weekly rate of pay."

Section 12(a) (4), as amended in Statutes of 1929, page 553, provides: "Where the employment is for less than five days per week or is seasonal or where for any reason the foregoing methods of arriving at the average weekly earnings of the injured employee can not reasonably and fairly be applied, such average weekly earnings shall be taken at ninety-five per cent of such sum as shall reasonably represent the average weekly earning capacity of the injured employee at the time of his injury, due consideration being given to his actual earnings from all sources and employments during the year preceding his injury; provided, that the earnings from other occupations shall not be allowed in excess of the rate of wages paid at the time of the injury."

In the present case the claimant was employed "irregularly." He was not hired for work which necessarily required five days' service per week. He had not been engaged in work during 1932 except one day when his injuries occurred. His earning capacity, therefore, could not be estimated on the wages actually paid to him during that year. During the previous year he was employed by the same master in the same character of work for eighty-six days. During that period of time he did not work less than five days a week, except upon one occasion. The employer testified that he was regularly paid $4 a day for this service. When he was otherwise employed he never received less than $4 a day. It is in accordance with the rules of the statute and entirely reasonable to assume the claimant's "average weekly earning capacity" was $4 a day for a five-day week. This amounts to $20 a week. Ninety-five per cent. of this sum amounts to $19 a week. Under the provisions of section 9 (b), subd. 2, in estimating "temporary total disability," sixty-five per cent. of the last-mentioned sum should be allowed as weekly compensation. This is the sum of $12.35 per week. This sum represents his reasonable average earning capacity. That is the exact sum which was awarded to him in the present case. This is authorized by law and reasonable.

The award is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

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129 Cal.App. 696

POSHARD v. PARKFORD et al.

Civ. 4742.

District Court of Appeal, Third District, California.

Feb. 18, 1933.

Rehearing Denied March 20, 1933.

Hearing Denied by Supreme Court April 18, 1933.

1. Contracts 🔑147(1).

Conveyances establishing contract between parties, intent of contract should be given full effect, irrespective of mere names.

2. Mines and minerals 🔑55(2).

Parties to conveyances of part of oil extracted from field, who for five years construed provision therein that grantor should pay operating expenses to include expense of drilling, *held* bound by their construction.

Appeal from Superior Court, Los Angeles County; Thomas H. Selvage, Judge.

Action by Anna Poshard against E. A. Parkford and another. From a judgment in favor of plaintiff, defendants appeal.

Affirmed.

Pease, Dolley & Elson, of Los Angeles, for appellants.

Jonah Jones, Jr., and Charles C. Stratton, both of Long Beach, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

The plaintiff had judgment against the defendants for the sum of $823.68 and costs of suit. From this judgment the defendants appeal.

The record shows that in 1922 the defendant Parkford, purchased 16 lots in the Santa Fé oil fields; that following the purchase of said property the defendant Parkford instituted a sales campaign for the sale of 25 per cent. of the oil which should be developed in and extracted from such field. The 25 per cent. was divided into 2,000 parts, and of these the plaintiff became the owner of 24; that is to say, the plaintiff in this action was and is the owner of $\frac{24}{2000}$ of $\frac{1}{4}$ of the oil produced from the lots purchased by the defendant Parkford.

Following the sale of the 2,000 parts representing 25 per cent. of the oil that should be produced of and from the lots purchased by the defendant Parkford, the defendant Parkford drilled four wells upon the premises, only two of which produced oil. Following the sale of the 2,000 parts representing 25 per cent. of the oil that should be produced of and from the lots purchased by Parkford, an agreement was entered into that the money received from the sale of such oil should be deposited with the First National Bank of Ontario, to be by said bank paid to the holders and owners of the 2,000 parts, respectively, according to their interests. Seventy-five per cent. of the oil produced from the premises was reserved to the defendant Parkford. The instruments evidencing the sale and conveyance to the respective purchasers of the 2,000 parts reserved to the defendant Parkford the sole and exclusive right of exploring and operating the premises for the production of oil. For convenience we will follow the course pursued by counsel in speaking of the respective parts as units.

One of the deeds or instruments conveying units to the plaintiff contained the following: "The grantor retains and reserves to himself the sole and exclusive right to drill for, develop, extract, take and remove from said land, oil, gas and other mineral substances; also, grantor reserved to himself all oil, gas and other mineral substances produced, taken and saved from the above-described lands herein expressly conveyed, and agrees to pay all costs of operating said property out of his proportion of said oil and gas." Other deeds conveying units contained the following: "All oil and gas and other mineral substances in and under said land, except the part hereinbefore granted to said grantee, and the sole exclusive right to drill for, develop, extract, take and remove from said land, oil, gas and other mineral substances, together with the right to use so much of the surface as may be necessary for construction of tanks, derricks and other equipment, including roads for operating upon said land for said purposes, are hereby expressly reserved by the grantor; provided, that the grantee shall always have and receive ——— two thousandths of one-fourth of the net production of oil, gas, and other mineral substances produced, taken and saved from the above described land." All of the instruments of conveyance reserved to the grantor the right to sell all of the oil produced from the premises at the same time, and with and as a parcel of one lot of the 75 per cent. of the oil reserved.

From the time that two of the four wells drilled by the defendant Parkford were brought into production, until some time in the year 1928, the defendant Parkford paid to the First National Bank of Ontario the money received from the sale of 25 per cent. of the oil produced, without any deduction therefrom for any purpose. The record shows that the defendant Parkford sank the four wells at his own expense.

There is some controversy appearing in the record as to whether the sales agents employed by the defendant Parkford during his campaign to sell the respective units to which we have referred promised that the defendant Parkford would sink two wells or four wells at his own expense. From the construction which we think should be applied to the instruments of conveyance involved in this action, it is immaterial as to whether the sales agents of the defendants made promises that the defendant Parkford would sink either two or four wells in his attempt to produce oil. In 1928 the two producing wells ceased commercial production, and the defendant Parkford entered into an agreement with the Rio Grande Oil Company to further develop the premises referred to herein. This agreement, after recognizing the rights of the unit holders to a certain portion of the oil produced, contained, among other things, the following: "That the party of the second part (being the Rio Grande Oil Company), shall retain the balance of all oil produced and saved from each well on said premises, being 75 per cent. thereof, until the net value of said 75 per cent. of said oil produced from each well, after deducting all production and operating costs and expenses of each well, shall equal all the cost and expense of drilling, completion and equipping for production of each well under the terms of this agreement, provided, however, that in no event shall the total cost and expense of drilling, completion and equipping for production of each well exceed the sum of $100,000.00. That after the party of the second part has been repaid the total cost and expense of drilling, completion and equipping for production of each of said wells out of said 75 per cent. of oil produced and saved from each of said wells," provision is made for a division of the expenses of operating the premises between the company and the defendant Parkford.

After the wells drilled by the Rio Grande Oil Company were brought under production, 25 per cent. of the net product of the wells was sold for the benefit of the unit holders, and the moneys received therefor deposited with the First National Bank of Ontario, to be distributed by said bank to the respective unit holders according to their interests.

Subsequent to the entering into the agreement with the Rio Grande Oil Company, the defendant Parkford sought and obtained from a number of the unit holders an agreement reassigning to him one-half of their interests theretofore owned by them in their respective units, and likewise sought a reassignment from the plaintiff of one-half of the units held by her to assist him in paying his portion of the expense incurred under his agreement with the Rio Grande Oil Company in drilling wells. The plaintiff declined to reassign any of her interests in said units, and thereupon the defendant Parkford notified the bank not to pay to the plaintiff any of the proportion of the moneys deposited by the Rio Grande Oil Company for her benefit. After making demand for the money, and being refused, the plaintiff began this action.

Upon this appeal the appellants advance the argument that the plaintiff is a tenant in common with the defendant E. A. Parkford, and that she is only entitled to participate in the profits derived from the oil produced upon the premises heretofore referred to, after paying her proportion of the expenses of drilling and operating.

[1] On the part of the respondents, it is contended that the relationship of landlord and tenant existed between the plaintiff and the defendant Parkford. We do not deem it necessary to enter into any discussion of the name to be given to the relationship existing between the plaintiff and the defendant Parkford. While the conveyances or transfer of units made by the defendant Parkford to the plaintiff are denominated as deeds, they are also contracts, and whether the relationship between the plaintiff and the defendant Parkford is one of cotenancy or one of landlord and tenant, does not obviate the fact that the instruments of conveyance or transfer of

units from the defendant Parkford to the plaintiff establishes a contract between the parties thereto, and the intent of that contract should be given full force and effect, irrespective of mere names.

On the part of the appellant, it is contended that that provision of one of the instruments of transfer specifying that the grantor shall pay all costs and expenses of operation does not include the expense of drilling, etc. There does not appear to be any real controversy as to the meaning of the words "net product," which was to be turned over to the unit holders; the 25 per cent. net product meaning that quantity of oil after it was rendered marketable. The controversy hinges around the words binding the grantor to pay operating expenses. Testimony was introduced, pro and con, as to the meaning of those words. On the part of the respondent, that it included the expenses of drilling. On the part of the appellant, that such expenses were not included.

[2] From the beginning of the production, after the execution of the instruments of transfer until after the agreement had been entered into by the defendant Parkford, with the Rio Grande Oil Company, the parties to this controversy, and also all the other unit holders, gave a construction to the words in question, to wit, that it was the intent and meaning of the words used, that the unit holders were not to be charged with any expenses incurred by the defendant Parkford, in the drilling of wells and in bringing the wells into production. For a period of between five and six years this interpretation was given to the instruments of transfer by the defendant Parkford, as well as by the unit holders, and the defendant Parkford continued to deposit with the First National Bank of Ontario the money received from the sale of 25 per cent. of the oil produced upon the premises referred to herein, without deducting therefrom any costs of drilling, operating, erecting buildings, or otherwise.

In the case of Loomis Fruit Growers' Ass'n v. California Fruit Exchange, 16 P.(2d) 1040, 1044, this court, having under consideration the interpretation given to a contract by the parties, where the wording of the contract was somewhat ambiguous, quoted with approval from 6 California Jurisprudence, 304, as follows: "The intention of the parties is to be ascertained by the writing alone, if possible, and not from the subsequent actions of one of them. However, it is well recognized that the terms of a contract may be manifested by conduct when not stated in words. And where the meaning is doubtful, the acts of the parties done under a contract afford one of the most reliable means of arriving at their intention. * * * It is to be assumed that they best know what was meant by its terms, and are the least liable to be mistaken as to its intention; that each party is alert to his own interests, and to insistence on his rights, and that whatever is done by them contemporaneously with the execution of the contract is done under its terms as they understood and intended it should be." This court then said: "The principle that parties should be bound by the construction placed upon a contract by a long course of conduct is eminently just and fair, and we think amply supported by the authorities. 6 Cal. Jur., p. 306; Alexander v. Walling, 105 Cal. App. 525, 288 P. 138; Retsloff v. Smith, 79 Cal. App. 443, 249 P. 886; Kennedy v. Lee, 147 Cal. 596, 82 P. 257."

In the very agreements entered into between Parkford and the Rio Grande Oil Company, an interpretation is given to the contract theretofore made by him with the unit holders, by providing that the Rio Grande Oil Company should pay over to the First National Bank of Ontario the moneys received from 25 per cent. of the net product of the oil produced, and the Rio Grande Oil Company and the defendant Parkford, out of the 75 per cent., were to pay the costs of drilling, operating, etc.

The findings of the trial court are to the effect that the instruments conveying the $24/2000$ of ¼ of the oil produced upon the premises referred to in the contracts belonged to the plaintiff, and that she was under no obligation to contribute to any of the expenses incurred by the Rio Grande Oil Company or the defendant Parkford, in the drilling of wells, bringing them under production or operating the wells thereafter, and the interpretation of the instruments which we have set forth herein were likewise given thereto by the trial court.

The appellants further contend that the trial court erred in failing to find as to the relationship existing between the unit holders and the defendant Parkford, and, further, that the court should have found that the legal relationship between said parties was that of tenants in common. If such a finding had been made, it would not have relieved the defendant Parkford from the obligations of his contract, which was entered into and became a part of the instruments of conveyance, as we have heretofore stated.

The judgment of the trial court is affirmed.

We concur: PULLEN, P. J.; R. L. THOMPSON, J.

129 Cal.App. 728

MILLS v. DICKSON et al.

Civ. 4791.

District Court of Appeal, Third District, California.

Feb. 20, 1933.

Rehearing Denied March 22, 1933.

Hearing Denied by Supreme Court April 21, 1933.

1. Venue 🔑68.

Court on defendant's motion to change venue, in action for injury, could consider counteraffidavit reciting that injury occurred in county of suit, where complaint was silent on that point (Code Civ. Proc. §§ 395, 396).

2. Venue 🔑16.

In action for injuries, county where defendants reside or where injury occurs is "proper county" (Code Civ. Proc. § 395).

[Ed. Note.—For other definitions of "Proper County," see Words and Phrases.]

Appeal from Superior Court, Sonoma County; Hilliard Comstock, Judge.

Action by B. Mills against Norman M. Dickson and Samuel D. Orwitz, individually and as copartners doing business under the name of Dickson & Orwitz. From an order denying a motion for change of place of trial, defendants appeal.

Affirmed.

Sidney Rhein and Frank Orwitz, both of San Francisco, for appellants.

A. W. Hollingsworth and L. R. Lambert, both of Santa Rosa, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This is an appeal from an order denying a motion for a change of place of trial from the county of Sonoma to the city and county of San Francisco. The motion is made upon the ground that San Francisco is the residence of the defendants. The order is sought to be upheld upon the ground that the action is one for personal injuries caused by alleged negligence in the extraction of a tooth, and that the injury occurred in the county of Sonoma.

Section 395, Code of Civil Procedure: "* * * The action must be tried in the county in which the defendants, or some of them, reside * * * or if it be an action for injury to person, * * * in the county where the injury occurs. * * *"

The complaint contains no allegation as to the county wherein the injury occurred nor the place of residence of defendants. Defendants demurred and moved for a change of venue, filing their affidavit in support thereof alleging residence in the city and county of San Francisco. In opposition to the motion, plaintiff filed a counteraffidavit claiming the injury occurred in the county of Sonoma; the court thereupon refused to change the place of trial, and from that order defendants appeal. Defendants object to consideration by the court of this counteraffidavit setting up the county wherein the injury occurred. It is their contention that the court is limited to an examination of the complaint and the affidavit of the moving party only, in determining the place of trial, and that plaintiff, in resisting a motion for a change of place of trial on the ground of residence, cannot file a counteraffidavit setting up facts showing the proper county to be the one in which the action was commenced.

[1] In an action where the court has jurisdiction of the subject-matter, in the absence of affidavits showing to the contrary, the county wherein the title of the action shows it was brought is prima facie the proper county (Lakeside Ditch Co. v. Packwood Canal Co., 50 Cal. App. 296, 195 P. 284), and, if timely demand for change of place of trial is not made, the right to do so is waived (Code Civ. Proc. § 396).

We have found no authority holding directly that the court may consider counteraffidavits in resisting such a motion, but the practice has been accepted and applied as proper by the courts.

In Mahler v. Drummer Boy Mining Company, 7 Cal. App. 190, 93 P. 1064, defendants moved to change the place of trial from Siskiyou county to the city and county of San Francisco, on the ground that at the commencement of the action the latter place was their place of residence. Plaintiff was permitted to file a counteraffidavit alleging that "at the time of the commencement of the action the residence of said defendant * * * was unknown to plaintiff."

In Loehr v. Latham, 15 Cal. 418, defendant moved to change the place of trial under the provisions of section 395 of the Code of Civil Procedure as it then stood, and the court said: "To resist the application of the defendant, the plaintiff should have shown that he used all proper diligence to ascertain the residence of defendant before suit, and failed."

In Bachman v. Cathry, 113 Cal. 498, 45 P. 814, 815, defendant moved to change the place of trial on the ground of residence, and upon the hearing of the motion, in addition to the complaint and the affidavits of defendant, there was presented an affidavit by plaintiff denying certain allegations in the affidavits of defendant. Upon an appeal, Mr. Justice Harrison, speaking for the court, said: "The affidavit of Cathry that at the commencement of the action he and his co-defendants were residents of the county of Inyo entitled him to have his motion granted, unless this fact should be overcome by affidavits on the part of the plaintiff. The plaintiff did not make any affidavit on the motion, and no showing was made by him, or on his behalf, that Brun was the individual intended by the fictitious name of John Doe."

In Woods v. Berry, 105 Cal. App. 90, 286 P. 1073, 1074, a motion was made by defendant to change the place of trial to the county of his residence, which motion was resisted on the ground of inconvenience of witnesses. The court said: "It seems to have been contemplated by statute and the courts that a motion for change of venue shall be heard upon affidavits and the verified pleadings. At least this is the uniform practice in California."

Appellants cite the case of Krogh v. Pacific Gateway Co., 11 Cal. App. 237, 104 P. 698, 699, to the point that the court is limited to an examination of the complaint to determine plaintiffs' claim for place of trial. In discussing that issue, this court said: "It cannot be said from any facts set forth in the complaint that the contract sued upon was made, or was to be performed, or that the alleged liability arose, or that its breach occurred, in Fresno county. But it does appear by the affidavit that the principal place of defendant's business is in San Joaquin county. The only contract shown by the complaint was made, and was to be performed subsequently to the representations made, at Fresno county. No obligation or liability or breach occurred at Fresno county so far as appears. The alleged representations made by Abrams may have induced plaintiff to subscribe for the stock, and pay his money to defendant for the same, but this took place, as appears from the complaint, after the representations were made, and not until then did any obligation arise, and defendant's alleged breach occurred still later."

It is obvious from the foregoing citation that plaintiff cannot be permitted by affidavit to controvert an allegation set forth in his complaint in an effort to retain the place of trial, but we know of no rule that would prevent the showing, by affidavit, of facts outside the allegations set forth in the complaint that might assist the court in determining the proper place for trial.

Defendants also rely upon the case of Brady v. Times-Mirror Co., 106 Cal. 56, 39 P. 209, 211, as authority for their contention that the court cannot receive counteraffidavits which would obviate objections pointed out by defendants, and in effect, amend the complaint. In that case the action was filed in San Diego county, and was one against a corporation, and certain individuals, residents of the county of Los Angeles. The cause of action was for libel. A motion was made to change the place of trial to the county of the residence of the individual defendants. Pending the determination of the motion plaintiff moved to amend her complaint by dismissing as to the individual defendants, which motion was granted, and the court thereupon refused to change the place of trial. In its opinion, reversing the judgment, the Supreme Court said: "After the motion for a change of the place of trial had been made, it was not competent for the court to entertain or make an order for the amendment of the complaint in the matter of parties, any more than in the matter of substantive averments. If, upon the case as it was then presented, the defendants were entitled to have their motion granted, they are entitled to have all judicial action in the cause determined in the superior court of their own county. Whether the plaintiff is desirous to amend his complaint so as to obviate the objections that have been pointed out by demurrer, or in other respects that may render it impervious to attack, *if such amendment can be made only upon the leave of the court*, he must wait until after the case has been transferred, and make his application to that tribunal. This motion intercepted all *judicial* action in the case, and suspended the power of the court to act upon any other question until it had been determined." (Italics ours.)

The filing of a counteraffidavit is not a judicial act by the court nor does the right to file the same depend upon leave of court. Upon the filing of a motion to change the place of trial, the court is limited strictly to a consideration of that issue, but there is no limit as to the receipt by affidavit of evidentiary matter for a proper determination of that question.

Good pleading in a complaint requires a statement of the facts constituting a cause of action in ordinary and concise language. In the case before us the name of the county in which the injury is alleged to have occurred is not essential to an allegation of the cause of action, and the pleader should not be penalized for omitting something that is only material when and if a motion for a change of place of trial is raised. Being a collateral matter the proper means of disposing of the motion is by affidavit and counteraffidavit and the pleader should not be compelled to anticipate a possible motion and embody allegations in his complaint that fulfill no other purpose than to meet a possible move to change the place of trial.

The court therefore properly received and considered the affidavits of plaintiff, showing the county of Sonoma to be the county wherein the injury to the person occurred, it not being in conflict with any allegation set forth in the complaint. The affidavit of plaintiff having been properly received and considered, the order refusing to change the place of trial was proper.

[2] In the case of Gridley v. Fellows, 166 Cal. 768, 138 P. 355, 356, the court said: "It will be observed that in the amended portion of the section [discussing the amendment of 1911, § 395, Code Civ. Proc.] it is provided that the action may be tried, either in the county where the defendant resides at the time it is begun, or in the county where the injury occurred. No preference is given to one over the other. Either county is therefore declared to be 'the proper county' for the trial, by this amendment."

The order of the court refusing to change the place of trial is affirmed.

We concur: **R. L. THOMPSON, J.; PLUMMER, J.**

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129 Cal.App. 738

TEXAS CO. v. MOYNIER et al.

Civ. 7285.

District Court of Appeal, Second District, Division 2, California.

Feb. 21, 1933.

Rehearing Denied March 22, 1933.

Hearing Denied by Supreme Court April 21, 1933.

1. Taxation ⟹80.

As between assessing authorities and oil and gas lessee taxes on mining rights *held* assessable against lessee.

2. Mines and minerals ⟹73.

Taxes assessed against mining rights *held* "land taxes" within oil and gas lease requiring lessee to pay five-sixths thereof; "land taxes" meaning "taxes on land," and mining rights being part of "land" (Pol. Code, § 3617, subd. 2).

[Ed. Note.—For other definitions of "Land," "Tax; Taxation" and "Tax on Land," see Words and Phrases.]

3. Mines and minerals ⟹73.

Oil and gas lease obligating lessee to pay one-sixth royalty and five-sixths of land taxes *held* as between parties to require lessors to pay one-sixth of such taxes.

4. Mines and minerals ⟹48.

Oil becomes "personalty" immediately on being extracted.

[Ed. Note.—For other definitions of "Personal Property," see Words and Phrases.]

5. Mines and minerals ⟹73.

Specific clause in oil and gas lease concerning lessors' share of taxes, if conflicting with general clause giving lessors certain share of gross production, would control.

Appeal from Superior Court, Los Angeles County; Harry R. Archbald, Judge.

Action by the Texas Company against Marius Moynier and another. Judgment for defendants, and plaintiff appeals.

Reversed with directions.

Charles C. Stanley and J. A. Tucker, both of Los Angeles, for appellant.

J. Wiseman Macdonald, of Los Angeles, for respondents.

WORKS, Presiding Justice.

Respondents are the lessors and appellant is successor to the lessee, a natural person, under a lease of oil lands, the instrument containing the usual provisions for the exploration and exploitation of the demised premises with a view to the taking of oil and natural gas therefrom. Plaintiff paid certain taxes under assessments made against it, pursuant to conditions hereafter to be stated, and thereafter commenced this action against defendants. The purpose of the action is to recover a one-sixth part of the amounts so paid. Judgment went for defendants and plaintiff appeals.

[1] The assessment upon which the taxes were based was made against the "mining rights" in the land described in the lease. That it was proper under the law, as between appellant and the assessing authorities, so to make the assessment and to make it against appellant, is settled by several thoroughly considered cases. One of these is Graciosa Oil Company v. County of Santa Barbara, 155 Cal. 140, 99 P. 483, 484, 20 L. R. A. (N. S.) 211. There the assessment against the lessee was upon "mining rights and privileges." Another of the cases is Mohawk Oil Co. v. Hopkins, 196 Cal. 148, 236 P. 133. In that instance the assessment ran against the "possessory rights and oil and gas leases in and upon" the lands demised. This latter decision was in effect approved in the somewhat peculiar and unusual case of County of Ventura v. Barry, 207 Cal. 189, 277 P. 333, in which certain assessments, according to the text of the court's opinion, ran against the "possession of, the claim to, or right to the possession of land, together with chattels real and leasehold interest in and to real property, together with all rights and privileges appertaining thereto, and improvements, thereon." See, also, as bearing upon the general subject, Merchants' Trust Company v. Hopkins, 103 Cal. App. 473, 284 P. 1072.

[2] The above is but a preface or introduction to the matters involved in the present action. Here we are not concerned with a question between the public authorities and one against whom they have levied an assessment and from whom they have collected the resulting tax. The point in this action

is presented by the query: As between lessor and lessee, who was to be the ultimate payer of the tax, either in whole or in part, under the terms of the lease, if that instrument contains provisions affecting the subject? After the premise laid above, we are now at the threshold of this question. The lease contains the following paragraphs:

"Said lessee covenants and agrees to pay as rent and royalty to said lessors for the tenancy, occupancy and privileges granted under this lease one-sixth (1/6) part of the gross production of all petroleum, oil or natural gas produced and saved from said land by said lessee (less deductions hereinafter stated) free from all costs, liens and charges of every kind and nature.

"The lessee shall pay all taxes that may be levied against his improvements, plants, machinery and personal property, and also five-sixths (5/6) of all land taxes hereinafter assessed against said property during the existence of this lease, including oil and minerals that may be stored on said lands by him before the same become delinquent. Lessors agree to promptly transmit all tax bills to lessee upon receipt thereof."

The phrase "all land taxes * * * against said property," employed in the second of these paragraphs, means "all taxes upon the land." So much, indeed, is conceded in the briefs. Respondents contend that by the use of the phrase the parties intended only what respondents term "the ordinary taxes upon the land," that is, the taxes which would have been levied against the land if it had no subsurface mineral value, thus attempting to approximate the situation, so far as the taxes are concerned, to that considered in Graciosa Oil Company v. County of Santa Barbara, when in that case the Supreme Court refers to "an ordinary lease for years giving the right to hold the land for usufructuary purposes only" and distinguishes between leases of that nature and those of the very kind in question here. Appellant's insistence is that the term "land taxes * * * against said property," as employed in the lease, means taxes upon the property considered in both its surface and subterranean aspects, and, especially, such taxes as appellant has been forced to pay, that is, taxes assessed against the "mining rights" in the property.

These contentions require, as a first aid to the construction of the lease, a consideration of the question, What is land? "Land always has a situs. The ownership of land consists in the right to use it for all lawful purposes, and that right of use constitutes its whole value. If the owner of land grants to another the right of way over it, or the right to lay and maintain pipes through it, the totality of ownership is divided into two separate interests: The original owner retains the right to use the land for every lawful purpose not inconsistent with the exercise of the privilege granted, and his grantee acquires the right to use it for the special purpose named in the grant. It is easy to suppose a case in which the value of the granted privilege or easement exceeds the value of the interest remaining in the grantor—indeed, such instances are of frequent occurrence; but, whether of greater or less value, it is still an interest in that particular piece of land, and no more of an ideal abstraction than the remaining right of the owner to cultivate the soil. The aggregate value of the two rights constitutes the aggregate value of the land, and each is assessable where the land is situated." Stockton Gas, etc., Co. v. San Joaquin County, 148 Cal. 313, 323, 83 P. 54, 58, 5 L. R. A. (N. S.) 174, 7 Ann. Cas. 511.

Innumerable cases could be cited which contain statements of this broad and general character, but references to them are unnecessary, as Graciosa Oil Company v. County of Santa Barbara touches the very situation presented here. In that case the Supreme Court in effect characterized "mining rights and privileges" thus: "The right vested in plaintiff is an estate for years, so far as necessary for the purpose of taking oil therefrom, and it carries with it the right to extract the oil and remove it from the premises. This right constitutes, for the term prescribed, a servitude on the land and a chattel real at common law." On the page preceding that which contains this language the court had already said, in speaking of the ordinary surface lease, if for convenience we may so term it, "that, in the absence of contrary statutory provisions, there is to be but one assessment of the entire estate in the land, and that this assessment should include the value of both the estate for years and of the remainder or reversion." The principal point decided in the case was that in the instance of an oil lease there were two assessments allowable, one against the lessor and one against the lessee, but there is nothing in the opinion to indicate, despite this proper divisibility of the assessment, that in the case of an oil lease there is not still an "entire estate" composed of the sum of the estate for years and the remainder or reversion. On the contrary, the opinion is affirmatively redolent of the idea that in such a case there is such an entire estate, so composed. This is made apparent in several passages, in addition to that already noted. For instance, it is said of the lessee under an oil lease: "His right extends to the extraction of a certain part of the substance of the land itself, to its permanent separation and removal and its conversion to his own use. The whole object of the contract is to effect, if not technically a sale and conveyance of a substantial and specific part of the land, at least a disposition and transfer thereof to another." Immediately following this passage occurs even more apposite language: "It can be easily seen that the reasons for the rule applicable to ordinary leases for the use only that the entire estate should be assessed to the lessor are entirely lacking here, and that it would be a more just and reasonable adjustment of the burden of taxation of such oil leases to assess each party separately with the value of his right or estate in the land." The court says, again: "The strata of oil or oil-bearing sand constitute, as we have seen, a part of the land which may be the subject of separate ownership. There may be a separate 'claim to' this part of the land, as well as a separate 'claim to' a portion of the surface. A 'claim to' take this stratum from its place and then convert it to one's own use may well be termed a claim to land, although not accompanied by actual physical possession of the subterranean deposit." And, finally, observe this expression of the court: "The oil strata also constitute 'minerals in and under the land,' and the rights and privileges of plaintiff under the lease are clearly 'rights and privileges appertaining' to such minerals, and consequently are real estate within the meaning of the second subdivision" of section 3617 of the Political Code, defining the term "real estate."

There is a passage in the opinion of the Supreme Court in Mohawk Oil Company v. Hopkins, supra, which at first glance may seem at variance with the numerous quotations contained in the paragraph immediately preceding this, but it is not so. It was said concerning Graciosa Oil Company v. County of Santa Barbara, in the opinion, with our italics: "The court held that the possessory right to lands for a term of years, embracing the privilege to bore for and extract oil therefrom, differed materially from ordinary leases for usufructuary purposes and that the right vested in a lessee in lands for the purpose of taking oil therefrom during a prescribed term was in the nature of a servitude on the land and a chattel real at common law, and as such *was separately assessable from the land itself.* * * *" Upon a little consideration it is evident that the italicized words of this passage were employed by the court through inadvertence. First, the court had just referred correctly to the earlier case in the phrase concerning "a servitude on the land and a chattel real at common law." Further, it is plain that what the court had really decided in the Graciosa Case is that rights under an oil lease are separately assessable *although a part* of the land. We make mention of this circumstance because respondents appear to place their principal reliance upon Mohawk Oil Company v. Hopkins. Really, that case and the earlier one are in entire harmony.

We are bound to conclude that the assessment upon which appellant paid the taxes, one-sixth of which it seeks to recover from respondents, was an assessment for "land taxes * * * against said property," as that term is employed in the second of the two paragraphs quoted above from the lease, for the very plain reason that the "mining rights" are a part of the land.

[3, 4] There is ample evidence, also, in the language of the two paragraphs of the lease that the parties to the instrument intended that the lessee should pay five-sixths and the lessors one-sixth of the taxes mentioned in the complaint in the action. Under the first of the two paragraphs respondents were to receive one-sixth of the gross production of oil or natural gas from the demised premises, leaving five-sixths thereof to appellant, the successor to the original lessee. This scheme for the division of production is basic to the arrangement made in the second paragraph for the apportionment of the liability of the respective parties to pay taxes, irrespective of the question as to who should be assessed for the "mining rights" by the taxing authorities under the law as first declared in the Graciosa Case. According to the second paragraph appellant is bound to pay five-sixths "of all land taxes"—and we have already ascertained the import of this expression under the law—assessed against the demised property, "including oil and minerals that may be stored on said lands" by it. Here the draughtsman of the lease was a bit inartistic in his work, for, technically, a "land tax" could not "include" oil and minerals stored on the surface of the property, for those products become personal property immediately upon their abstraction from the subterranean areas of the land. This fact does not interfere, however, with the inevitable conclusion that the clause imports that appellant was to pay but five-sixths of the taxes upon abstracted and stored production, as well as upon "land." This provision is in complete harmony with the scheme for the division of gross production, five-sixths to appellant, one-sixth to respondents. But the idea that appellant was to pay the total taxes upon the "mining rights"—a term which represents the privilege of taking from the ground the valuable content yet unabstracted and unstored upon the surface of the ground—is altogether out of harmony with the arrangement for the division of production. Moreover—and this is especially to be noted, as it is a cardinal factor in the construction of the second paragraph above quoted—if the contention of respondents were to be adopted, the tax arrangement, first, as to "mining rights," and, second, as to product stored on the surface of the ground, would be utterly inharmonious between themselves. Taking the total language of the two paragraphs, how can it be conceived that the parties intended that appellant should pay but

five-sixths of the taxes on captured and stored product, after having successfully rescued it from the soil, while it should pay the totality of taxes upon the right which was representative of the uncaptured product yet remaining in the soil, that uncertain product yet to be secured and stored wholly at the risk and expense of appellant? It is evident to us that the lease intends a straight arrangement throughout for a five-sixths to one-sixth apportionment of gross production and the same fractional apportionment of "all land taxes," no matter to which of the parties the taxes are assessed.

[5] Although we have now arrived practically at a determination of the appeal, the case may be further clarified by giving consideration to a few special points presented by respondents. It will be observed that it is provided in the first paragraph quoted from the lease that respondents' one-sixth share of the gross production is to be paid "free from all costs, liens and charges of every kind and nature." Respondents contend that this language imports that the share shall be paid "without any deduction for taxes." This position is untenable for several reasons. In the first place, the omission of the word "taxes" from the clause, probably one of the principal items of expenditure in connection with the joint venture, is alone sufficient to show that the argument is unjustified, when it is considered that the subject of taxes is so clearly treated in the second paragraph. Then the clause as to costs, liens, etc., is general, while the provision as to taxes is specific. If there were a conflict between the two, the latter, under a well-known rule of law, would control. The view of respondents is unsound also for the reason that they admit, as they must, that they are bound to pay one-sixth of the "ordinary taxes," what we may perhaps call the surface taxes, on the land. This circumstance alone condemns the attitude that the one-sixth share of production is to be paid "without any deduction for taxes."

It is claimed by respondents that the lease does not provide that respondents shall pay "one-sixth of the taxes." It does not, in terms, for there was no necessity for such a provision. If appellant is to pay but five-sixths of "all land taxes * * * against the property," who under the law is liable for the payment of the remainder if not respondents, the owners of the fee? Beyond the shadow of doubt, if respondents should fail to pay in any year a one-sixth part of the land taxes on the property, whatever for the moment that expression may mean, appellant, having paid the whole tax for the protection of its investment under the lease, could recover the one-sixth part from respondents, as it is endeavoring to do in this action. This is a proposition of law too well settled to require the citation of authority.

The trial court made certain findings of fact which are inconsistent with the conclusions reached in this opinion, and it erred in doing so. It is unnecessary to state specifically what those findings were.

No question is made as to the amount which is due appellant in case it is entitled to recover in the action, and for that reason it is proper, in ordering a reversal, to direct that judgment be rendered in appellant's favor.

Judgment reversed, with directions to the trial court to render judgment as prayed for in the complaint.

We concur: CRAIG, J.; STEPHENS, J.

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129 Cal.App. 686

KERNER et al. v. PEACOCK DAIRIES, Inc., et al.

Civ. 809.

District Court of Appeal, Fourth District, California.

Feb. 17, 1933.

Rehearing Denied March 18, 1933.

Hearing Denied by Supreme Court April 18, 1933.

1. Evidence ⚷588.

Evidence of conditions surrounding collision between motor vehicles may overcome positive contrary oral evidence.

2. Trial ⚷139(1).

Inferences from physical facts surrounding collision between automobiles are evidence which jury may accept, instead of testimony of parties.

3. Appeal and error ⚷1002.

Implied finding of jury on conflicting evidence is conclusive on appeal.

4. Automobiles ⚷245(14).

In action for death of motorist in intersection collision with truck, evidence *held* for jury (St. 1923, p. 553, § 113, as amended by St. 1927, p. 1436).

5. Trial ⚷207.

Where employer and employees were sued for death of motorist, admission of employees' declarations against interest was not error, where court instructed jury that declarations could be considered only against parties making them.

6. Trial ⚷59(2).

Order of proof rests largely in discretion of trial judge, and admission of declaration against interest out of usual order was not abuse of discretion.

7. Appeal and error 🔑757(4).

Where all instructions given are not printed in appellants' briefs, alleged errors in giving or refusing of instructions may be disregarded.

8. Negligence 🔑138(4).

Where plaintiffs in death case produced no evidence showing contributory negligence on part of deceased, they were entitled to instruction that law presumes that deceased exercised ordinary care, and that such presumption could be overcome only by satisfactory evidence.

9. Trial 🔑260(1).

No complaint can be made of refusal of instructions, where subject-matter was properly covered by instructions given.

10. Trial 🔑295(1).

Instructions must be considered as a whole, and judgment will not be reversed for failure to give one instruction specially devoted to burden of proof, where subject was covered by instructions given.

Appeal from Superior Court, Fresno County; H. Z. Austin, Judge.

Action by Lawrence Kerner and others by their guardian ad litem, Christina Kerner, and Christina Kerner against Peacock Dairies, Inc., and others. From judgment for plaintiffs, defendants appeal.

Affirmed.

W. M. Conley, Philip Conley, Matthew Conley, and Conley, Conley & Conley, all of Fresno, for appellants.

Edmond A. Chevalier and Denver S. Church, both of Fresno, for respondents.

MARKS, Justice.

The respondent Christina Kerner is the widow of August D. Kerner who was killed in an automobile collision on July 22, 1931. The nine minors who are respondents are their children. They recovered judgment for $10,000 damages, from which this appeal is taken.

At the time of the accident deceased was driving his Chevrolet touring car westerly on North avenue, and appellant Moore was driving a one and a half ton panel body Ford delivery truck south on Fowler avenue. The two streets intersect at right angles. The intersection was an obstructed one where the speed limit was fifteen miles an hour, under the definition contained in section 113 of the California Vehicle Act (as amended by St. 1927, p. 1436). At the time of the accident the visibility was good and the roadways dry. Fowler avenue is a graded country road about forty-one feet wide between gutters, with a hard oiled surface about twenty feet wide in its center. North avenue is graded to a width of about thirty-two feet with an oiled strip about fifteen feet in width in its center.

As grounds for a reversal of the judgment, appellants urge: (1) That the court erred in denying their motions for instructed verdicts; (2) that the verdict and judgment are not supported by the evidence and is contrary to it; (3) that the trial court erred in overruling objections to evidence offered by respondents; (4) that the trial court erred in giving instructions proposed by respondents, and in refusing to give instructions requested by appellants. The first specification of error is included in the second, and will not be separately discussed.

August D. Kerner died shortly after the accident, and respondents were compelled to rely entirely upon the physical facts of the accident as evidenced by skid marks upon the road surface and the appearance and positions of the vehicles after the collision, together with extrajudicial admissions against interest by Moore and Christiansen and their admissions while on the witness stand.

Christiansen and Moore, both employees of the Peacock Dairies, Inc., the only living witnesses to the accident, testified on behalf of appellants. Their evidence may be summarized as follows: That Moore was driving the truck with Christiansen sitting beside him; that they approached and entered the intersection on their righthand side of Fowler avenue at a speed of about twenty miles an hour; that they entered the intersection first and observed the Chevrolet approaching the intersection from their left at a speed of between thirty-five and forty-five miles an hour; that when the rear of their truck had reached a point near the center line of North avenue the deceased turned his Chevrolet sharply to his left and drove its right front into the left rear wheel of the truck; that the collision took place several feet south of the center line of North avenue and on Kerner's left-hand side of the street; that by the time he reached the center line of Fowler avenue the north half of North avenue was free and clear of anything obstructing it so that he could have proceeded on his way westward on his own side of the street and have avoided the collision; that the force of the impact caused the truck to roll over twice; that it came to rest between sixty and seventy-five feet south of the intersection lying on its side at right angles to Fowler avenue with its front to the east; that the Chevrolet came to rest standing on its wheels facing northwest at the southwest corner of the intersection.

Appellants contend that as these two men were the only eyewitnesses to the accident, and as their testimony stands uncontradicted by that of any other eyewitness, it must be taken as true, and that the judgment cannot stand. It is true there was no living witness to the accident to contradict their accounts of it. It is also very evident from the verdict rendered that the jury did not believe their evidence, for if their testimony were taken as true the judgment should have gone for the appellants. We must, therefore, carefully examine the record to determine whether the verdict and judgment find evidentiary support, and whether the action of the jury in rejecting the evidence given on the witness stand by Moore and Christiansen is justifiable.

We find a rather complete and careful description of the tire marks made by the Chevrolet and truck on the road surface of the intersection, photographs of the Chevrolet and a description of its condition after the accident, a full description of the course taken by the truck after the collision, and an account of the position of the deceased in his automobile after it came to rest. All of this evidence can be reasonably construed as directly contradicting that of Christiansen and Moore, and as supporting the theory of respondents, and the verdict and judgment.

[1] In many instances evidence of the conditions surrounding a collision between motor vehicles is of controlling force. In many cases, when accepted as true by a jury or trial judge, it has been permitted to overcome positive contrary oral evidence. See Fletcher v. Lloyd, 75 Cal. App. 205, 212, 242 P. 746; Fong Lin v. Probert, 50 Cal. App. 339, 195 P. 437.

The first witness on the scene of the accident, other than the parties, testified that skid marks made by the Chevrolet started seven or eight feet west of what we assume to be the line of the east gutter of Fowler avenue produced across North avenue. These skid marks extended west "about 4 or 5 or 6 feet, something like that, near to the middle" of Fowler avenue and then turned sharply south for an additional distance of five or six feet, where they ended in "another mark, when the Chevrolet kind of turned around and pushed sideways on North avenue and Fowler, on the corner, kind of pushed it west about 2 feet, something like that." The same witness saw the skid marks made by the tires of the truck. They started at about "the imaginary property line" bounding North avenue on the north, and extended south about nine feet, "The marks both of them sliding as they come together. From there on you couldn't see no further mark. The truck tipped over a couple of times." From the testimony of this witness it is evident that he placed the point of impact between five and seven feet south of the center line of North avenue and slightly west of the center line of Fowler avenue.

Several witnesses described the damage to the Chevrolet without giving us a very clear idea of its condition after the accident. However, there are several clear photographs of it in the record, which, with the descriptions of the witnesses, give us a good picture of its condition. The right front fender is bent upward and inward, with the top of its arch slightly back of the rear of the radiator. The portion in front of this point has the outside edge bent inward. The front end is not crumpled backwards. No damage to the front of the radiator, frame, or headlights appears, except that the right headlight is deflected to the right when viewed from the driver's position. The glass is not broken from the headlights. The right front wheel is bent sharply outward from the rear, with the greatest outward deflection appearing in the upper rear quarter segment and a corresponding inward deflection in the lower front quarter segment. The front of the right running board is splintered. The covering of the top, over the rear seat, is torn off. The steering wheel and windshield are intact and undamaged.

Christiansen went to the Chevrolet immediately after the accident. He saw Kerner lying with his head and shoulders on the rear seat with his feet on the floor between the seats. The next witness to view him described him as kneeling on the floor between the seats.

We are given no clear description of the condition of the truck after the collision. There is a photograph of its front as it was lying on its right side across Fowler avenue from which it would appear that the left front hub cap extended outward beyond the tire, left fender, and front bumper. We know nothing further concerning its left side.

The damage to the right side of the Chevrolet, and the lack of any damage to its front, would indicate that it was "sideswiped" by the truck, and did not run into it. This theory is further strengthened by the position of Kerner after the collision. If the testimony of Christiansen and Moore was true, and the Chevrolet while traveling at about twice the speed of the truck had run into it, all movable objects in the Chevrolet would have received a sharp forward impulse from the sudden stopping of its onward progress. Such was not the case. Kerner was catapulted from his position at the steering wheel, over the back of the seat, onto the floor and rear seat of his car. This would indicate that the Chevrolet received a sudden and powerful shove forward sufficient to throw Kerner over the back of the front seat into the position in which he was found. The further fact that the upper rear quarter segment of the right front wheel of the Chevrolet was deflected outward, and the lower front quarter segment inward, might indicate that the truck, traveling at a much greater speed than the Chevrolet, hooked onto this wheel, while the rear portion was turned outward in turning the car sharply to its left, which gave it the forward impulse throwing Kerner onto the back seat. That the Chevrolet was jerked about two feet to its right by the impact lends further support to this theory. The further fact that the truck tires skidded about nine feet before the impact, and that afterwards the truck turned over twice, rolling between sixty and seventy-five feet before it came to rest, strongly supports the conclusion that it was traveling much more than twenty miles an hour when it entered the intersection. The jury could also reasonably infer that Kerner entered the intersection first.

[2, 3] The inferences from the physical facts surrounding the accident are evidence in the case which the jury evidently accepted as true. They flatly contradict the testimony of Christiansen and Moore, which the jury evidently rejected as untrue. The implied finding of a jury on conflicting evidence is conclusive on appeal.

Statements made by Moore and Christiansen after the accident were admitted in evidence as only binding on the person making them. Moore said, "We were driving pretty fast," and that he did not see the other car until the impact. Christiansen said of the accident, "it was all my fault. * * * We seen him, but we couldn't stop; I wish I was driving, it wouldn't have happened."

A portion of Moore's evidence deserves special mention. He testified that when he was twenty feet north of the north property line on North avenue he saw the Chevrolet two hundred feet to his left traveling at a speed of forty miles an hour while the truck was traveling twenty miles an hour. If these estimates of distances by this witness be taken as a basis of computation, the Chevrolet traveled about five or more times the distance traveled by the truck to reach the point of impact. If the speed of the truck be taken as twenty miles an hour, the Chevrolet would have had to maintain a speed of one hundred or more miles per hour to reach the point of collision at the same time the truck arrived there. The photographs show the Chevrolet to be of ancient vintage. Its most ardent admirer would not claim it capable of maintaining any such speed. This testimony may be one of the reasons the jury refused to accept Moore's account of the accident.

[4] From our study of the record we have concluded that the trial court properly denied appellants' motions for instructions to the jury to bring in a verdict in their favor and that there is ample evidence to sustain the verdict and judgment.

[5, 6] Appellants next complain because the trial court overruled their objections to questions propounded to witnesses, and admitted in evidence declarations against interest made by Christiansen and Moore. In each instance the trial court carefully instructed the jury that the declaration could be considered against the party making it, and no other. It is true that part of the declarations might better have been admitted in rebuttal after the witnesses had testified. This goes to the order of proof, which is a matter largely in the discretion of the trial judge, and we can see no abuse of discretion in the admission of evidence out of the usual order.

[7] Appellants complain of two instructions given at the request of respondents, and of the refusal to give several instructions which they proposed. The other given instructions are not printed in appellants' briefs, nor any supplement, as required by the rules adopted for this court. For that reason we might be justified in refusing to consider the alleged errors. Coats v. Hathorn, 121 Cal. App. 257, 8 P.(2d) 1038. Because they contend there were no other instructions given on the subjects embodied in the refused instructions, we have examined all of the instructions given, as well as all of those which were refused.

[8] The first instruction of which appellants complain opens with the statement that the burden was on the defendants to prove the contributory negligence of Kerner. Then follows the portion to which objection is made, where it is stated that the law presumes that Kerner took "ordinary care of his own concerns and exercised due care for his own safety," and that this presumption is a "species of evidence and it shall prevail and control unless it is overcome by satisfactory evidence." A similar instruction was approved in Olsen v. Standard Oil Co., 188 Cal. 20, 204 P. 393. See, also, Davis v. Tanner, 88 Cal. App. 67, 262 P. 1106. Appellants assert that the rule announced in these cases has been overruled in Rogers v. Interstate Transit Co., 212 Cal. 36, 297 P. 884, 885. We do not so understand the Rogers decision. It was there said: "Whether the plaintiff took ordinary care of his own concerns while operating his car at that particular occasion was a matter of evidence established by the plaintiff and witnesses called by him in support of his claim that he did. In the face of this evidence there was no room for any presumption. If the evidence on his part showed that he was negligent, then it cannot be said that the jury, notwithstanding this evidence, might presume that he was not negligent, or that he took ordinary care of his own concerns, which amounts to the same thing. On the other hand, if this evidence showed that plaintiff was not negligent in the operation of his car at the time of its collision with defendant's stage, then that fact was before the jury, not as the result of any presump-

tion, but in response to testimony of witnesses testifying in the case. In either event, the jury, in determining whether the plaintiff was guilty of negligence, would look to, and be governed by, the evidence before the court, and not by any presumption. Whatever the rule may be when the evidence contrary to the presumption is produced by the adverse party, it is well established in this state that a presumption in favor of a party is entirely dispelled by the testimony of the party himself or of his witnesses."

In the instant case the respondents produced no evidence showing contributory negligence on the part of Kerner, and were entitled to the benefit of the presumption under the rule announced in Smellie v. Southern Pacific Co., 212 Cal. 540, 299 P. 529.

[9, 10] The second instruction of which appellants complain stated the "great peril" rule, which was proper under the facts of this case.

Appellants complain of the failure of the trial judge to give eight instructions proposed by them. The subject-matter of seven of these instructions was properly covered by others given. It would have been better to have given the other requested instruction, which was on burden of proof, as no one instruction was devoted to that subject. Taken as a whole, we regard the instructions given sufficient, and can find no prejudicial error in the refusal to give this instruction.

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

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129 Cal.App. 747

MASAJIRO NAKANISHI v. POLICY HOLDERS' LIFE INS. ASS'N OF LOS ANGELES.

Civ. 8609.

District Court of Appeal. First District Division 1, California.

Feb. 23, 1933.

Hearing Denied by Supreme Court April 24, 1933.

1. Venue 🔑70.

Where motion to change venue is resisted on ground of witnesses' convenience, issue must be joined so that court may determine whether witnesses are necessary and what facts are incident to issues raised.

2. Venue 🔑68.

Where venue is to be determined from issues tendered on moving party's affidavit, counter affidavits may be permitted.

3. Venue 🔑68.

Where insurer sought change of venue on ground contracts sued on were consummated, were to be performed, and were allegedly breached in county of insurer's residence, insured could file counter affidavits to negative such grounds of change of venue.

4. Corporations 🔑503(3).

Corporation sued in one of counties specified in Constitution cannot demand change of venue as matter of right, but only for reasons other than that action was commenced in improper county (Const. art. 12, § 16).

5. Contracts 🔑208.

Corporation's contract sued on, not expressly stipulating place of performance, ought to be held performable in place where circumstances, viewed in light of pertinent statutes, indicate that parties expected or intended it to be performed (Civ. Code, § 1489).

6. Insurance 🔑596.

Where insured elected to have payment made at his residence, known to insurer as specified county, such residence was appropriate place to tender payment in order to discharge insurer's obligation (Civ. Code, § 1489).

Appeal from Superior Court, Contra Costa County; A. B. McKenzie, Judge.

Action by Masajiro Nakanishi against the Policy Holders' Life Insurance Association of Los Angeles. From an order denying its motion for change of venue, defendant appeals.

Affirmed.

Hugh Martin Young, Thomas W. Hughes, and Chas. D. Warner, all of Los Angeles, for appellant.

Geary & Geary, of Oakland, for respondent.

PARKER, Justice pro tem.

This is an appeal by defendant from an order denying its motion for a change of venue from Contra Costa county to Los Angeles county. The action was to recover upon life insurance policies.

The complaint set up the contracts of insurance in hæc verba, alleged the death of the insured in the county of Contra Costa, and that plaintiff was the beneficiary under the policies. Upon its first appearance defendant demanded a change of the place of trial, and filed its written demand and affidavit of residence as well as the required affidavit of merits. No point is made by respondent as to the procedure. The affidavit upon which the demand for change of venue is based may be summarized. It is set forth that the contracts of insurance upon which the action is based were issued upon the signed applications of one Yukichi Arii; that the applications were received by defendant in the city of Los Angeles; that the policies were issued from Los Angeles; that the policies were issued and the contracts consummated in Los Angeles by delivery of the contracts at Los Angeles, and that said contracts were to be performed, and the liability thereon arose, at Los Angeles, where defendant has its principal and only place of business; further, that the obligations of the contracts of insurance were to be performed in Los Angeles; that in Los Angeles defendant rejected and repudiated any claim of liability, and that therefore the breach, if any, occurred there; that defendant at all times has had its principal place of business in Los Angeles, and has never had, nor has it now, any place of business or resident agent or agency in Contra Costa county. As before stated, the affidavit contained further the statement of merits.

[1-3] The court below permitted plaintiff to file counter affidavits. Appellant strenuously contends that this action of the trial court was erroneous, and that these counter affidavits must be entirely disregarded. The counter affidavits were not made to retain the case in Contra Costa county on account of convenience of witnesses or on any ground which conceded the right of removal. The sole purpose of the counter affidavits was to negative the averments of defendant's affidavit and to fully present the issues tendered. The objection of appellant is that no counter affidavits are permissible upon a motion to change venue until such time as answer has been made and issue joined. Appellant has misconstrued the purport of the cited cases. The point of the authorities is that, where a motion to change the venue is resisted on the ground of convenience of witnesses, it is first necessary that issue be joined in order that a court may determine whether any witnesses are necessary, and, if so, then what facts are incident to the issues raised. Such is not the case here, and the authorities cited have no application. Where venue is to be determined from the issues tendered on the moving party's affidavit, it has been recognized as a proper practice to permit counter affidavits. For instance, if a defendant should move on the sole ground of residence, it would surely be permissible to show the actual residence by counter affidavit; this merely as an illustration. Other situations often arise, and the practice permits and encourages a full hearing of the facts determinative of the venue. Brown v. San Francisco Sav. Union, 122 Cal. 648, 55 P. 598; Brady v. Times-Mirror Co., 106 Cal. 56, 39 P. 209.

These counter affidavits showed that the defendant had communicated with plaintiff, addressing him at Contra Costa county, and that plaintiff beneficiary had always resided in said county, and that the place of performance of said contracts of insurance was Contra Costa county.

Another counter affidavit showed that the agent of defendant had solicited the insurance in Contra Costa county, and that the applications were executed and payment made in said county; that the policy holder at the time of his death was a resident of Contra Costa county.

The policies of insurance provided that upon the death of insured the company was to pay the face of the policies to plaintiff, and the address of plaintiff was given in the applications, which were made a part of the contracts, as Martinez, Contra Costa county.

[4] Section 16, article 12, of the state Constitution, provides that a corporation may be sued in the county: (a) Where the contract is made or is to be performed; (b) where the obligation or liability arises; (c) where the breach occurs; (d) where the principal place of business of such corporation is situated. Where a corporation is sued in any one of the counties mentioned in this section, it cannot demand a change of venue as a matter of absolute right, but only as in other cases, and for reasons other than that the county in which the action is commenced is not the proper county. Trezevant v. Strong Co., 102 Cal. 47, 36 P. 395; Fresno National Bank v. Superior Court, 83 Cal. 491, 498, 24 P. 157.

[5] In the case of Burr v. Western States Life Ins. Co., 211 Cal. 568, 296 P. 273, it was held that an action to recover on a policy of insurance was properly transferred to the county wherein the defendant had its principal place of business. The reason of this decision was that the policy of insurance specifically provided that payments should be made at the home office in San Francisco. The language of the decision makes it clear and unmistakable that, if the policy had provided no place of payment, the venue would have been properly laid in the county wherein the liability arose or where the contract was to be performed. In a suit upon the contract of a corporation, where no place of performance is expressly stipulated, it ought to be held performable in the place where the circumstances, viewed in the light of pertinent Code provisions, indicate that the parties expected or intended it to be performed. Bank of Yolo v. Sperry Flour Co., 141 Cal. 314, 74 P. 855, 65 L. R. A. 90.

[6] Section 1489 of the Civil Code provides that, in the absence of an express provision to the contrary, an offer of performance may be made at the option of the debtor: (1) At any place appointed by the creditor; (2) wherever the person to whom the offer ought to be made can be found. In this case the creditor elected to have the payment made at his place of residence, known to the debtor, in Contra Costa county. He could be found there, and that was the appropriate place for tender of

payment in order to discharge the obligation of the debtor. In Robinson v. Order of Railway Employees, 53 Cal. App. 404, 200 P. 87, 88, the court quotes approvingly from 11 Ency. of Pleading & Practice, as follows: "Where statutes provide that an insurance company may be sued within the county in which the cause of action or some part of it arose it is generally held that an action on a policy of life insurance is maintainable in the county where the insured resided and died." See, also, McKenzie v. Los Angeles Life Ins. Co., 96 Cal. App. 386, 274 P. 384; Haas v. Mutual Relief Ass'n, 5 Cal. Unrep. 180, 42 P. 237; Cooley's Briefs on Insurance, vol. 7, p. 6778.

The order is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

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130 Cal.App. 11

CITY OF LOS ANGELES v. DUNCAN et al.

SAME v. M'DIVANI et ux.

Civ. 8667.

District Court of Appeal, First District,
Division 2, California.
Feb. 23, 1933.

Rehearing Denied March 25, 1933.
Hearing Denied by Supreme Court April 24, 1933.

1. **Evidence 🔑383(9).**

Map, being declaration of landowners' predecessors who prepared it, *held* evidence against landowners, but not conclusive (Code Civ. Proc. § 1849).

2. **Navigable waters 🔑36(2).**

Where map and testimony showed that undescribed line thereon was merely meander line, line of mean high tide as existing on ground *held* true boundary (St. 1917, p. 89).

3. **Navigable waters 🔑36(6).**

That court, having adopted line on map, fixed boundary line at place other than that required by scale thereof, created fatal ambiguity (Code Civ. Proc. § 1849).

4. **Evidence 🔑383(9).**

United States Coast and Geodetic Surveys are prima facie evidence of facts shown; weight and effect being fact question for court in quiet title action.

Appeals from Superior Court, Los Angeles County; Clair S. Tappaan, Judge.

Separate actions by the City of Los Angeles against E. Duncan and another, and against Prince David Zahari M'Divani and wife, were consolidated. From the judgment, plaintiff appeals.

Reversed.

Erwin P. Werner, City Atty., Frederick von Schrader, Asst. City Atty., and Joseph T. Watson, Deputy City Atty., all of Los Angeles, for appellant.

Loeb, Walker & Loeb, of Los Angeles, for respondents Title Guarantee & Trust Company, Prince David Zahari M'Divani, and Mae Murray M'Divani.

Mark S. Feiler, of Hollywood, for respondent E. Duncan.

GRAY, Justice pro tem.

In each of these consolidated cases the city of Los Angeles, as successor of the city of Venice, to which tidelands, within its then territorial limits, had been granted by Statutes 1917, p. 89, sued to quiet its title to a portion of such tidelands, lying oceanward of the seaward boundaries of the properties of the respective respondents. Such tidelands are situated on the Pacific Ocean at Playa Del Rey about 26 miles northwesterly from the entrance of Los Angeles harbor and lie adjacent to and northwesterly of a narrow inlet through the beach of Santa Monica bay into a lagoon. Respondents' disclaimer of any title to tidelands narrowed the dispute to the location on the ground of the line of mean high tide, which, concededly, fixed the boundary between the city's tidelands and respondents' property. Omitting, as immaterial for present purposes, the northwesterly and southeasterly boundaries, which differed in each case, the court found and decreed that the city owned the tidelands "adjacent to and southwesterly of the southwesterly line of Block E, Portion of Playa Del Rey Townsite, as per map recorded in Book 7 of Maps, at page 130 thereof, records of Los Angeles County; said southwesterly line of said portion of Block E being fixed as a line distant 139 feet southwesterly from the northeasterly line of Marine Walk, as shown on said recorded Map." In effect, the court established the boundary line, first, by determining it to be the southwesterly line of block E, and, secondly, locating such line by fixing its distance from the "Marine Walk." Appellant not only does not quarrel with the establishment of such southwesterly line as the boundary, but argues strenuously therefor. But it does contend that its distance from the "Marine Walks," which is not stated on the map, should have been established solely by scaling. By this method, such distance is approximately 36 feet, making a difference laterally from that found by the court of approximately 103 feet.

[1, 2] Among the several maps introduced by appellant was the one referred to in the finding and judgment and which had been

prepared and recorded by respondents' predecessors in title. This map, drawn to scale, depicts a subdivision with various streets, including "Marine Walk," blocks and lots, having designated locations and dimensions. Waterward of "Marine Walk" appears an area denominated as "Block E," bounded on the southwest by an undescribed sinuous line, which appellant claims is the line of mean high tide. In support of this conclusion, appellant relies upon the position of this line and to its similarity of location with a line upon a previous map of this subdivision which is expressly called the line of mean high tide. In contradiction, respondents produced the maker of the map, who testified that he did not use the previous map, that he did not draw the line from measurements, but drew it, haphazardly, merely to indicate that there was land on one side and water on the other. Citing cases, of which Chapman v. Polack, 70 Cal. 487, 11 P. 764, is typical to the effect that a map referred to in a deed is to be regarded as giving the true description of the land conveyed and that lines and natural objects, shown on such map, form part of the description, appellant argues that the location of the sinuous line is to be solely fixed by measuring its distance from the "Marine Walk," according to the scale of the map. Wise v. Burton, 73 Cal. 166, 14 P. 678. This rule, which has been codified in section 2077, subd. 6, of the Code of Civil Procedure (Miller v. Grunsky, 141 Cal. 441, 66 P. 858, 75 P. 48), applies to the construction of an ambiguous description in a deed where the deed refers to a map and the parties have acted with reference to such map. Since no construction of such a deed is here involved, this rule is inapplicable. However, such maps, being declarations of respondents' predecessors in title, were evidence against them (Code Civ. Proc., § 1849), but were not conclusive, and merely raised a question of fact. MacGregor v. Knowlden, 102 Cal. App. 42, 282 P. 438. The map itself, together with its maker's explanation, shows that the sinuous line was intended as a meander approximately locating the line of mean high tide. Therefore the line of mean high tide, as it actually existed on the ground, rather than this meander line, constituted the real boundary. Curtis v. Upton, 175 Cal. 322, 165 P. 935; Los Angeles v. San Pedro, etc., R. R. Co., 182 Cal. 652, 189 P. 449.

[3] The court first located the boundary by adopting the southwesterly line of block E as shown on the map. While the map does not state in words or figures, the distance between such line and the "Marine Walk," its scale provides the method for establishing such distance as approximately 36 feet. Wise v. Burton, supra. Secondly, the court fixed such distance as 139 feet. The location of the line, as shown by the map, conflicts with its location as fixed by the court, thereby creating a patent ambiguity in the description, which is fatally defective. Anaheim Sugar Co. v. County of Orange, 181 Cal. 212, 183 P. 809. Furthermore, there is no evidence from which the court could have fixed this distance. It is true that respondents' witness fixed the line of mean high tide a few feet seaward of the line, located by the court, but such testimony did not attempt to fix this line of block "E." While the court might have accepted this testimony and established the line of mean high tide, in accordance therewith, as the boundary, it did not do so, but first adopted a line as shown by the map as the boundary, and then located the same line, without testimony, at a place 103 feet waterward from the location shown by the map.

[4] Counsel, in their respective briefs, have extensively discussed the weight and effect of two United States Coast and Geodetic Surveys of 1876 and 1887 and testimony based thereon and derived therefrom. In view of the necessity, otherwise, of a new trial when the evidence may differ, no useful purpose will be served by reviewing and discussing this evidence, but it will suffice to state the principle applicable thereto. Such maps are prima facie evidence of the facts shown thereon, but the weight and effect to be given thereto is a question of fact for the court. City of Oakland v. Wheeler, 34 Cal. App. 442, 168 P. 23.

The judgment is reversed.

We concur: SPENCE, Acting P. J.; STURTEVANT, J.

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129 Cal.App. 735

RICHARDSON, State Building & Loan Commissioner, et al. v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

Civ. 8724.

District Court of Appeal, Second District, Division 2, California.

Feb. 21, 1933.

Appeal and error ⚿467.

Undertaking to secure injunction enjoining foreclosure sale pending appeal *held* effectual as stay bond, so that mandamus directing sale would not lie (Code Civ. Proc. § 945).

Petition by Friend W. Richardson, as State Building & Loan Commissioner in the liquidation of Fidelity Savings & Loan Association of Los Angeles and others for a writ of mandate to be directed to the Superior Court in and for Los Angeles County and others, requiring a sale of mortgaged property.

Petition denied.

Arthur Frederick Coe and John L. Mace, both of Los Angeles, for petitioners.

Newby & Newby, of Los Angeles, for respondents.

CRAIG, Justice.

The owners of certain real property instituted suit to declare usurious loans thereon, and at the same time were made defendants in a suit to foreclose a mortgage on said property, which said suits were consolidated for trial. The court below determined that, although usurious, the note was held by an innocent purchaser for value, that the owners were not entitled to the relief prayed by them, and decreed foreclosure, from which an appeal was perfected. The sale was enjoined pending appeal, provided a bond in the penal sum of $10,000 be furnished in accordance with said decree. Such undertaking having been held insufficient, another in lieu thereof was filed and these undertakings were made grounds for the instant attack upon the restrictive provisions of said decree of foreclosure. The plaintiff, having obtained a writ of enforcement, insisted that said injunction order was ineffectual, and applied for a writ of mandamus requiring a sale of the mortgaged property.

Said decree contained the usual form of recitals that amounts specified were due the plaintiff, and directing a sale of the property; that the proceeds of sale be applied to said obligations; that the defendants and subsequent lienholders be barred and foreclosed from equity of redemption from the delivery of a deed; that the purchaser be let into possession, and that judgment be entered for any deficiency. Contemporaneously, nevertheless, it was further ordered that "upon the solicitation and request of defendants * * * an injunction pending appeal shall issue herein restraining the mortgage foreclosure sale in the above-entitled cause upon appeal from the judgment of the court in this cause, provided the above-named defendants in this action diligently and in good faith prosecute their appeal from said judgment in this cause and in addition thereto within ten (10) days from and after the signing of these findings the above named defendants obtain and file a good and sufficient surety bond in this cause in the sum and amount of $10,000.00, and in a form and content as shall be approved by this court, protecting and indemnifying the Fidelity Savings and Loan Association as provided by section 945 of the Code of Civil Procedure." The undertaking furnished pursuant to such decree recited jurisdictional facts, rendition of judgment in foreclosure, and that the defendants desired to appeal; that in "consideration of the premises and of the issuing of said injunction pending said appeal, the surety undertakes in the sum of $10,000.00 and promises that in case said injunction pending appeal shall issue, the said defendants" will promptly pay to the plaintiff any deficiency that may arise upon the mortgage foreclosure sale of the mortgaged premises, together with costs, attorneys' fees, damage, loss, or injury arising from waste, etc. An injunction order substantially conforming to said decree was made and entered, and a subsequent motion seeking its dissolution was denied.

We are not convinced by the arguments and citation of authorities by the parties that a suspension of the right of sale was or might have been effected by the injunctive restrictions related. Section 945 of the Code of Civil Procedure we think was intended as the exclusive means of staying execution pending appeal in such a case. "If the judgment or order appealed from, direct the sale or delivery of possession of real property, the execution of the same cannot be stayed, unless a written undertaking be executed on the part of the appellant, with two or more sureties, to the effect that during the possession of such property by the appellant, he will not commit, or suffer to be committed any waste thereon, and that if the judgment be affirmed, or the appeal dismissed, he will pay the value of the use and occupation of the property from the time of the appeal until the delivery of possession thereof, pursuant to the judgment or order, not exceeding a sum to be fixed by the judge of the court by which the judgment was rendered or order made, and which must be specified in the undertaking. When the judgment is for the sale of mortgaged premises, and the payment of a deficiency arising upon the sale, the undertaking must also provide for the payment of such deficiency." Code Civ. Proc. § 945.

It at once is obvious that the surety, in attempting to comply with a decree requiring security to protect the plaintiff "as provided by section 945 of the Code of Civil Procedure," did undertake that the defendants would pay any deficiency arising upon foreclosure sale, and all costs, fees, and damage, loss or injury from waste. Since said section expressly proscribes any stay in the absence of such undertaking, it must have intended that the means expressed in other recitals of said decree and surety bond should be inoperative, and hence the same become superfluous. It further appears that, when so required, a new undertaking in form and substance stipulated by the plaintiff was furnished, approved, and substituted in place and stead of the former. This latter also provided for the payment of "any deficiency that may arise," and all costs, loss, damage, and attorneys' fees incurred or occasioned by this appeal, "any damage, loss or injury involved in this litigation and occasioned by the commission of any waste," not exceeding the sum of $10,000.

Holding, as we do, that the appeal was perfected and that the undertaking ostensibly given to secure injunctive relief is nevertheless effectual as a stay bond under section 945 of the Code of Civil Procedure, it follows that the petition must be denied.

The petition for a writ of mandate is denied.

We concur: WORKS, P. J.; STEPHENS, J.

129 Cal.App. 713

IRWIN v. MURPHY.

Civ. 8459.

District Court of Appeal, First District, Division 1, California.

Feb. 20, 1933.

Hearing Denied by Supreme Court April 20, 1933.

1. Libel and slander 🔑80.

Where complaint in libel shows on its face that publication was privileged, no cause of action is stated.

2. Grand jury 🔑1.

"Grand jury" is a judicial body with power to make full inquiry into public offenses triable in county, and its members are officers of the court (Const. art. 1, § 8; Code Civ. Proc. § 192; Pen. Code, §§ 915, 920, 922).

[Ed. Note.—For other definitions of "Grand Jury," see Words and Phrases.]

3. Grand jury 🔑25.

Grand jury has right and duty to make report as to any matter which it may investigate, notwithstanding no indictment is returned (Const. art. 1, § 8; Code Civ. Proc. § 192; Pen. Code, §§ 915, 920, 922).

4. Grand jury 🔑42.

Grand jury's report upon professional boxing following death of boxer in bout did not exceed scope of legitimate inquiry, though no indictments were returned (Const. art. 1, § 8; Code Civ. Proc. § 192; Pen. Code, §§ 31, 915, 920, 922).

5. Libel and slander 🔑38(1).

Reports of grand jury upon matters properly cognizable by it are privileged, so that member is not liable to action for libel and slander based upon report (Const. art. 1, § 8; Code Civ. Proc. § 192; Pen. Code, §§ 31, 915, 920, 922, 927).

Appeal from Superior Court, City and County of San Francisco; J. J. Trabucco, Judge.

Action for libel and slander by Tobey Irwin against John P. Murphy. From judgment for defendant, plaintiff appeals.

Affirmed.

Leon Samuels, of San Francisco, for appellant.

Robert E. Fitzgerald, of San Francisco, for respondent.

PARKER, Justice pro tem.

This is an appeal from a judgment made upon an order sustaining, without leave to amend, a demurrer to plaintiff's amended complaint in an action to recover damages for libel and slander.

We summarize the complaint. It is alleged that in the year 1929 defendant, together with eighteen other persons, constituted the grand jury in and for the city and county of San Francisco, regularly drawn, impaneled, and sworn; that on or about September 26, 1930, the said persons, acting under order of official authority as a grand jury, did make and publish openly and publicly, and cause to be circulated, a certain written report. This written report set forth that the grand jury had made an investigation into the details connected with a certain boxing contest theretofore held in the city and county of San Francisco and that the evidence presented to the grand jury did not permit the return of indictments against any of the principals involved. The report then continued and stated that the evidence presented did justify certain conclusions. These conclusions referred to the manner in which boxing matches were conducted, and the conduct and character of those connected with the promotion and management of such contests. Among other things, it is said in the report that professional boxing has become a "racket" not cleanly conducted; that gambling cliques and other evil influences dominate the boxing clubs; also, that certain referees are selected as a money getting scheme; that the boxing commissioner for the bay district is unfit; that the referee in the fight or contest being investigated was guilty of carelessness and inefficiency, and that his testimony before the grand jury was in conflict with other testimony; that unsportsmanlike conduct on the part of one contestant, combined with an uncalled for viciousness, resulted in the death of his opponent. The grand jury, then, in the same report, made certain recommendations. It was recommended that the Governor request the resignation of the boxing commissioner, and that the state athletic commission perpetually revoke the license of Mr. Tobey Irwin as referee. It was further stated that for the betterment of existing conditions the following suggestions were offered, namely: That the "fight game" was controlled by sure-thing gamblers whose influence spread through clubs, managers, and fighters, and that fighters' seconds and even the referee are but puppets subject to dismissal upon failure to obey the orders of the powers in control. The report concludes with suggestions as to the remedy. The complaint then alleges that the particular fight mentioned in the report was a boxing contest held under and pursuant to a statute of this state, and the plaintiff was the referee of said contest, duly appointed to such position according to the provisions of the statute. The complaint thereafter contains appropriate allegations of falsity, and lack of privilege, and damage to plaintiff both as an individual and as a referee. Likewise does the complaint amplify upon the publication of said libelous matter.

A second count in said complaint is based upon an alleged slander. The basis thereof is an alleged oral statement made by defendant in referring to said report, wherein he stated the plaintiff had been lucky to get off so easily and had been rather lightly dealt with by the grand jury in view of the conflicting testimony presented.

[1] The main question presented upon this appeal is that of privilege. The character of the alleged publication, whether libelous or not, is not argued, and for all purposes here might be conceded. However, if it were essential to a decision, we would not readily make such a concession. The nicer points of pleading are likewise not discussed. Here again a concession might be made on the point that privilege is a defense, and lack of privilege need not be specifically pleaded. Yet, on this point, it needs no citation of authority that where a complaint in libel shows on its face that the publication was privileged no cause of action is stated. Gosewisch v. Doran, 161 Cal. 511, 119 P. 656, Ann. Cas. 1913D, 442. The ground upon which the court below made its order sustaining the demurrer without leave to amend is that the publication is and was privileged, the ratio decidendi being that a grand jury is a judicial body and its report a judicial proceeding.

[2] Preliminary to any discussion of the powers, rights, and duties of a grand jury or its members, it may be well to ascertain just what manner of organization a grand jury may be. Section 192, Code of Civil Procedure, defines a "grand jury" as follows: "A grand jury is a body of persons, nineteen in number, returned in pursuance of law, from the citizens of a county, or a city and county, before a court of competent jurisdiction, and sworn to inquire of public offense committed or triable within the county or city and county." Section 8 of article 1 of the Constitution provides that a grand jury shall be drawn and summoned at least once a year in each county. These provisions demonstrate that a grand jury is not a nondescript gathering of local celebrities enthused with zeal for civic betterment, but rather a body of citizens forming a part of the government, and are essential under the organic law. A grand jury is a judicial body and grand jurors are officers of the court. Ex parte Sternes, 82 Cal. 245, 23 P. 38; Turpen v. Booth, 56 Cal. 65, 38 Am. Rep. 48; In re Gannon, 69 Cal 541, 11 P. 240. In the Code definition we find the outline of at least a part of the function of a grand jury, namely, to inquire of public offense. Code Civ. Proc. § 192; also, Pen. Code, § 915, to the same effect.

In the Matter of Tyler, 64 Cal. 434, 437, 1 P. 884, 887, it was said: "A grand jury should never forget that it sits as the great inquest between the state and the citizen." From the foregoing it is manifest that a grand jury is inherently a body of inquisition empowered to make full and diligent inquiry into public offenses triable within the county. This idea is carried out in the provisions of the Penal Code. Section 920 places the duty of investigation with the grand jury, and demands that this body not only hear and weigh incriminating evidence, but that it shall hear evidence which it may have reason to believe will explain or clear away any pending charge. Section 922 again places upon the grand jury the duty of investigating a charge where any member has reason to believe that a public offense has been committed.

[3] The appellant concedes, as he must, the foregoing. Thus conceding, he would limit any report of the grand jury to an indictment, presentment, accusation, or an express report ignoring the charge. In other words. appellant argues that when the commission of a public offense is being inquired into or investigated the power of the grand jury is limited to a definite charge, whether by indictment or otherwise, against the person being investigated; that if the grand jury does not find sufficient evidence to indict, the power of the body terminates and any act thereafter is in excess of jurisdiction. We think this too narrow a construction to be placed upon the powers of a grand jury. As a matter of routine, if nothing further, the power to investigate includes as an integral part thereof the right and duty to report the result of such investigation. The duty of a grand jury is to protect the citizen against unfounded accusation. Matter of Tyler, supra. Such a duty, coupled with the power of investigation, almost demands completeness of disclosure on matters investigated. It seems futile to attempt demonstration of the obvious. Law and common sense combine to compel the conclusion that, if a grand jury is authorized and bounden to inquire of public offense, a necessary element of this power must be the power and duty to disclose the result of the inquiry.

[4] Coming then to the instant case as disclosed by the complaint: A human being had

been killed. Murder is the highest offense known to the law and every killing may disclose facts going to constitute a crime. The man had been killed in a boxing contest, which contest was held under sanction of the statute. It is conceded that the grand jury was empowered to investigate the killing. Given a death in a boxing contest, it became of primary importance to inquire the conditions under which the contest was held. The Penal Code declares that all persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense or aid and abet in its commission, or, not being present, have advised and encouraged its commission, are principals in any crime so committed. Pen. Code, § 31. So, therefore, an investigation into a death resulting from an alleged boxing contest, would present an almost unlimited field of inquiry. It would present for examination not only the principals to the contest, but likewise the promoters, seconds, referee, boxing commissioner, and also the regulations or laws under which such a contest was held. Given a homicide, the grand jury upon investigation must find whether or not a public offense had been committed. They were compelled, under the statute, to hear and consider evidence which would explain the death. What an inane and lifeless body a grand jury would be if the limit of its power in case no indictment were returned were complete silence or a formal report of two words—"charge ignored." Without further discussion, we conclude that the report before us did not involve any person or subject beyond the scope of legitimate inquiry. Thus holding, we approach more closely the questions presented by appellant.

[5] The first question as stated by appellant is as follows: Did the grand jury in making the statements against appellant act in excess of its powers and beyond its jurisdiction? Our answer is in the negative and the reasons therefor appear hereinbefore. The second question follows: Is the report of a grand jury, upon matters properly cognizable by it, privileged? The answer must be in the affirmative. Whatever the rule may be elsewhere, and regardless of the persuasive force of contrary contention, the rule in this jurisdiction is well settled. Turpen v. Booth, supra; Pickett v. Wallace, 57 Cal. 555; Going v. Dinwiddie, 86 Cal. 633, 25 P. 129; Pen. Code, § 927. Indeed, the authorities seem to go further than it is necessary for us to go here. There is abundant support in precedent and authority for the principle that the privilege of a grand jury and a grand juror is absolute, while here we simply hold that the privilege exists where the alleged libelous matter is pertinent to the matters or persons under investigation. We do not pass upon the question of absolute privilege, but we do expressly refrain from limiting the privilege. Without extended quotation, reference may be had to the following authorities: Houghton v. Humphries, 85 Wash. 50, 147 P. 641, L. R. A. 1915E, page 1051; Sidener v. Russell, 34 Ill. App. 446; Hunter v. Mathis, 40 Ind. 356. In the last-cited case it is said: "Few persons would be willing to act as grand jurors, if, upon the testimony of their fellows or others who are entrusted with the performance of duties in connection with their deliberations concerning the manner in which they discharged their duties, * * * they would be liable to be subjected to an action and to the payment of damages. Doubtless, if we should depart from the rule which has come down to us approved by the wisdom of ages, we should soon appreciate more fully the wisdom of the rule and the reasons upon which it is founded. Let it be conceded that grand jurors are sometimes influenced by improper motives, which it is believed is not often the case, and still the evils which would result from any other rule would be far more frequent and pernicious than those resulting from this."

The announced principle behind the doctrine of privilege is that such a rule is not for the protection or benefit of any individual, but for the benefit of the public, to whose interest it is that judicial functions should be exercised with independence and without fear of consequences. Appellant has submitted his appeal limited to the two questions noted.

The judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

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129 Cal.App. 793

Tobey IRWIN, Plaintiff and Appellant, v. Selma ANSPACHER et al., Defendants and Respondents.

Civ. 8460.

District Court of Appeal, First District, Division 1, California.

Feb. 20, 1933.

Hearing Denied by Supreme Court April 20, 1933.

Appeal from Superior Court, City and County of San Francisco, J. J. Trabucco, Judge, in an action for damages for libel and slander.

Leon Samuels, of San Francisco, for appellant.

Robert E. Fitzgerald, of San Francisco, for respondents.

PARKER, Justice pro tem.

This is a companion case to Irwin v. Murphy (Cal. App.) 19 P.(2d) 292. Upon agreement of counsel the decision in either of these cases was to control the decision in the other.

Judgment affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

129 Cal.App. 680

HACKLER et ux. v. TUBACH et ux.

Civ. 4735.

District Court of Appeal, Third District, California.

Feb. 17, 1933.

1. Exchange of property 🔑8(4).

Evidence supported finding that parties to exchange agreement with judgment debtor agreed to satisfy judgments, if possible, for less than face value, charging debtor only with amount paid.

2. Trial 🔑395(1).

General findings that "all" as distinguished from "material" allegations of pleading are true or are untrue are sufficient.

3. Trial 🔑398.

Finding that defendants fraudulently procured note *held* not inconsistent with finding that defendants were entitled to recover certain amount thereon.

Appeal from Superior Court, Orange County; E. J. Marks, Judge.

Action by Byron K. Hackler and wife against W. S. Tubach and wife. Judgment for plaintiffs, and defendants appeal.

Affirmed.

Charles D. Swanner, of Santa Ana, for appellants.

James L. Davis and Sharpless Walker, of Los Angeles, for respondents.

BURROUGHS, Justice pro tem, delivered the opinion of the court.

This action arose out of an agreement between the plaintiffs and defendants for the exchange of real property.

Under the terms of the agreement defendants were to accept the property conveyed to them by the plaintiffs, subject to a mortgage for the sum of $32,500. During the course of the negotiations it developed that there were other debts owed by plaintiffs, which it was the desire of the parties to have adjusted and settled. Two of the debts referred to were judgments against the plaintiff Byron K. Hackler, which on the day the exchange was completed amounted to the sum of $1,282.24. As the plaintiffs were without money to pay said debts, an estimate of the amount was made and the plaintiffs thereupon executed and delivered to the defendants their promissory note in the sum of $3,750, which sum included at their face value the aforementioned judgments. To secure the payment of said note plaintiffs also executed a trust deed upon a portion of the real property which had been conveyed to them by the defendants in the exchange of property as aforesaid. The settlement of the amount actually due on this promissory note is the only issue involved in this suit. All items making up the total of the note have been satisfactorily adjusted except the amount to which the defendants are entitled under the aforementioned judgments against plaintiff. The court awarded plaintiffs a credit on said judgments for the full amount thereof. Defendants have appealed.

It is alleged in the complaint that to arrive at the amount for which said promissory note was given an estimate was made because the true amount could not then be ascertained for the following reasons: That at the time the promissory note and deed of trust were executed, "there was a mutual, oral, contemporaneous, dependent agreement entered into between plaintiffs and the said defendants W. S. Tubach and Della Tubach, wherein and whereby it was mutually understood and agreed * * * that the said judgments totaling on their face $1,264.74 as aforesaid, could be paid, settled and satisfied for approximately one-half of their face value; that the said defendants could possibly make a more advantageous settlement of said judgments than could the plaintiffs; and that the said defendants would make the best settlement of said judgments procurable and that the plaintiffs would be given credit on said promissory note and trust deed in the amount of the full face value, principal and interest, of the total of said judgments so to be paid by said defendants, and that said defendants would charge plaintiffs with only the actual amount paid by defendants in the payment and satisfaction of said judgments." The foregoing allegations are followed by others that the defendants settled said judgments for the sum of $600, but irrespective of such settlements claim that the full amount of said judgments are due them from the plaintiffs. By their answer, the defendants deny the making of the agreement, but admit the settlement of the judgments for $600.

The court made general findings that all of the allegations of the complaint were true and supported by the evidence and that all of the allegations of the answer were untrue and were not supported by the evidence.

[1] Evidence in support of the making of the agreement above set forth is in part as follows: A. R. Boyd testified that he was the real estate broker who arranged the exchange of the properties between the parties; that at the time of the exchange, Mr. Hackler said, referring to the judgments, "'I can get a settlement on these judgments for half or less if I can have a week's time,' so Mr. Andrews, the escrow officer, spoke up and said, 'Mr. Hackler, why don't you have Mr. Tubach go out shopping on these judgments? Don't you think he can get a better settlement for you than you can for yourself?' He sided in with him and said that was a pretty good suggestion, 'perhaps he can.' He said, 'You just have Mr. Tubach go out shopping on these judgments and see if he cannot get a better settlement than you can get yourself.' Then Mr. Tubach said if that was satisfactory with all concerned he would be willing to handle the matter for him if he would furnish him the names and addresses of these parties and the attorney who was handling this case. Then that was agreed upon."

The foregoing evidence is supported by that of the plaintiff Byron K. Hackler, who, in addition thereto, testified that he gave Mr. Tubach the names of the attorneys who handled the cases in which the judgments were entered against him, and that Tubach, after negotiating the settlement, consulted with him and he authorized Tubach to settle the judgments for $600. There is other evidence which supports the findings, but we can conceive of no good reason for discussing it further. True, the defendant W. S. Tubach and his witnesses deny such an agreement, but that merely presents a conflict in the evidence which it was the province of the trial court to decide and which it has already decided adversely to appellant.

[2] Appellants contend that a general finding is insufficient to support the judgment and cites in support thereof, Hall v. Mitchell, 59 Cal. App. 743, 211 P. 853, Holt Mfg. Co. v. Collins, 154 Cal. 265, 97 P. 516, Turner v. Turner, 187 Cal. 632, 203 P. 109, and Gordon v. Beck, 196 Cal. 768, 239 P. 309, where it is held that a finding by a court that all the material allegations of a pleading are true or untrue is insufficient because it is uncertain as to which of the findings the court deems material. However, it has long been the rule that findings, such as made in the case at bar, that all the allegations of a pleading are true or a finding that all of the allegations of a pleading are untrue, are sufficient. Fritz v. Mills, 170 Cal. 449, 150 P. 375; MacMurtry v. Fraties, 84 Cal. App. 401, 258 P. 120; Ferguson v. Koch, 204 Cal. 342, 268 P. 342, 58 A. L. R. 1176. There is no merit in the claim.

[3] Reversible error is also predicated upon an alleged conflict in the findings of fact. The complaint contains allegations of fraud on the part of defendants in procuring the note and deed of trust. These allegations are denied in the answer. Under the general findings above referred to those allegations are found to be true. In the adjustment of the accounts between the parties the court also found that the defendants were entitled to a judgment on the said note in the sum of $572.79; this, it is claimed by appellants, establishes the validity of the note and purges the transaction of fraud. We do not so construe these findings. It became the duty of the court to settle the differences between the parties and the mere fact that in the transaction it resulted that the defendants were entitled to recover a money judgment upon the note would not be inconsistent with the findings upon the issue of fraud.

So far as a failure of consideration for the promissory note to the extent of $682.24 is concerned, it did fail to that extent because of the settlement of the judgments for the sum of $600 and the agreement of the parties that plaintiff should have the benefit of the difference between the face value of the judgments included in the note and the amount for which they were actually settled, and such finding is not inconsistent with the general findings.

The cases cited by appellants that where special issues are raised by the pleadings the parties are entitled to specific findings thereon are not in point. In James v. Haley, 212 Cal. 142, 297 P. 920, cited by appellants, special damages were alleged, item by item; each allegation was denied and evidence introduced on each allegation. The court found damages in a lump sum without any attempt to find on each issue. It was held error not to find on each separate issue of damage thus raised. In the case at bar the only item in dispute is the credit to be given on the note arising out of the settlement of the judgments above referred to and which is the only issue in dispute, therefore there could be no question as to the source nor the amount found due. Without further discussion of the other cases cited by counsel it is sufficient to say we have examined each one of them and in each there is some feature that distinguishes it from the instant case.

It is also claimed as error, that as the action was tried upon the issue as to whether or not the parties entered into a contemporaneous oral agreement at the time of the execution of the promissory note and deed of trust, appellants were entitled to a special finding upon that issue, as the court apparently decided the case upon an entirely different theory. In reply to this contention, it is a sufficient answer to say that under the authorities heretofore cited the general findings were sufficient to cover the issue, and is a finding that such agreement was actually made as alleged in the complaint, and the colloquy between the court and counsel at the time of the trial as to another theory of the case held by the court is immaterial.

Complaint is also made of a finding by the court that when the promissory note for $3,750 was given, it was not given to settle any particular obligation or obligations for the exact amount which plaintiffs owed at the time and which were liens upon plaintiffs' property, could not be definitely determined, and the amount of said note was an estimate of the approximate amount only. It is claimed that this finding is not based upon any issue raised by the pleadings and is not supported by the evidence. An examination of the pleadings in detail and also the evidence does not, we believe, sustain appellants' contention, but even if it did, in the light of what has already been said it would not affect the judgment. There are no further questions requiring consideration.

The judgment is affirmed.

We concur: R. L. THOMPSON, J.; PLUMMER, Acting P. J.

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129 Cal.App. 650

SECURITY FIRST NAT. TRUST & SAVINGS BANK et al. v. LOFTUS et al.

Civ. 8757.

District Court of Appeal, First District, Division 1, California.

Feb. 17, 1933.

1. Reformation of instruments 🔑45(9).

Evidence did not show mistake warranting reformation in oil and gas lease respecting price to be used for computing royalty on oil (Civ. Code, § 3399).

2. Reformation of instruments 🔑17(1).

Reformation for mistake may be granted only where statute warrants it (Civ. Code, § 3399).

3. Reformation of instruments 🔑43.

Every presumption favors view that contract deliberately entered into expresses true intent of parties.

4. Appeal and error 🔑1011(1).

Appellate court would not concern itself on appeal with conflict in evidence where evidence as whole was sufficient to sustain findings and judgment.

5. Mines and minerals 🔑79(3).

Lease provision that value of petroleum should be "deemed" to be certain oil company's prevailing price meant that such prevailing price should be adjudged or held to be value for computation of royalty.

Oil and gas lease contained provision that value per barrel of petroleum should be deemed to be prevailing price per barrel publicly offered at time of production of such petroleum by certain oil company to producers generally in oil fields for district within which land was situated for petroleum of like gravity.

[Ed. Note.—For other definitions of "Deem," see Words and Phrases.]

6. Mines and minerals 🔑79(3).

Oil lease provision that prevailing price offered by certain oil company should be deemed value of petroleum contained no ambiguity, making extrinsic evidence unnecessary.

7. Mines and minerals 🔑73.

Where language of oil and gas lease was plain, parties were bound by it, since court could not make different contract for them (Civ. Code, §§ 1638, 1639).

8. Mines and minerals 🔑79(3).

Clauses making sale price of gas and gas products basis for royalty did not affect meaning of provision making prevailing price basis for royalty on oil.

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Action by the Security First National Trust & Savings Bank and others against William Loftus and another. From a judgment for defendants, plaintiffs appeal.

Affirmed.

John H. Burke, of Long Beach, for appellants.

Loeb, Walker & Loeb, of Los Angeles, for respondents.

COMSTOCK, Justice pro tem.

This is an appeal by the plaintiffs from a judgment in favor of the defendants in an action for the recovery of money and for the reformation of an oil and gas lease and the recovery of certain royalties alleged to be due under the lease as reformed.

Under date of June 15, 1927, the parties to this action entered into the lease in question, whereby the plaintiffs leased unto the defendants certain lands at Signal Hill, Los Angeles county, for the purpose of exploring, mining, and operating for oil and gas and other incidental purposes. The lease, among other things, contained the following clause: "That the Lessees will pay to the Lessors, in cash, the royalties hereinafter specified, and in the manner following: The Lessees shall, on or before the 20th day of each and every calendar month, account to the Lessors for all petroleum produced and saved from the well on the demised land during the preceding calendar month, and at such accounting shall pay to the Lessors the value of one-sixth (1/6) of the total amount of such petroleum so produced and saved; one-half (½) of one-sixth (1/6) of all such payments shall be made to the Western Savings Bank of Long Beach, California, for the account and to the credit of Frank G. Butler and Hannah N. Butler, and one-half (½) of the one-sixth (1/6) royalty of all such payments to be made to the Long Beach Branch of the Pacific Southwest Trust and Savings Bank, for the account and to the credit of Trust No. 3621, Central Office, File No. 1 Long Beach Branch, Butler Lease, for account and to the credit of the Lessors. The value per barrel of such petroleum shall be deemed to be the prevailing current price per barrel, publicly offered at the time of the production of such petroleum by the Standard Oil Company of California to producers generally in the oilfield or district within which said leased land is situated for petroleum of like gravity."

The theory of plaintiffs' action is twofold: First, that defendants are, under the lease as written, indebted to plaintiffs in the amount sued for as a royalty based upon the value of one-sixth of the total price of oil produced and sold from the leased premises during the period alleged; and, secondly, that the agreement of the parties was that defendants should pay plaintiffs a royalty equal to one-sixth of the total price received by them for the oil, but that through mutual mistake made by the plaintiffs and known or suspected by the defendants, said agreement was omitted from the lease and the clause fixing the price publicly offered by the Standard Oil Company of California, as above quoted, erroneously inserted therein as the basis for computing the royalty, and that reformation should be granted and plaintiffs be given judgment for the full one-sixth of the price received by defendants for all oil sold.

It was stipulated (saving to plaintiffs all rights with respect to the construction of the lease) that one-sixth of the value of all petroleum produced and saved from the land, based upon the current prevailing price per barrel publicly offered at the time of production by the Standard Oil Company of California to producers generally in the district within which the land is situated for petroleum of like gravity, had been paid to plaintiffs, and that defendants had received for petroleum produced from the leased premises and sold by them certain sums in excess of said Standard Oil Company price, one-sixth of which excess amounted to $9,271.89, no part of which had been paid to plaintiffs.

[1, 2] The court found in favor of the defendants upon all issues. Appellants contend that the evidence does not support the findings and judgment and that the findings and judgment are contrary to the evidence. No particular finding is pointed out as being lacking in necessary evidentiary support, but it is argued that the evidence shows without conflict a right to reformation and that regardless of the theory of reformation the lease as written should receive a construction to the effect that plaintiffs are entitled to not less than one-sixth of the said Standard Oil Company price and one-sixth of the total sale price if sold for more. We cannot agree with these contentions.

It appears from the evidence that there were some preliminary negotiations between the plaintiff Frank G. Butler and the defendants, at the office of the defendant Loftus, in Los Angeles, shortly before the lease was executed, during which the amount of the royalty was bargained for. Butler asked one-fifth, having been offered that by others. Loftus offered one-sixth, which was acceptable to said plaintiff. There was no conversation relating to the Standard Oil price nor to any particular basis for the computation of royalties. Neither was there any conversation relating to many other details of the formal lease later prepared. At this time defendants were engaged in selling oil to the Standard Oil Company and no bonus or sum in excess of any standard or uniform price level was mentioned nor appeared to be in the minds of the parties. There had been a former lease negotiated between Mr. Butler and another and the defendants during the preliminary discussion of which Mr. Butler had insisted on a clause similar to the one concerning the Standard Oil price. He had then stated that they did not want to be bothered with getting their money. They wanted the money and they wanted the Standard Oil price. They did not want it sold to some friend of the lessees for less. To whomever they leased they wanted to be paid the money; they did not wish to be bothered with the oil. Defendants prepared the lease in question here and in its formal arrangement included the clause concerning the Standard Oil price, believing that since this had been insisted upon in discussing the lease formerly bargained for it would be desired in this one. Loftus stated that by inserting this provision he understood the intent and meaning to be that no matter what price the lessees got for their oil, they were under the obligation to pay the lessors based upon the Standard Oil price and exactly that. A portion of his testimony may be directly quoted:

"Q. Will you tell the court exactly what you understood to be the meaning and intent of that provision when you put it in the lease? A. My understanding was that we would pay them the Standard market price, and I would like to qualify that by saying that Mr. Graham objected to that, saying we might get stuck; maybe we can't sell the oil and we will have to sell it for less, but it was agreed on anyway. It was after the lease was drawn that that discussion was had.

"Mr. Burke [counsel for appellants]: I move to strike out everything that was said by Mr. Graham and Mr. Loftus not in the presence of plaintiff.

"Q. By Mr. Walker [counsel for respondents]: Was this said in the presence of Mr. Butler? A. No. Mr. Walker: I consent that it be stricken out.

"A. My intention was that he would get that money, and no matter what we got we were under that same obligation, by agreeing to pay it, whether we got the Standard price or not. I have a lease of that kind now.

"The Court: Was there any question of bonus discussed during any of the negotiations? A. No, no. At that time there was no bonus being paid.

"Q. That already appears. Did anybody mention bonus, did anybody say 'Well, if you get a bonus'—did anybody say 'We will so draw the lease that if you get a bonus you will get that in addition to the Standard price'? A. No, there was nothing of the kind said at all.

"Q. By Mr. Walker: Nothing relating to any such matter as that? A. No.

"Q. In inserting that provision in the lease did you intend by that to mean that if you received a bonus that a portion of the bonus would be paid to the plaintiffs in this action? A. No.

"Q. Or the lessors in that lease? A. No, we didn't."

Mr. Loftus mailed the lease to Mr. Graham, who, before signing, read it thoroughly, as it was his duty to do.

From the foregoing it is plain that there was not only direct evidence that defendants were not mistaken in any respect as to their contract, and did not know or suspect that plaintiffs, or any of them, were mistaken, but there were abundant facts and circumstances from which the trial court might have inferred that even plaintiffs were not mistaken. Reformation in case of mistake may be granted only where the case is brought within the provisions of section 3399 of the Civil Code. The language used by the Supreme Court of this state in Burt v. Los Angeles Olive Growers' Ass'n, 175 Cal. 668, 166 P. 993, 996, seems particularly applicable to the situation before us. The court there said: "Every presumption in equity favors the view that such a contract as this, thus deliberately entered into, expresses the true intent and meaning of the parties. The burden of showing the contrary is upon the party seeking to avoid its plain terms. Under this evidence it cannot be successfully contended that the mistake was mutual, or that it was induced by plaintiff, by the suppression of any term in the contract, or even that it was known to plaintiff, or suspected by plaintiff, that defendant did not understand its terms. * * * This testimony is aided by the legal duty imposed upon a party to read such a contract before executing it. [Cases.] * * * And finally, upon this subject, it should be said that, while it is quite true, as declared in Los Angeles & Redondo R. R. Co. v. New Liverpool Salt Co., 150 Cal. 21, 87 P. 1029, that the mere failure of a party to read an instrument with sufficient attention to perceive an error or defect in its contents will not prevent its reformation, this means no more than that when the cause of this failure is satisfactorily explained to the court of equity, that court will hold that the explanation or excuse of the failure relieves from the charge of the neglect of a legal duty, within the meaning of section 1577 of the Civil Code. The trial court in this instance manifestly took the view, either that the failure to read the contract comprehendingly was not sufficiently explained and excused, or that in fact the contract was read comprehendingly, and the defendant was but attempting to escape the consequences. * * * It is immaterial which of these two views the trial court in fact adopted. Either is sustainable under the evidence." See, also, Meyerstein v. Burke, 193 Cal. 105, 222 P. 810; Ward v. Yorba, 123 Cal. 447, 56 P. 58; Kepner v. John M. C. Marble Co., 26 Cal. App. 696, 148 P. 231.

[3] Appellants quote freely in their brief from the testimony of Mr. Graham and from that of Mr. Loftus given both upon direct and cross-examination and argue therefrom that a reversal of the judgment of the trial court must follow. We deem it unnecessary to enter into a detailed discussion of this testimony as it does no more than raise a conflict with which we will not concern ourselves upon this appeal, the evidence as a whole being sufficient to sustain the findings and judgment of the court below.

There is no word of evidence in the record tending to prove that the plaintiffs Security First National Trust & Savings Bank and Hannah N. Butler were parties to the alleged mistake, but we need not notice whether there was a relationship of principal and agent between them and Frank G. Butler, nor whether their interest in the contract was such as would entitle them to claim a reformation of the instrument, in view of our conclusion that there was no such mistake, mutual or otherwise, as would justify a reformation as to any plaintiff.

[4-7] Certain clauses of the lease relating to payment by the lessees to the lessors of one-sixth of the net proceeds from the sale of gas or gas products are stressed by appellants, as well as a clause providing for the payment of taxes assessed due to the discovery of oil or gas in the proportion of one-sixth by the lessors and five-sixths by the lessees. It is argued that these throw light upon the intention of the parties to contract for the payment of a one-sixth royalty on the total amount of petroleum sold, without regard to the Standard Oil price. Further, appellants urge that

the word "deem" as used in the clause providing for the Standard Oil price basis as to the petroleum is used in the sense of "consider" or "suppose." It is, however, conceded that it has also been held to mean "adjudge," "hold," and "to determine upon consideration." Upon this premise, appellants insist that even without reformation the clause taken in conjunction with defendant Loftus' testimony that Graham did not want them to sell the oil to some friend for less than the Standard Oil price means that if they secured a greater price one-sixth thereof would be paid to plaintiffs. It is somewhat difficult to follow this argument and it appears to us illogical. The plain sense in which the word "deem" is employed in the clause under consideration is that the Standard Oil Company's prevailing price per barrel publicly offered in the oil field or district concerned shall be adjudged or held to be the fixed basis of value for the computation of the royalty on the oil. Defendant Loftus' testimony that in negotiating for the former lease Mr. Butler insisted upon a similar clause because he did not want the lessees to sell to some friend for less than the Standard price is of no aid whatsoever to appellants in this connection, for it is not necessarily in conflict with his other testimony to the effect that they intended the clause to mean that exactly the Standard Oil price should govern. But it must be remembered that the evidence of preliminary oral negotiations bore only upon the issue of reformation. There is no ambiguity or uncertainty in the language employed; hence there is no need to resort to extrinsic evidence to determine its meaning. The language is clear and explicit and the intention of the parties may be easily ascertained from the writing itself. Had the parties meant that the lessees were to pay the royalty based upon not less than the Standard Oil price and in any event upon the actual price received for the oil if sold at a greater price than that, nothing would have been simpler than to have incorporated said intention into the writing in plain and definite language. Not having done so, and the language which they did employ being plain, they are bound by it. We are not privileged to make a different contract for them. 6 Cal. Jur. 277; Civ. Code, §§ 1638, 1639.

[8] We find nothing in those clauses relating to a straight one-sixth royalty upon the sale price of the gas and gas products which militates against the clear meaning of the provision concerning the oil. Conditions may have been such in connection with the marketing of these items that but one price basis was reasonably possible. Then, again, the quantity of these items expected to be developed for sale may have been of very little importance compared to the oil. As to the taxes, the parties were free to fix any basis they wished for the division of this expense, and since at the time of making the contract the lessees were selling oil produced by them from other properties to the Standard Oil Company, and were receiving no bonuses, it appears that the proportions agreed upon for payment of taxes were the most natural and equitable under the circumstances, and in no measure inconsistent with the intent and meaning of the petroleum provision as we have read and construed it.

It follows that the judgment should be affirmed. It is so ordered.

We concur: **TYLER, P. J.; KNIGHT, J.**

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129 Cal.App. 635

LYDERS v. SUPERIOR COURT OF CALIFORNIA IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al.

Civ. 8849.

District Court of Appeal, First District, Division 2, California.

Feb. 16, 1933.

Hearing Denied by Supreme Court April 17, 1933.

1. Mandamus 🔑57(2).

Mandamus *held* proper to require court to approve undertaking on appeal, since appeal from order denying justification of surety on undertaking, if order were appealable, would furnish an inadequate remedy (Code Civ. Proc. §§ 948, 963, subd. 2, and §§ 1056–1057a).

2. Mandamus 🔑40.

Rulings on admission of evidence cannot be attacked by mandamus.

3. Appeal and error 🔑381.

Surety on undertaking on appeal, though solvent when signing, should not be accepted if insolvent on date of hearing (Code Civ. Proc. § 942 et seq., and §§ 948, 954, 1056–1057a).

4. Appeal and error 🔑381.

County clerk's certificate, regular on its face, showing suspension of certificate of authority of corporation formerly authorized to become sole surety upon undertaking *held* conclusive upon insufficiency of such corporation as surety on undertaking on appeal (Code Civ. Proc. §§ 948, 1056–1057a).

5. Insurance 🔑23.

Statute providing that when liabilities of corporation authorized to become sole surety upon undertaking exceed its assets, insurance commissioner shall require deficiency to be paid within 60 days, and that until deficiency is paid corporation shall do no business, prevented such corporation from doing business from time insurance commissioner gave corporation notice of deficiency (Code Civ. Proc. § 1056).

6. Insurance ⚷20.

Statute providing for review of insurance commissioner's revocation of insurer's license, and authorizing insurer to do business pending final determination of controversy, *held* inapplicable to insurance commissioner's revocation of certificate of authority of surety company (Code Civ. Proc. § 1056; Pol. Code, § 633d, as added by St. 1923, p. 728).

> Pol. Code, § 633d, as added by St. 1923, p. 728, providing for review of insurance commissioner's revocation of insurer's license, and authorizing insurer to do business pending final determination of controversy, is inapplicable to insurance commissioner's revocation of certificate of authority of corporation authorized to become sole surety upon undertaking; the power to suspend the certificate of authority of surety company being governed by Code Civ. Proc. § 1056.

Application by Eric Lyders for writ of mandate directed to the Superior Court of State of California in and for the City and County of San Francisco, and Honorable John J. Van Nostrand, judge thereof, to require approval of an undertaking tendered as stay bond on appeal.

Writ denied.

Sawyer & Cluff and Milton H. Silverberg, all of San Francisco, for petitioner.

Herbert W. Clark, C. Coolidge Kreis, and Morrison, Hohfeld, Foerster, Shuman & Clark, all of San Francisco, for respondents.

STURTEVANT, Justice.

The petitioner commenced a proceeding asking a writ of mandate directed to department 4 of the superior court of the state of California in and for the city and county of San Francisco and the judge thereof, directing them to approve an undertaking theretofore tendered as a stay bond on appeal. The respondents answered, and the parties have submitted a stipulation of facts.

Heretofore five different actions were commenced by Inger Marie Petersen et al., against Eric Lyders, and judgment was obtained in the sum of $16,058.13. A motion to tax costs and a motion for a new trial were made, but both motions were denied. Thereupon the defendant served a notice of appeal. On September 6, 1932, he filed an undertaking in the sum of $32,116.26, double the amount of the judgment appealed from, and the said undertaking was executed by Benjamin Franklin Bond & Indemnity Corporation, a corporation organized under the laws of the state of Arizona and at that time doing business in the state of California. In due time the plaintiffs in said actions served their notice excepting to the sufficiency of the surety. On September 19, 1932, the hearing of the justification commenced. It was continued from time to time until the 24th day of October, 1932. On that date the bonding company appeared and submitted to the court, first, a certified copy of the power of attorney showing the authority of J. H. Miller to execute the said undertaking; second, a certified copy certified September 19, 1932, of the certificate of authority issued by the insurance commissioner of the state of California; third, a certificate from the county clerk of the city and county of San Francisco showing that the certificate of authority had not, on October 24, 1932, been surrendered, revoked, canceled, annulled, or suspended; and, fourth, a financial statement showing the assets and liabilities of said Benjamin Franklin Bond & Indemnity Corporation at the end of the quarter calendar year prior to thirty days next preceding the date of the execution of said undertaking, but said last-named document was not verified under oath by the president or vice president and attested by the secretary or assistant secretary of said corporation. The hearing was again continued until October 25, 1932. On that date a certificate in due form was tendered under the fourth division. At the same time a new certificate under the third division was submitted showing that the certificate of authority had been suspended but had been renewed, and that said renewed certificate had not been surrendered, etc. At the same hearing the plaintiffs offered the testimony of Lawrence Rouble, an examiner in the office of the insurance commissioner of the state of California, tending to impeach the bonding company's financial statement tendered under the fourth division. To that evidence numerous objections were made, but they were overruled subject to a motion to strike. Among other things, it transpired that the bonding company was in the act of tendering to the insurance commissioner additional securities for the purpose of eliminating any question regarding its solvency. The hearing was therefore continued until November 14, 1932. On the latter date a motion to strike the testimony of the witness Rouble was renewed. It was not ruled on. On the same date the plaintiffs introduced in evidence a certificate of the county clerk under date of November 14, 1932, showing that the renewed certificate of authority of the bonding company was suspended by the insurance commissioner on November 10, 1932, and that the certificate of authority had not since been renewed. Thereafter the court denied the motion for justification of the surety in each cause so pending before it.

[1] The respondents make a preliminary objection that mandamus is not the proper remedy. They contend that the petitioner had the right to appeal from the refusal of the judge to approve the bond, claiming the refusal was an order made after final judgment. Code Civ. Proc. § 963, subd. 2. The petitioner's reply is that in at least two cases a proceeding in mandamus was approved as a proper remedy. San Francisco-Oakland Terminal Railways v. Superior Court, 48 Cal. App. 586, 192 P. 116, and Central Holding Corporation v. Superior Court, 122 Cal. App. 515, 10 P.(2d) 514. To that contention the respondents reply that neither of those cases involved an appealable order. To this the petitioner replies that neither was the ruling under attack in the instant case an appealable order. He cites and relies on Lake v. Harris, 198 Cal. 85, 243 P. 417. Continuing, he claims that even though the order was appealable the right of appeal is inadequate. Both contentions of the petitioner we think are well founded. As will more fully appear as we proceed, we think the right to appeal, even if one existed, is inadequate for the purpose of protecting either party in his statutory rights to a good and sufficient bond on appeal.

[2] The petitioner complains because the witness Rouble was allowed to give oral testimony. Conceding that such procedure was irregular (Central Holding Corporation v. Superior Court, supra), it will likewise be conceded that, the respondent court having taken up the hearing, rulings on the admission or exclusion of evidence may not be attacked by a mandamus proceeding. 16 Cal. Jur. 822. It is not a writ of error.

[3] Again it is claimed that on October 25, 1932, the showing on the part of the bonding company was wholly complete, and that the respondent judge should have approved the bonds on that date. In this connection the petitioner contends the sufficiency of the appeal bond was to be ascertained as of the date the bond was signed. With this contention we cannot agree. Bonds on appeal from judgments of the superior court are provided for in Code of Civil Procedure, § 942 et seq. It is provided that each bond will be executed by two or more sureties. The right to except to the sufficiency of the sureties is addressed to all of such bonds. Code Civ. Proc. § 948. The foregoing provisions in substance have been incorporated in the law since 1850. Commencing in 1889, legislation has been enacted, from time to time, authorizing certain corporations to become sole sureties. Whether the surety is a natural or an artificial person, when he or it attempts to justify, no distinction is made in the statute as to the specific date as of which his or its showing must be made. If on the date of the hearing it transpired that a surety was abundantly solvent on the day he signed but was insolvent on the date of the hearing, he should not be accepted. To act otherwise would be to defeat the general policy of the law. In Fox v. Hale & Norcross S. M. Co., 97 Cal. 353, at page 358, 32 P. 446, 447, the late Chief Justice Beatty, speaking for the court, said: "But to allow this clause of the act such unlimited operation would defeat *its general policy, which is undoubtedly to provide ample security for money judgments in order to stay proceedings for their enforcement pending appeals.*" (Italics ours.) The proceeding before the court had its foundation in section 948, Code of Civil Procedure, which provides for exceptions to sureties. Section 954, Code of Civil Procedure, provides that after a bond is given if the sureties become insufficient on an application duly made the court will order a new bond given. If the contention of the petitioner is sound, it follows that at the time of the hearing it was the duty of the respondent court to approve the bond then before it, and then entertain a motion by the plaintiffs under section 954, Code of Civil Procedure, directing the defendants to file a new bond. But the law neither does nor requires idle acts. Civ. Code, § 3532.

[4, 5] It is next claimed by the petitioner that, without receding from the foregoing contention, the suspension of the certificate of authority was made at a time not contemplated by the statute. To that claim there are two separate replies. It is not claimed that any such claimed irregularity existed on the face of the certificate of the county clerk dated November 14, 1932. That certificate, being regular in all respects on its face, ends the matter. Because, as this petitioner contends and as we have conceded above, on a complete showing made under Code of Civil Procedure, § 1057a, the respondent court was compelled to act, whether the action was for or against the surety company. Code Civ. Proc. § 1057a; Central Holding Corporation v. Superior Court, supra. The other reply is on the merits. The petitioner quotes Code of Civil Procedure, § 1056, as follows: "And whenever the liabilities of any such corporation shall exceed its assets, the insurance commissioner shall require the deficiency to be paid up in sixty days, and if it is not so paid up, then he shall issue a certificate showing the extent of such deficiency, and he shall publish the same once a week for three weeks in a daily San Francisco paper. And, until such deficiency is paid up, such company shall not do business in this state." As shown by the stipulation, on October 8, 1932, the insurance commissioner notified the surety company that its liabilities exceeded its assets on July 31, 1932, in the sum of $110,000. The petitioner argues that the surety company had until December 7, 1932, within which to make up the deficiency before its certificate of authority could be revoked. This reasoning is not persuasive. It will be freely conceded the language quoted from section 1056 of the Code

of Civil Procedure is not altogether clear and certain in its terms. The insurance commissioner, however, interpreted the section as providing that from the date of his notice until the deficiency should be made up the company should not do any new business. We are unable to say he erred in his interpretation of the statute. In the instant case, to adopt the contention of the petitioner is to hold that a surety company whose liabilities exceeded its assets in the sum of $110,000 was entitled, after that fact had been duly ascertained, to continue to write new business for the period of sixty days. Numerous courts have said: "Mere philology often sticks in the bark, and so becomes an obstruction rather than an aid to a correct exposition of the meaning of the statute." In the case of Fox v. Hale & Norcross S. M. Co., 97 Cal. 353, 32 P. 446, the court was considering sections 1056 and 1057 of the Code of Civil Procedure as they were worded in 1893. The bond required was in the sum of $2,030,000. A surety company, solvent in all respects, but having a capital of only $100,000, claimed it should be accepted as sole surety in full compliance with all the provisions of the statute. Having quoted the two sections, on page 357 of 97 Cal., 32 P. 446, 447, the court said: "No doubt they must be allowed some operation, but if it is possible to find a meaning for them which will justify their insertion in the statute without convicting the legislature of having enacted an absurdity, they must be limited to such meaning; or, in other words, if the apparent object and policy of the law is subserved by taking them in a qualified and restricted sense, while one of its principal objects is utterly defeated by giving them their largest possible significance, the former interpretation must be preferred." And later, on page 358 of 97 Cal., 32 P. 446, 447, the court said: "But to allow this clause of the act such unlimited operation would defeat its general policy, which is undoubtedly to provide ample security for money judgments in order to stay proceedings for their enforcement pending appeals." The same reasoning applies to the instant case. It is absurd to hold that the Legislature, in the absence of very clear words to that effect, has provided that for a period of sixty days an insolvent surety company may write new business, that the insurance commissioner cannot stop it, and the courts cannot do otherwise than approve its bonds.

[6] In this same connection the petitioner quotes and relies on next to the last paragraph of section 633d (1 Deering's Political Code, page 319), as follows: "If at any time the insurance commissioner revokes or suspends the license theretofore issued to a company or other insurer, the company or other insurer whose license to do business in this state has been so revoked or suspended, may commence an action against the insurance commissioner for the purpose of reviewing the facts pertinent to the controversy and for the purpose of obtaining relief or cancelling the act of the insurance commissioner. In any such action, the court shall have full power to investigate all the facts de novo, without regard to the determination previously made by the insurance commissioner. Pending final determination by the courts of such controversy, the right of the company or other insurer whose license to do business in the State of California has been revoked or suspended, shall remain unimpaired."

The passage is not pertinent to the instant case. In this state insurance may be furnished by or through agents, brokers, or solicitors. Each such person is by law required to obtain a license. The section cited applies to such persons. Such persons, and only such persons, are "licensed" within the meaning of the insurance statutes of this state. On the other hand an insurance company is allowed to act by reason of its "certificate of authority." As to the power to suspend the "certificate of authority" of a surety company, the statute governing the power is Code of Civil Procedure, § 1056, and not section 633d, Political Code (as added by St. 1923, p. 728).

It follows that the bonding company did not justify as required by section 1057a of the Code of Civil Procedure.

The application for a writ of mandamus is denied.

We concur: SPENCE, Acting P. J.; GOODELL, Justice pro tem.

129 Cal.App. 567

WATKINS v. CLEMMER (two cases).

Civ. 8702.

District Court of Appeal, First District, Division 1, California.

Feb. 11, 1933.

1. Principal and agent 🔑164(1).

Ratification can only be effectual between parties when act is done by agent for principal, and not when it is done for third person.

2. Principal and agent 🔑163(1).

"Ratification" is subsequent adoption and affirmance by one person of act which another, without authority, has previously assumed to do for him while purporting to act as agent.

[Ed. Note.—For other definitions of "Ratification," see Words and Phrases.]

3. Attorney and client ⚷103.

Where divorced wife's lawyer had telephone conversation with husband, in which husband promised to pay son's doctor bill, doctor could not ratify lawyer's act so that there would be account stated between doctor and husband.

4. Divorce ⚷298(1).

Rights mother had respecting custody and control of son after divorce would arise solely from court orders (Civ. Code, §§ 138, 197, 198).

5. Divorce ⚷302.

Question of child's custody having been decided in mother's favor by order in divorce action, it became closed issue, subject only to later modification or vacation, appointment of guardian, or marriage or majority of boy (Civ. Code, §§ 138, 204).

6. Divorce ⚷302.

Order giving divorced wife exclusive custody of minor did not make her a guardian (Civ. Code, § 138).

7. Divorce ⚷302.

Divorced mother, awarded custody of son, would be entitled to son's earnings despite statute providing parent has no control over child's property (Civ. Code, §§ 138, 197, 202).

8. Master and servant ⚷400.

Claim for workmen's compensation is not necessarily such asset of minor as to require guardianship (St. 1917, p. 869, § 57 (a) (2) (3).

9. Divorce ⚷324.

Primary parental obligation toward son was with mother who was awarded his custody in divorce case, and order, as between former spouses, was measure of father's obligation (Civ. Code, §§ 138, 196).

10. Divorce ⚷324.

Divorced mother's proceeding to recover workmen's compensation for boy, of whom she was awarded custody, was what she was bound to do and constituted no valid consideration for father's promise to pay doctor's bill if action terminated unfavorably (Civ. Code, §§ 138, 196, 197; St. 1917, p. 869, § 57 (a) (2) (3).

11. Contracts ⚷75(1).

Neither promise to perform duty nor performance of duty constitutes "consideration" for contract.

[Ed. Note.—For other definitions of "Consideration," see Words and Phrases.]

12. Contracts ⚷187(1).

Where no valid consideration supported contract, and promisee could not enforce it, third party beneficiary could not.

13. Appeal and error ⚷816.

Where there are two actions between same parties, each case must be considered by itself on appeal.

14. Frauds, statute of ⚷18(1).

If divorced father was under no obligation to pay son's doctor bill, mother having already incurred bill and become obligated, father's promise to pay was to answer for debt of another and within statute of frauds (Code Civ. Proc. § 1973).

Appeals from Superior Court, Marin County; Edward I. Butler, Judge.

Two actions by James T. Watkins against Charles T. Clemmer, Jr. From the judgments, plaintiff appeals.

Judgments affirmed.

Francis Gill, of San Francisco, for appellant.

George H. Harlan, of San Rafael, for respondent.

PER CURIAM.

This, the first of these appeals, is taken upon the judgment roll. The appellant sued the respondent upon an account stated for $1,500, based upon surgical services rendered to respondent's minor son. The court held that the statement of an account had not been established, and found, among other facts, the following: In 1920 the respondent and Bernice Clemmer were divorced; the custody of their son, John, was awarded to Mrs. Clemmer, and the respondent was ordered to pay $20 a month for the boy's support, and later $35, which he has since paid. Mrs. Clemmer remarried, and is now Mrs. Wehrli. When John was twelve he was injured in the course of his employment as a newsboy. A major operation was necessary, and Mrs. Wehrli engaged the appellant, who operated on the boy in September, 1928, and later rendered her a bill for $1,500, which was found to be the reasonable value of his services. Thereafter she asked Jordan L. Martinelli, a San Rafael lawyer, to telephone to respondent respecting the payment of this and several other bills arising out of the operation. When he did so, on October 29, 1928, respondent replied that he "refused to do anything until action was taken before the Industrial Accident Commission, stating that if the outcome was unfavorable and no award was made, he would then take some steps to borrow the money to meet the aforesaid accounts; * * * other than in said conversation defendant * * * did not admit nor deny owing said debts." About April 1, 1929, the appellant consulted Mr. Martinelli for the first time respecting this $1,500 bill. The "plaintiff testified without contradiction at the trial that he had ratified, affirmed and adopted the action and conduct of Jordan L. Martinelli in his said conversation with defendant as his own." Appellant carried respondent on his books as one of the debtors on the $1,500 bill, but respondent "never acquiesced in the same." Nothing appears in the findings upon the subject of an account stated further than what has been related. The day after the telephone conversation an application was filed with the Industrial Accident Commission and in due time a disability indemnity was awarded at the weekly rate of $4.17, but the commission denied any award for medical, surgical, or hospital treatment. The appellant then filed a claim of lien for his services, and the commission fixed a fee of $375 as a lien against the boy's award, and gave a ten-day notice, within which time appellant withdrew his claim and it was dismissed. The award was affirmed by the Supreme Court. Globe Indemnity Co. v. Industrial Accident Com., 208 Cal. 715, 284 P. 661. Respondent was informed of all proceedings before the commission. The $403.90 award to Mrs. Wehrli was by her paid to appellant on account, and he then brought this action against respondent for the balance.

The appellant presents five points in seeking a reversal: The first is that an account may be agreed to orally, which, of course, is conceded by the respondent. The second point is that the respondent's telephonic promise to Mr. Martinelli "clearly shows a full and complete statement of the account and agreement to pay the same." The third point is that prior transactions may not be inquired into upon proof of an express agreement to pay an account stated. The fourth: "The consideration for an account stated, being a form of accord, is the agreement itself." Appellant states his fifth point as follows: "One may ratify an unauthorized act or contract (in this case the stating of the account) made on one's behalf by a mere stranger or volunteer whenever there is no want of mutuality."

We are satisfied that appellant's proof of a settled or stated account breaks down on the question of ratification, if for no other reason. The occasion upon which this account is supposed to have been settled was a telephone conversation between Jordan L. Martinelli and the respondent on October 29, 1928. Mr. Martinelli had been asked by Mrs. Wehrli to call up the respondent respecting the unpaid bills. In doing so he avowedly represented her, and the respondent talked with him, knowing that he represented her and nobody else. Indeed, it is not claimed that there was any discussion of the $1,500 bill between Mr. Martinelli and the appellant until five months later. It is perfectly clear, then, that, if in that telephone conversation any account was stated or promise made, the parties to the contract were the respondent, as promisor, and Mrs. Wehrli (through her agent, Martinelli), as promisee. Indeed, it is conceded by appellant that as to him Mr. Martinelli was then "a mere stranger or volunteer."

[1, 2] A "ratification can only be effectual between the parties, when the act is done by the agent *avowedly for or on account of the principal, and not when it is done for or on account of* the agent himself, or of *some third person.*" The quotation is from Story on Agency (7th Ed.) § 251a, and the emphasis is ours. The learned author then makes the following comment: "This would seem to be an obvious deduction from the very nature of a ratification, which presupposes the act to be done for another, but without competent authority from him; and therefore gives the same effect to the act as if it had been done by the authority of the party for whom it purported to have been done and as his own act." Mr. Mechem at section 347 of his work on Agency defines ratification as "the subsequent adoption and affirmance by one person of an act which another, without authority, has previously assumed to do *for him while purporting to act as his agent.*" At section 386 Mr. Mechem again says that the act must be done *as agent*, but he adds, if done as agent "*on account of some third person*, it cannot thus be ratified." (Italics ours.) Clark & Skyles on Agency, § 102, p. 263, states the rule in substantially the same way. The excerpt quoted by appellant from 2 Corpus Juris, 470, likewise shows that the acts must have been *on behalf of the ratifier* and that the "stranger" has, despite the fact that he has acted as a volunteer, *assumed to act* as agent for the ratifier. At page 474 the same idea is repeated in an ampler statement, and at page 475 it is said: "Nor can one person ratify an act done by one assuming to act as agent for another person." The courts of this state have always followed this rule. As early as 1859 Chief Justice Field applied it in Ellison v. Jackson Water Company, 12 Cal. 542, 551, where he said: "It cannot in strictness be said that Bayerque 'adopted and ratified' the contract between the plaintiff and the company. These terms are properly applicable only to contracts made by a party acting or assuming to act for another. The latter may then adopt or ratify the act of the former, however unauthorized. To adoption and ratification there must be some relation, actual or assumed, of principal and agent. No such relation existed. * * *" In Puget Sound Lumber Co. v. Krug, 89 Cal. 237, 243, 26 P. 902, 904, it is said: "* * * And it would seem that a ratification is only effectual when the act is done by a person professedly acting as the agent of the party sought to be charged as principal, (1 Amer. & Eng. Enc. Law, 431, and authorities there cited; McLaren v. Hall, 26 Iowa, 305)." In Schultz v. McLean, 93 Cal. 329, 359, 28 P. 1053, 1059, it is said: "There can be no ratification of an authority which the agent did not assume to possess, and which the other party did not believe or suspect him to possess." See, also, Pacific Bone, etc., Co. v. Bleakmore, 81 Cal.

App. 659, 664, 665, 254 P. 618. In Schomaker v. Petersen, 103 Cal. App. 558, 570, 285 P. 342, 347, it is said: "And ratification is effectually implied only in respect of an act done by a person professedly acting as the agent of the party sought to be charged as principal." Probably the most comprehensive and exhaustive review of the subject is to be found in the case of Keighley, Maxsted & Co. v. Durant, in the House of Lords, reported in 70 L. J. K. B. 662 and at 1901 Appeal Cases, 240, where seven Lord Justices concurred in the decision reversing the Court of Appeal, Q. B. Div. (See 69 L. J. Q. B. 382.) The dissent of Lord Justice Smith in the Court of Appeal was virtually adopted by the House of Lords, and should be read in connection with their decision. It reviews all the English cases on the subject, and, it is interesting to note, relies upon two American text-writers, as well, Story on Agency, § 251a, supra, and 2 Kent's Commentaries, p. 616. Incidentally Soames v. Spencer, 1 D. & R. 32, 24 R. R. 631, cited by appellant in the case at bar, is distinguished and disposed of in the Keighley Case.

From what has been said, it is clear that the law upon the subject is well settled in California, contrary to appellant's theory and contention. The general weight of authority is that way in the United States (see footnote to Mechem, § 386), and it is the law in England.

The only finding from which anything can be gleaned upon the subject of ratification is: "* * * That plaintiff testified without contradiction at the trial that he had ratified, affirmed and adopted the action and conduct of Jordan L. Martinelli in his said conversation with defendant as his own." It is indeed doubtful if a person can, by simply taking the stand and making such self-serving declaration, ratify the act of another even if such act is susceptible of ratification. It would seem that there should be something more than that, some act or conduct. Civ. Code, § 2310. However, it is not necessary to pass upon this question.

[3] In view of what has been said, it is quite unnecessary, also, to discuss the first four points urged by the appellant. The telephone conversation wherein it is claimed the account was settled having been between the respondent and a person who then avowedly represented Mrs. Wehrli, and who did not represent, and could not profess to represent, the appellant—who was an utter stranger to the transaction—there could not be a ratification by the appellant, and hence there was no account stated between respondent and himself. The judgment of the trial court was correct, and should be affirmed. It is so ordered.

The second appeal was taken from a judgment in favor of the respondent, for his costs, after his general demurrer to the complaint had been sustained and the appellant had refused to amend. The second action was commenced after the first had been decided. Both actions are based upon the appellant's $1,500 bill; the first upon the theory that respondent's promise made to Mr. Martinelli as Mrs. Wehrli's agent was the statement of an account which could be availed of by ratification by appellant, and the second upon the theory that the respondent's promise to Mrs. Wehrli was for the benefit of appellant.

The complaint alleges the following facts: The respondent and his wife (now Mrs. Wehrli) were divorced, and the care and custody of their son, John, was awarded to the mother; when the boy was twelve, he was injured in the course of his employment, and his mother engaged appellant to perform an operation necessary to save the boy from becoming a cripple; the appellant performed these surgical services, the reasonable value of which was $1,500; that the respondent said, substantially, to Mrs. Wehrli: You take action before the Industrial Accident Commission on behalf of our son in an attempt to recover from his employer the cost of his medical, surgical and hospital treatment, and if such action terminates unfavorably and no award is made for such treatment, then I shall pay the doctor's (plaintiff's) bill. The next day, so it is alleged, Mrs. Wehrli, relying upon that promise, instituted those proceedings, which terminated unfavorably, in that the award denied compensation for said treatment. It is alleged that Mrs. Wehrli has fully performed all conditions precedent to the performance of respondent's promise. It is then alleged that respondent's promise to pay the $1,500 was supported by a valid consideration in that Mrs. Wehrli, at respondent's request, carried through the proceedings before the commission "as requested by the said defendant for his said promise to pay plaintiff $1,500." The payment of $336 on account is alleged, and judgment asked for $1,164, with interest and costs.

The question presented is whether the complaint pleads a contract for the benefit of a third person, the consideration for which is alleged to have moved from Mrs. Wehrli. If no duty already rested upon Mrs. Wehrli to prosecute such proceedings, then it is perfectly clear that her prosecution of them furnished a sufficient consideration for the respondent's promise; the promisee having done something which she was not obligated to do. The appeal is presented largely upon this question of parental duty. In that connection the appellant contends that the respondent and not his divorced wife owed the minor the duty of carrying through the proceedings before the commission, the argument being that the divorce decree, whereby the custody and control of the boy was awarded to the mother, could not confer authority or guardianship over his estate; further, that his right against his employer was an asset of his estate, and consequently, when Mrs. Wehrli performed this duty for respondent, it constituted a valid consideration for his promise to pay the appellant's $1,500 bill. The respondent denies that there is any such duty, and points out that the appellant has cited no authority in support of the proposition that any one other than a guardian or person having the legal custody of a minor is duty-bound to commence such proceeding.

[4-7] It appears from the complaint that Mrs. Wehrli employed the appellant to perform the operation, and, so far as appears, the respondent had nothing to do with it. It likewise appears that, when the appellant was so employed, Mrs. Wehrli had the exclusive care and custody of the minor under a court order made in the divorce action pursuant to section 138 of the Civil Code. After the divorce, neither parent would have any superior right over the other to the boy's custody or control. Civ. Code, §§ 197, 198. Such rights and powers, therefore, as the mother had respecting custody and control were derived solely from that order, and, the question having been decided in her favor by the order, it became a settled and closed issue, subject only to being later modified or vacated (Civ. Code, § 138), or to the appointment of a guardian of the person, or the marriage or majority of the boy (Civ. Code, § 204). That order presumably is still in effect, and while it remains in force the control is hers, and with control goes responsibility. "The parent entitled to the custody of a child must give him support and education * * *" (Civ. Code, § 196), and, if there is parental neglect, a third person can supply necessaries and recover the reasonable value thereof from the parent having custody. Civ. Code, § 207. It is true that a parent "as such, has no control over the property of the child." Civ. Code, § 202. It is also true that an order under section 138 of the Civil Code does not make the parent a guardian (Collins v. Superior Court, 52 Cal. App. 579, 580, 199 P. 352), but Mrs. Wehrli, under the court order, would certainly be entitled to the boy's earnings, as they would follow control despite the provisions of section 202, Civil Code, supra. See section 197, Civ. Code, and Pacific G. D. Co. v. Industrial Accident Com., 184 Cal. 462, 464, 194 P. 1, 3, 13 A. L. R. 725. Earnings become important in this discussion only because they are related to the proceedings before the commission. Can it be that the father, with no right to the son's earnings, is the one to prosecute a proceeding arising out of an employment whence the earnings are derived, while the mother, under the law, is entitled to the earnings themselves? In this connection it is noteworthy that, by section 57 (a) (2) of the Workmen's Compensation Act (St. 1917, p. 869), the commission is invested with "full power and authority: * * * To regulate and provide the manner, *and by whom*, minors * * * shall appear and be represented before it." (Italics ours.) The inquiry naturally arises, Would the respondent have been recognized or given any standing before the commission?

[8] It was not at all necessary that a guardian of the minor's estate be appointed to prosecute the claim before the Industrial Accident Commission; the appearance could be by trustee and guardian ad litem, as, indeed, it is alleged to have been in the instant case. Under section 57 (a) (3) of the said act the commission has power "to appoint a trustee or guardian ad litem to appear for and represent any * * * minor * * * upon such terms and conditions as it may deem proper, * * *" and the case of Lee v. Superior Court, 191 Cal. 46, 214 P. 972, holds that, where the estate of a minor consists merely of a claim for compensation under the said act, the jurisdiction of the probate court to appoint a guardian of such estate is ousted, by the commencement of the proceeding for compensation before the power of the probate court is invoked. Conversely, if a guardian is first appointed in probate, the commission is then without jurisdiction to appoint a trustee. A claim for compensation, therefore, while a valuable right in the nature of a chose in action, is not necessarily such an asset or such property of a minor as to require guardianship. Indeed, the act is designed to obviate proceedings in the probate court; ample statutory machinery being provided for safeguarding and accounting for the award. See section 57 (a) (1 to 3), supra. Moreover, if respondent had filed the application with the commission on behalf of the boy—the order under section 138 being then in effect—it would have been an interference with the control awarded by that order and a contempt of the court making it.

[9-12] We are mindful of the fact that the statutory provisions to which we have referred do not necessarily mean "that the natural duty of a father to provide for his minor child is, under our law, finally and absolutely terminated by an award of the custody of the child to the mother." Lewis v. Lewis, 174 Cal. 336, 340, 163 P. 42, 44. But, while that is true, it cannot be gainsaid that those statutory provisions do cast upon the parent to whom custody is awarded the *primary* parental duty and liability and as "between such parent and the one who has been deprived of such custody the latter is absolved from liability, in the absence of any decree of court requiring contribution to such maintenance." Pacific G. D. Co. v. Industrial Accident Com., supra, page 465 of 184 Cal., 194 P. 1. Section 270, Penal Code, requires the father to provide for his minor child regardless of property settlements, alimony, or other similar orders. It is, of course, a criminal

statute. In the instant case any order requiring respondent to pay a given sum periodically for the support of the boy can be enforced: (1) By contempt proceedings; and (2) by this very effective cumulative remedy under section 270. This remedy was invoked in precisely this way in People v. Schlott, 162 Cal. 347, 349, 122 P. 846, where the defendant had omitted to pay $50 a month for the support of his divorced wife and their child in the mother's custody. In several recent cases the question is discussed of a father's responsibility. They are Industrial Accident Commission cases where the question was whether the minor was a dependent of the father at the time of the father's death, an award of the minor's custody having been made to the mother, but the father having resumed parental relations. They are Pacific G. D. Co. v. Industrial Accident Com., supra; Llewellyn Iron Works v. Industrial Accident Com., 191 Cal. 28, 214 P. 846, and Federal Mutual L. Ins. Co. v. Industrial Accident Com., 195 Cal. 283, 233 P. 335, and they all affirm the award to the minor as a dependent. The later cases follow the Pacific Gold Dredging Case, wherein it is said: "We find no authority for holding that, *as between parent and child*, the father is absolved from his legal duty to provide support. * * * And while, *as between himself and third parties*, that obligation may be shifted in proceedings of divorce or guardianship, * * * it may be doubted if by such proceedings, to which he is not a party, a minor can be deprived of his natural right to turn to his father for maintenance, *if the substituted source of supply fails*." (Italics ours.) Other Industrial Accident Commission cases are the Sherer Case, 182 Cal. 488, 188 P. 798, and the Southern California Edison Case, 92 Cal. App. 355, 268 P. 415. The most recent case on the general subject is Dixon v. Dixon (Cal. Sup.) 14 P.(2d) 497, where the father's obligation to support his daughter had ended in Oklahoma (where a girl attains majority at 18), and thereafter they came to California, where her mother sued the father in the daughter's behalf for the daughter's support. The father was held liable for the daughter's support *here* until she reached 21. The court said: "Neither the age of majority in Oklahoma nor the provisions of a decree of divorce in that jurisdiction have any bearing whatsoever on this issue." It will be readily observed that all these cases deal with the duty of support *as between the minor and his parent*, and not with the duty of support *as between a third party and the parent*. See Pacific G. D. Co. Case, supra.

Under the statutory provisions and decisions to which we have referred, we are satisfied that the primary parental obligation in this case was with the mother, and will continue with her until the order (under section 138) is modified or vacated; that, so long as the order remains in force, it is the measure —at least as between the former spouses— of the father's obligation. That being so, it was the duty of the mother, having custody of the minor, "to assert his rights, or to vindicate his wrongs" as his "nearest relation" or "next friend." In re Cahill, 74 Cal. 52, 55, 56, 15 P. 364, 366. To paraphrase Poetker v. Lowry, 25 Cal. App. 616, 619, 144 P. 981, 982: That which Mrs. Wehrli did, in proceeding before the commission, in consideration of respondent's promise, "is exactly that which, under the law, and independent of the agreement, she was bound to do," and constituted no valid consideration for the alleged contract made with respondent. "It is well settled that neither a promise to perform a duty, nor the performance of a duty, constitutes a consideration of a contract." Sullivan v. Sullivan, 99 Cal. 187, 193, 33 P. 862, 864. If no valid consideration supports the alleged contract, and the promisee cannot enforce it, it follows, of course, that the beneficiary cannot. This was doubtless the view entertained by the trial judge, and we think it is the correct view.

[13] The second point made by the appellant is that: "As an agreement to settle the claim, defendant's promise is supported by sufficient consideration." There is nothing in the complaint respecting a disputed claim. Reference is made in appellant's brief to the findings in the first case, but, needless to say, each case must be considered by itself, and each of these two appeals has been so treated by us and entirely independently of the other.

[14] The third point, that respondent's promise was not within the purview of the statute of frauds (Code Civ. Proc. § 1973) need not be discussed at any length. The discussion of the first point indicates our views on this subject. If the respondent was not under obligation to pay the doctor bill—the complaint shows that Mrs. Wehrli had already incurred the bill and had become obligated on it—then his promise was to answer for the debt of another and within the statute. If it was his own debt, then, of course, it was not within the statute.

What has been said disposes of the appellant's contentions respecting sections 1430 and 1431 of the Probate Code. The provisions of section 57 (a) (1 to 3) of the Workmen's Compensation Act, supra, answer both contentions. The judgment in this second case should likewise be affirmed.

For the reasons stated in the foregoing opinions, both judgments (in cases Nos. 9810 and 10001, in the trial court) are and each of them is affirmed.

SECURITY-FIRST NAT. BANK OF LOS ANGELES v. SUPERIOR COURT OF CALIFORNIA IN AND FOR SAN DIEGO COUNTY et al. *

Civ. 1029.

District Court of Appeal, Fourth District, California.

Feb. 14, 1933.

Rehearing Granted March 16, 1933.

1. Equity 🔑72(1).

To sustain defense of laches, there must be, in addition to unexplained lapse of unreasonable time, circumstances causing prejudice to adverse party.

2. Certiorari 🔑41.

Petition for writ of review to annul order granting new trial *held* not barred by laches because not filed until six months after entry of order.

> The defense of laches could not be sustained and did not prevent court from considering whether order granting motion for new trial was in excess of superior court's jurisdiction, since lapse of time did not affect rights of any interested party, and delay prejudiced no one, and, if order was nullity, it could only promote ends of justice to have it so declared and removed from records of court.

3. New trial 🔑116(2).

Judgment for plaintiff in quiet title action, unless defendant within three months paid specified sum to plaintiff, though designated "interlocutory decree," *held* "final judgment," as respects time to file motion for new trial.

> Purported "interlocutory decree" found for plaintiff, except that it provided that defendant should have approximately three months after rendition of judgment in which to pay plaintiff specified sum; that, if such payment be made, title to realty involved should be quieted in defendant, and, if such payment were not made, title should be quieted in plaintiff; and decree specifically continued trial of cause until date about three months after entry of judgment for sole purpose of receiving proof as to whether payment had been made by defendant to plaintiff. The judgment was final and not interlocutory, because nothing was left for future determination of court, except question of payment by defendant to plaintiff, which was a mere ministerial act not involving judicial discretion.
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> [Ed. Note.—For other definitions of "Final Decree or Judgment," see Words and Phrases.]

Petition for writ of review by Security-First National Bank of Los Angeles to annul an order of the Superior Court of San Diego County, C. N. Andrews, and Lloyd E. Griffin, judges thereof, granting a motion for a new trial.

Order vacated and annulled.

Hamilton, Lindley & Higgins, of San Diego, and William M. Hiatt, of Los Angeles, for petitioner.

Stearns, Luce & Forward, Albert J. Lee, and Fred Kunzel, all of San Diego, for respondents.

MARKS, Justice.

Petitioner is the successor of the Pacific-Southwest Trust & Savings Bank. It does not appear when the change of name occurred. For the sake of brevity we will hereafter refer to petitioner and the Pacific-Southwest Trust & Savings Bank as the Security Bank, as the change of name does not affect the merits of the controversy.

The Security Bank, owner of certain real estate in San Diego, entered into a contract with Harry A. Clark to sell him this property for $15,000. A deed to Clark was deposited in escrow with the San Diego Trust & Savings Bank. This bank delivered the deed to Clark contrary to written escrow instructions given to it by the Security Bank. After the deed was recorded, the San Diego Trust & Savings Bank loaned Clark and his wife $18,000 which was secured by a deed of trust upon this real property. At the time of the delivery of the deed, $14,000 remained unpaid to the Security Bank on the purchase price.

When the Security Bank learned of the delivery of the deed to Clark, and the execution of the deed of trust, it instituted its action to quiet title to the real estate. The case was tried and all material facts in issue were found in favor of the plaintiff. The trial court, in the exercise of its equity jurisdiction, entered what it called an "interlocutory decree" in accordance with its findings of facts and conclusions of law, with the one exception that it was provided that the San Diego Trust & Savings Bank have until October 30, 1931, approximately three months after the rendition of judgment, in which to pay to the Security Bank the sum of $14,000, with interest; that, if such payment be made, title to the real estate should be quieted in the San Diego Trust & Savings Bank; that, if such payment were not made, title to be quieted in the Security Bank. This decree specifically continued the trial of the cause until 2 o'clock in the afternoon of October 30, 1931, for the sole purpose of receiving proof as to whether or not the payment had been made by the San Diego Trust & Savings

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*For subsequent opinion see 23 P.2d 1055.

Bank. A hearing was had on October 30th; it then appearing that payment had not been made, judgment was rendered quieting the Security Bank's title to the property. This was denominated a "judgment quieting title." It was filed and entered November 16, 1931. Notice of entry of the "interlocutory judgment" was given on July 30, 1931, and the second judgment on November 17, 1931.

On November 19, 1931, the San Diego Trust & Savings Bank gave notice of its intention to move for a new trial. The motion was made and argued on January 6, 1932. At this time counsel for petitioner objected to the hearing of the motion upon the ground that the notice of motion was given and filed too late, and that the court had no jurisdiction to hear and pass upon it. The motion was continued until January 14, 1932, when the same objection was again made before another judge of the respondent court. On the following day this objection was overruled, and the motion for new trial was granted. Nothing further was done in the case until July 15, 1932, when the petition for a writ of review was filed in this court seeking to annul the order granting the new trial.

It is the theory of petitioner that the so-called interlocutory judgment of July 28, 1931, was in fact and in law a final judgment in the case; that the time within which a motion for new trial could be made had expired long before the notice of motion was filed on November 19, 1931, and that the respondent court and its judges exceeded their jurisdiction in hearing and granting the motion. This presents the question of whether the so-called interlocutory judgment of July 28, 1931, was in fact a final judgment. If it was, the notice of motion was given too late, and the respondent court had no jurisdiction to grant it. If, however, the judgment filed November 16, 1931, was the final judgment, the notice of motion was given in time, and the respondent court was within its jurisdiction in granting it.

Respondents urge, first, that as the petition for the writ of review was filed six months after the entry of the order granting a new trial it was barred by laches, and, second, that the so-called interlocutory judgment was in fact an interlocutory judgment, and that the judgment entered November 16, 1931, was the final judgment.

In support of their first contention, respondents cite and rely upon three cases decided by the Supreme Court; namely, Keys v. Marin County, 42 Cal. 252; Reynolds v. Superior Court, 64 Cal. 372, 28 P. 121; and Smith v. Superior Court, 97 Cal. 348, 32 P. 322. In each of these cases it is flatly held that, in the absence of a showing of some special reason for the delay, a writ of review will not be granted after the expiration of the time within which an appeal from the questioned order or judgment might be taken.

In the case of Keys v. Marin County, supra, the order sought to be vacated was one made by the board of supervisors of Marin county locating and establishing a public road. It clearly appears from the opinion that between the time of the order by the board and the petition for the writ of review considerable sums of public money had been expended upon the road to make it suitable for public use, and that loss might be occasioned by annulling the order.

The decision in the case of Reynolds v. Superior Court, supra, was based solely upon the court's summary of the holding in the case of Keys v. Marin County, supra, that, "unless circumstances of an extraordinary character be shown to have intervened, the remedy through a writ of certiorari should be held to be barred by the lapse of the same length of time that bars an appeal from a final judgment." No facts are stated in the Reynolds opinion.

The cases of Keys v. Marin County, supra, and Reynolds v. Superior Court, supra, are cited with approval in the case of Smith v. Superior Court, supra, wherein an order of the superior court of Los Angeles county, erroneously appointing a receiver, was sought to be annulled. In addition to the lapse of about three years between the order appointing the receiver and the petition for the writ of review, it appears that a receiver had been appointed and had taken over the property belonging to a Los Angeles corporation and had administered it for nearly three years. The writ was discharged and the proceeding dismissed.

[1] Where the defense of laches is presented it is very generally held, that in addition to the unexplained lapse of an unreasonable time, there must be circumstances causing prejudice or injury to an adverse party in order to sustain the plea. Cahill v. Superior Court, 145 Cal. 42, 78 P. 467; Taber v. Bailey, 22 Cal. App. 617, 135 P. 975; Donovan v. Board of Police Commissioners, 32 Cal. App. 392, 163 P. 69; Carr v. Sacramento C. P. Co., 35 Cal. App. 439, 170 P. 446; La Shells v. Hench, 98 Cal. App. 6, 276 P. 377. If the general rule which we have stated be applied to the facts of the case before us, the defense of laches cannot be sustained because of the lack of any prejudice or injury to respondents and the San Diego Trust & Savings Bank from the lapse of time. The position of none of them has been changed in the slightest degree between the making of the order granting the new trial on January 15, 1932, and the filing of the petition for a writ of review in this court on July 15, 1932.

In the case of Diamond v. Superior Court, 189 Cal. 732, 210 P. 36, 39, a writ of review was granted by the Supreme Court annulling an order of the superior court granting a new trial, because the order was made upon a ground not authorized by statute after the motion had been denied on all statutory grounds. An examination of such of the original files in this case as are available to us would indicate that the petition for a writ of review was filed in the Supreme Court more than sixty days after the superior court made the order sought to be annulled. While the Supreme Court did not specifically refer to any of the three cases cited by respondents, the rigor of the rule established by them may be somewhat modified by language which it used, as follows: "Respondent resists this application upon the ground that jurisdiction to entertain and dispose of motions for new trials is vested in the superior court, and that therefore certiorari will not lie, the remedy of the aggrieved party being by an appeal from the order. It relies upon a number of cases so holding, but those decisions are no longer authority on the precise point which arises here. Since the amendment to section 963 of the Code of Civil Procedure (Stats. 1915, p. 209) an appeal is no longer allowed from an order granting a new trial in an action tried by the court." Diamond v. Superior Court, supra.

In the case of Dolan v. Superior Court, 47 Cal. App. 235, 190 P. 469, 471, the petitioner sought a writ of review to annul orders made in the respondent court after the rendition of an interlocutory decree of divorce. The appellate court held that the orders were beyond the jurisdiction of the superior court to make, and annulled them. In reaching its conclusion, the following language was used: "A void order may be swept aside whenever it comes before a court, and the order vacating the judgment without directing what judgment should be entered was such an order. Upon the present state of the record the original judgment stands unaffected by the subsequent proceedings, unless it be modified or set aside on appeal or in some other way permitted by the statutes."

[2] After a careful study of the authorities bearing upon the question, we have reached the conclusion that the defense of laches should not be sustained in this case, and should not prevent us from considering whether the order granting the motion for new trial was in excess of the jurisdiction of the superior court. The lapse of time has not affected the rights of any interested party. The delay has prejudiced no one. If the order in question is a nullity, it can only promote the ends of justice by having it so declared and removed from the records of the respondent court. The order granting a motion for new trial was not appealable, and could only be attacked by petitioner in a special proceeding. Section 963, Code Civ. Proc.

[3] The second question presented by respondents has received consideration by both the Supreme and Appellate Courts of the state, with the result that there seems to be some difficulty in applying the established rule to varying facts. One line of authorities is relied upon by respondents to support the contention that the judgment of July 28, 1931, is strictly interlocutory and not final, and is not an appealable judgment. Another line of authorities is relied on by petitioner to support the contention that the same judgment is not interlocutory, but is final, and must be attacked, if at all, on motion for new trial within the ten days permitted by statute.

Respondents have cited many cases involving dissolutions of partnerships where the courts have determined by interlocutory decrees that partnerships have existed and have appointed referees to take testimony on an accounting, and in which cases it has been universally held that the interlocutory decrees were not final judgments. See Middleton v. Finney, 214 Cal. 523, 6 P.(2d) 938; Di Blasi v. Di Blasi, 209 Cal. 753, 290 P. 7; Gunder v. Gunder, 208 Cal. 559, 282 P. 794; Clement v. Duncan, 191 Cal. 209, 215 P. 1025; Doudell v. Shoo, 159 Cal. 448, 114 P. 579. It has been universally held that in cases of this kind there remained questions for judicial determination by the trial court. It is for this reason that the decrees have been held to be interlocutory and not final in this line of cases.

Two cases which seem to lend support to the contention of respondents that the interlocutory judgment of July 28, 1931, is not a final judgment, are Krotzer v. Clark, 178 Cal. 736, 174 P. 657; and Los Angeles Auto Tractor Co. v. Superior Court, 94 Cal. App. 433, 271 P. 363, 365.

In the Krotzer Case the plaintiff made a written agreement for the sale of a parcel of land in Los Angeles county to Clark for the sum of $4,100. Fifty dollars was paid in cash; the balance to be paid in installments. The contract contained the covenant that the land was to be free and clear of all roads, easements, or incumbrances, and that title should be evidenced by an unlimited certificate of title made by a title insurance company. The action was brought upon the theory that the title was defective and not in a condition to be corrected. The plaintiff offered to restore to the defendant the $50 paid, and prayed that the contract be annulled and his title quieted. During the pendency of the action the incumbrance upon the property was removed. Supplemental pleadings were filed, and at the trial findings were made in plaintiff's favor. Upon these findings the trial court entered an interlocutory judgment decreeing that plaintiff should within a fixed time tender to the defendant a deed and a certificate of title, and if the defendant should for twenty days fail to make the payments specified in the contract, plaintiff would be entitled to a decree quieting his title. The tender of the deed and certificate was made and refused, whereupon the court entered a final decree quieting plaintiff's title. The defendant moved for a new trial, which motion was denied. He appealed from the interlocutory judgment and the order denying the motion for new trial. The Supreme Court held that the attempted appeal from the interlocutory decree was not effectual for any purpose, as it was not one of the interlocutory decrees from which an appeal may be taken under section 963 of the Code of Civil Procedure, and "the court is therefore without jurisdiction of the attempted appeal. * * * The defendant did not appeal from the final judgment."

The facts in the case of Los Angeles Auto Tractor Co. v. Superior Court, supra, are similar to those of the instant case. The petitioner there was a plaintiff in an action to quiet title. In the respondent court, findings of fact and conclusions of law were made and an interlocutory decree entered. By the interlocutory decree it was adjudged that the plaintiff's title to the real estate be quieted against the defendant, the Gladiator Manufacturing Company, unless within thirty days after the entry of the interlocutory judgment the defendant pay to a named trustee the sum of $15,500, together with certain taxes paid by the plaintiff and due from defendant. It was provided in the interlocutory decree that if these payments were made within the thirty-day period the plaintiff should execute a deed and deliver it with a certificate of title to the defendant. By the interlocutory decree it was further ordered that on or before the expiration of sixty days from its entry, a final judgment determining all the rights of the parties to the action should be entered. Defendant did not deposit the required money with the trustee, and several modifications of the interlocutory judgment were secured extending its time to make its payments. The matter came before the District Court of Appeal upon a petition for writ of mandate requiring the superior court to enter the final judgment quieting plaintiff's title to the real property upon the failure of defendant to make the payments required in the interlocutory decree. The peremptory writ of mandate was denied. The District Court of Appeal said that, "Looking to the terms of the decree as entered in the case at bar, we see in it a complete determination of the facts and of the rights of the parties. This being so, we are inclined to regard it as a final decree." The court seemed to yield to the decision of Krotzer v. Clark, supra, but decided the case upon another ground.

We will now consider the authorities which support the position of the petitioner and uphold the view that the so-called interlocutory judgment of July 28, 1931, was in effect a final judgment. We have spent considerable time in an endeavor to analyze and harmonize the holdings in Krotzer v. Clark, supra, with those made in the cases which follow. We have reached the conclusion that while some minor differences appear in the facts of the respective cases, these differences in facts are not of sufficient substantiality to enable us to distinguish and harmonize them without being hypertechnical.

The first case cited by petitioner is Clark v. Dunnam, 46 Cal. 204. In this case the rule was announced that where a judgment, and the findings upon which it was based, determined and settled the issues presented by the pleadings, and left nothing to be done except to execute the judgment, even though a further court order were necessary, the judgment was final and not interlocutory. It was specifically held that where nothing remained to be done by the court, except the execution of the decree by a sale of property and a distribution of the proceeds in the manner fixed in the decree itself, the trial court had only a ministerial duty to perform in executing and carrying out its original decree. The rule announced in this case has not been questioned. Its application to varying facts has led to some confusion.

While Clark v. Dunnam, supra, has been cited with approval in many decisions, the next case to which our attention has been called, in which the rule there announced has been applied to facts similar to those of the case at bar, is Zappettini v. Buckles, 167 Cal. 27, 138 P. 696. The facts in this case and conclusions by the Supreme Court are clearly set forth as follows: "In this action judgment was given, decreeing that the partnership was dissolved, declaring what property belonged to the partnership, describing it, the same consisting of both real and personal property, adjudging that all of said property be sold 'together, as a whole and in one parcel at public sale for cash,' by a receiver theretofore appointed by the court, and that said receiver, after deducting the costs and expenses of sale, pay the remainder of the proceeds into court 'to abide the further order of the court'; adjudging that the proceeds of the sale be paid and applied as follows: (1) To the payment of the fees and expenses of the receiver, 'the same to be fixed and determined by this court'; (2) to the payment of the fees and expenses of a referee theretofore appointed, the same 'to be fixed and determined by the court'; (3) 'to the payment of the debts of said copartnership upon the determination thereof by this court, and that the determination thereof be and is hereby reserved by this court until after the return upon the sale of said property'—adjudging that any money remaining after said payments be divided and paid over to the parties in the following proportions, viz.: To plaintiff, John Zappettini, 10.3484 per cent. thereof, and to defendant Joseph Arata 89.6516 per cent. thereof; such payments to be made 'as ordered by the court, or upon the consent of the parties to this action'—and adjudging further that each party to the action shall pay his own costs. * * * There remains only the question whether the judgment appealed from is a 'final judgment,' within the meaning of those words in our statutes on appeal. Notwithstanding the deferring of the fixing of the compensation of the receiver and of the referee, and the reservation of the determination of the question of the debts of the firm to others, the judgment fully and finally determined all the rights of the parties as between themselves. The partnership was dissolved, all the property was ordered sold, and the manner in which the proceeds should be divided was finally adjudicated, including the respective proportions of the two partners in any money remaining after the payment of the costs of sale, fees of receiver, fees of referee, and the debts of the firm. Nothing remained to be done by the court except the mere ascertainment of the amounts due to others than the parties on account of fees for services in the action and debts owing by the parties as partners, and to see that the decree already made was properly executed. Upon the subsequent ascertainment of the amounts due to others by force of the judgment appealed from, the parties to this action will become entitled to the portions of the remainder adjudged to belong to them. It is sometimes very difficult to determine whether a decree is a 'final judgment,' within the meaning of that term as used in our statutes concerning appeals. We are of the opinion that the decree before us should be held to be such a final judgment. A somewhat similar decree was held to come within this term in Clark v. Dunnam, 46 Cal. 204, where the decree was one for the dissolution of the partnership, a sale of all its property and effects, the payment out of the proceeds of sale, first, of the expenses of sale; second, any balance due to the receiver; third, certain costs; fourth, a certain sum to a creditor; and, fifth, any balance remaining to the partners in certain proportions fixed by the decree. It was said that this determined the whole matter in litigation, and that nothing remained for the court to do except to see that the decree was duly executed. In this case, it is true that we have a reservation by the court of the question of the debts due others from the partnership, with the result that some action is essential before it can be determined what the surplus will be for division between the partners. That the exact amount of surplus for division between the parties has not been ascertained does not, however, prevent the decree from being a final judgment within the meaning of the statute. In Clark v. Dunnam, supra, the balance due the receiver was not ascertained, and, of course, wherever the property to be divided consists of the proceeds of a sale to be had, the exact amount can be ascertained only after the sale is had. The general rule applicable in determining whether a judgment is final or merely interlocutory, as deducible from the authorities, is that if anything further in the nature of judicial action on the part of the court is essential to a final determination of the rights of the parties, the judgment is interlocutory only. Mr. Freeman in his work on Judgments says that if after a decree has been entered, no further questions can come before the court except such as are necessary to be determined in carrying the decree into effect, the decree is final. Section 22. In section 24, he says that although other proceedings before the master are necessary to carry the decree into effect, yet if all consequential directions depending upon the result of the proceedings are given in the decree, it is final. He further says that it is none the less final because some future orders of court may be necessary to be carried into effect, nor because some independent branch of the case is reserved for future consideration, nor because an account is directed to ascertain what sum is due from one to the other as the result of the decision. In the case before us, nothing further in the nature of judicial action on the part of the court is essential to a final determination of the asserted rights of the respective parties. Those rights are fully established by the judgment. Other proceedings required before the court are simply such proceedings as are necessary to carry the judgment into effect. They relate solely to the ascertainment of the amount of money to be paid from the net proceeds of the sale to other persons, to creditors of the partnership, and for fees and expenses of the receiver and referee, the remainder, after such payment, to be divided between the partners in the proportions specified in the judgment. All consequential directions depending on the result of the subsequent proceedings are given in the decree. It seems to us that, under the general principles declared to obtain in such matters, the reservation by the court of the determination of these matters does not prevent the judgment before us from constituting a 'final judgment' as between the parties thereto, within the meaning of those words as used in our statutes relating to appeal. There appears to be some conflict in the authorities in the application of the well-settled rules bearing on the matter before us, but, so far as we have found, there is no decision of this court at variance with the views we have expressed, and what is said in Clark v. Dunnam [46 Cal. 204], supra, appears to be in line with those views."

The question we are considering was again before the Supreme Court in the case of Guaranty Trust & Savings Bank v. City of Los Angeles, 186 Cal. 110, 199 P. 35, 37. From the opinion it appears that what is known as the Hill Street Tunnel in the city of Los Angeles was constructed under local improvement proceedings which were subsequently held to be invalid and the bonds issued were void. The action, as the issues were finally framed, was brought by the holders of the void bonds, and property owners who had paid their assessments, to secure possession of the tunnel. The further pertinent facts and the conclusions of the Supreme Court are clearly set forth in the following quotation:

"This so-called judgment was interlocutory in its nature. Although it declared the rights which the court concluded the plaintiff and the parties then before the court had with respect to the tunnel, it is evident from the fact that other parties having similar rights were necessary to a complete determination of the case, and direction was given for bringing them in, that it was not intended to be final. In accordance with this direction, a supplemental complaint was filed and served upon a large number of persons who had either paid assessments or held bonds issued thereon. Such persons filed complaints in intervention, demurrers were filed thereto by the city and were overruled, and decrees or orders similar to that just mentioned were entered on March 29th and July 3d, 1918. Finally, however, on August 15, 1918, the parties ordered to be brought in having all appeared or having declined to appear, the court entered a judgment, reciting that the cause came on regularly for final hearing, all the parties being represented by their respective counsel. This judgment recites the beginning of the action, the filing of the several complaints in intervention and of the demurrers thereto, the orders overruling the demurrers, the refusal of the city to answer the several complaints; that thereupon the court determined the amounts due to the respective parties interested on account of said assessment and bonds. Then follows the judgment of the court that the city held the tunnel in trust for the plaintiff and interveners; that if it chose to do so it would be allowed to retain the tunnel by paying into court for the persons entitled thereto the sums of money so ascertained as due them, which are set out in detail, amounting to $144,526.81; that the city be granted twenty days from the entry of the judgment in which to elect whether it would pay said amount; that if within that period it announced its intention to pay, it should be given such time and afforded such facilities to make such payment as the court should deem reasonable, and that if it did pay the same, the amount should be distributed to each party according to the apportionment made in the decree; that if within the twenty days it should fail to so elect to retain the tunnel, it should then deliver the said tunnel to the parties entitled thereto, that is, the plaintiff and the interveners, and that 'all its right, title, interest and claim in and to the said tunnel do by force and virtue of this decree, ipso facto, pass to and vest in said parties'; also that thereupon the tunnel be sold as upon the foreclosure of a mortgage and the amount realized be distributed among the parties according to their interest.

"We think there can be no doubt that this judgment constitutes the final judgment in the action. It was not made until all the parties whom the court deemed necessary were brought in and made parties to the suit so that the entire controversy could be determined. It purports to and does determine all the issues presented by the pleadings of all the parties, and it ascertains and states the rights of the parties arising thereon, and the relief to be given for the enforcement of those rights. This constitutes a final judgment. 'A decree which finally disposes of all the issues raised between all the parties to an action and finally settles and adjudicates all the rights in controversy is final.' 2 Ency. of Pl. & Pr. 65. An order 'is a decision made during the progress of a cause * * * settling some point of practice or some question collateral to the main issue presented by the pleadings,' if made before judgment, or settling some question 'necessary to be determined in carrying into execution the final judgment,' if made after judgment. The final judgment 'is the determination of the court upon the issue presented by the pleadings, which ascertains and fixes absolutely and finally the rights of the parties in the particular suit in relation to the subject-matter in litigation, and puts an end to the suit.' Loring v. Illsley, 1 Cal. 27, 28. 'A decree is none the less final because some future orders of the court may become necessary to carry it into effect; * * * nor because, when the merits of the controversy are adjudicated upon, and the equities of the parties definitely settled, an account is directed to be taken to ascertain what sum is due from one to the other, as the result of the decision made by the court' (Freeman on Judgts. § 24); or where, as the result of the judgment, the defendant or plaintiff is required to pay money in order to have it carried out and a subsequent order is necessary for the purpose of determining that the money had been paid and the conditions complied with."

In the case of Olds v. Thorington, 47 Cal. App. 355, 190 P. 496, 497, which was an action to quiet title, a judgment was entered in which it was directed that the plaintiff's title be quieted upon his payment to the defendants of a fixed amount within a definite time. The court said: "Preliminary to the main questions presented by the appeal, respondent contends that the appeal should be dismissed upon the ground that said judgment is interlocutory in its character and not final. We are of the opinion that the point is not well taken. The form of judgment is one falling within the rule stated in Zappettini v. Buckles, 167 Cal. 27, 138 P. 696, in which it is held that if after a decree has been entered no further proceedings can come before the court, except such as are necessary to carry the decree into effect, the decree is final. Under the provisions of the judgment in this action no further judicial action on the part of the court is necessary to a final determination of the rights of the parties. The amount to be paid by plaintiff before he is entitled to relief has been definitely fixed and determined by the court, and upon said payment plaintiff ipso facto becomes entitled to a decree quieting his title. Nothing remains to be done by the court except to carry the decree into effect, which, as we have seen, does not render the decree interlocutory in its character. We do not consider the case of Krotzer v. Clark, 178 Cal. 736, 174 P. 657, relied upon by respondent, in point, for the reason that the decree in that case was apparently rendered and intended by the court as an interlocutory decree. Furthermore, the entry of the final decree in that case depended upon the tender of a deed and a certificate of title showing the names and widths of all streets and roads touching the property, which, if tendered, may have given rise to further questions for judicial determination as to the sufficiency of said deed and certificate."

More recent cases in which the rule announced in the case of Clark v. Dunnam, supra, has been applied, are: Sondergard v. Breaum, 83 Cal. App. 352, 256 P. 580; People's Ditch Co. v. Foothill Irrigation District, 103 Cal. App. 321, 284 P. 514; and Orton v. Daigler, 120 Cal. App. 448, 8 P.(2d) 161.

In the case of Krotzer v. Clark, supra, it does not appear from the opinion that the question of whether or not the so-called interlocutory decree was in fact a final determination of the questions in issue between the parties was presented for the consideration of the Supreme Court. The question was not directly discussed in the opinion, though the final conclusion reached can only be supported upon the theory that the court regarded the decree as interlocutory and not a final judgment. In so far as the opinion discloses, no consideration was given to the rule announced in Clark v. Dunnam, supra, and the cases following it which we have already considered, where the effect and finality of a so-called interlocutory judgment, which in fact disposed of all the issues between the parties, was directly presented to and passed upon by the Supreme Court and a District Court of Appeal.

We are of the opinion that the rule announced in the case of Clark v. Dunnam, supra, as followed and applied in the case of Zappettini v. Buckles, supra; Guaranty Trust & Savings Bank v. City of Los Angeles, supra; and Olds v. Thorington, supra, must be controlling here. It is not contended by respondents that the judgment of July 28th, 1931, left anything for the future determination of the court except the question of the payment by the San Diego Trust & Savings Bank to petitioner. Under the authorities just cited the determination of this question was a ministerial act not involving judicial discretion. It follows that the judgment of July 28, 1931, was the final judgment in the case; that the notice of intention to move for a new trial was filed too late; that the motion for new trial was made and granted after the time permitted by law for such proceedings had expired; that the respondent court exceeded its jurisdiction in granting the motion of the San Diego Trust & Savings Bank for a new trial.

The order granting the motion of the San Diego Trust & Savings Bank for a new trial is vacated and annulled.

We concur: BARNARD, P. J.; HARDEN, Justice pro tem.

217 Cal. 447

TWEEDY et al. v. PARSONS et al.

Sac. 4601.

Supreme Court of California.

Feb. 27, 1933.

1. Mines and minerals 🔑38(14).

Claimants of mining property, contending that defendants' locations were void because made before property became subject to relocation by earlier claimant's failure to do annual work, had burden of proving validity of prior claims.

2. Mines and minerals 🔑14(1).

Absence of good faith vitiates any attempt to initiate mining rights.

3. Mines and minerals 🔑19(1).

Valid mining right to property actually in another's possession cannot be initiated by posting location notices at concealed and inconspicuous places.

In Bank.

Appeal from Superior Court, Sierra County; Raglan Tuttle, Judge.

Action by George A. Tweedy and another against Kenneth Parsons and others, in which Jack Wheeler and others filed a cross-complaint. Judgment for defendants, and plaintiffs appeal.

Affirmed.

Wilson Craven, J. M. McMahon, of Downieville, and Woodruff, Musick & Hartke (by George Martinson), of Los Angeles, for appellants.

Raymond McIntosh, of Downieville, Fisher & Coffin, of Boise, Idaho, Dean Perkins, of Long Beach, Leland S. Fisher, of San Francisco, and Harry L. Fisher, of Boise, Idaho, for respondents.

THOMPSON, Justice.

Plaintiffs commenced this action to establish their right to the possession of certain placer mining ground then in the actual possession of the defendants and to enjoin defendants from interfering with plaintiffs' use and occupation thereof. The judgment decreed that plaintiffs had no right, title, or interest in the real property; that the injunction pendente lite theretofore issued be dissolved; and that defendants and cross-complainants Fisher, Wheeler, and Sandsbury, who were actually working the property until forced to desist by the injunction, recover $1,000 damages. The plaintiffs prosecute this appeal from the judgment.

The respondents Parsons and Hatfield, on July 1, 1929, made, posted, and recorded a single notice of location of the Hettie Mae and Hettie Mae Extension placer mining claims, describing them by metes and bounds and as containing 40 acres. The locators monumented the ground and brushed out the lines so that the boundaries could be readily traced and be referable to a natural and permanent object, namely, "Hungry Mouth Creek." The defendants Fisher, Wheeler, and Sandsbury, under a working agreement with the locators, entered upon the ground and thereafter resided thereon while performing work in the development of the ground as placer mining claims. It was stipulated that the respondents actually possessed the claims and that Fisher, Wheeler, and Sandsbury lived upon and worked them from June 3 to August 19, 1930, and were stopped on August 27, 1930, by service of the injunction heretofore mentioned. Amended notices of location filed by defendants Parsons and Hatfield in October, 1931, were admitted in evidence for the sole purpose of showing the ground claimed and worked by defendants.

On August 19, 1930, appellants Tweedy and wife and one Perry Denmire, who subsequently conveyed to Tweedy, sought to initiate a placer location of 50 acres, called the Defiance claim, and Tweedy, alone, at the same time sought to initiate the Defender claim of 20 acres. The claims were located with reference to legal subdivisions and included the ground covered by the Hettie Mae and Hettie Mae Extension claims.

The appellants' theory is that at the time the locations of the Hettie Mae and Hettie Mae Extension were made on July 1, 1929, the land was not open public land subject to location because in 1928 assessment work had been done by Lincoln Placers, Inc., successors of prior Lincoln and Argonaut locations. Therefore, they say, respondents' locations were void, and that the Tweedy locations were valid, having been made after the Lincoln Placers, Inc., locations had become subject to relocation by failure to do the annual work thereon. They also argue that respondents' locations are void not only as against the prior locators, but also as against all the world; that failure of the prior locators thereafter to do the annual work did not inure to the benefit of respondents, and hence the Hettie Mae and Hettie Mae Extension locations may not prevail over the appellants' Defiance and Defender locations made after the ground had become subject to relocation. Appellants do not claim to be successors in interest of Lincoln Placers, Inc.

[1] As proof of the prior locations of the Lincoln and Argonaut claims, appellants offered in evidence certified copies of the notices from the records. At the time of the offer the court ruled against their admission as out of the order of proof and the record does not disclose a renewal of the offer. Al-

so, when appellants offered testimony that the assessment work was performed in 1928, their attention was directed to the fact that they were offering evidence of such labor prior to any proven location, and an objection to its introduction was sustained on this ground. No proof was offered of the other requirements of a valid mining location. Under appellants' theory the burden was upon them to establish the validity of the prior Lincoln and Argonaut claims. Copper Globe Min. Co. v. Allman, 23 Utah, 410, 64 P. 1019.

[2] The essential question arising upon the record is the manner and nature of appellants' locations. The appellants justify their locations of the Defiance and Defender claims as against respondents actually in possession and honestly working said mining ground under color of their claims, on the ground that the appellants' locations were made openly and peaceably, and therefore prevail over any claim, possessory or otherwise, of the respondents. The trial court, however, has found that appellants' locations were not made in good faith, nor openly, but that they were made secretly, clandestinely, surreptitiously, and fraudulently. Appellants practically concede that if their locations were so made they cannot prevail as against the respondents. Good faith, as an element in the initiation of mining rights under federal and state laws, is absolutely essential to the validity of such rights, may not be dispensed with, and lack of it vitiates any attempt to initiate such rights. Belk v. Meagher, 104 U. S. 279, 287, 26 L. Ed. 735; Du Prat v. James, 65 Cal. 555, 4 P. 562; Miller v. Chrisman, 140 Cal. 440, 73 P. 1083, 74 P. 444, 98 Am. St. Rep. 63; Phenix M. & M. Co. v. Lawrence, 55 Cal. 143. In the last-cited case it is said: "But a person who knows that a mining claim is in the actual possession of another cannot honestly believe that it is vacant, and subject to entry and relocation; and the entry under such circumstances cannot be made in good faith, unless it is made upon some right, or color of right, or claim of a legal right, to make the entry. Such a claim of right must exist before the entry, to constitute good faith in making the entry. If it does not exist, the entry is made without right or color of title, and is an entry in bad faith; for actual possession in another is prima facie evidence of title in the possessor, and is protected by the law against lawless invasion without right or color of right; but one who has a title and present right of possession may always take peaceable possession of what he claims to be his own."

[3] There was evidence to support the finding that appellants' attempted locations were secret, clandestine, and the notices thereof "posted at concealed and inconspicuous places upon the property." It requires no amount of argument to demonstrate that a valid mining right to property actually in the possession of another and being worked as mining property cannot be so initiated. Hanson v. Craig, 170 F. 62, 95 C. C. A. 338; Miller v. Chrisman, supra; Little Sespe Consol. Oil Co. v. Bacigalupi, 167 Cal. 381, 139 P. 802; Phenix M. & M. Co. v. Lawrence, supra.

The appellants complain particularly of a finding of the trial court to the effect that at the time of respondents' location the "mining ground was vacant, unoccupied public domain of the United States." We have already observed that the court did not exclude evidence of prior locations further than to require counsel to proceed with the regular order of proof. But, aside from this fact, even if we assumed the locations of respondents to be invalid, in view of a properly supported finding that appellants did not openly, peaceably and in good faith initiate their claims, the result would not be altered.

Judgment affirmed.

We concur: WASTE, C. J.; SHENK, J.; SEAWELL, J.; PRESTON, J.; CURTIS, J.; LANGDON, J.

COLORADO POWER CO. v. PACIFIC GAS & ELECTRIC CO. *

Sac. 4565.

Supreme Court of California.

Feb. 28, 1933.

Rehearing Granted March 30, 1933.

1. Waters and water courses ⚷78, 133.

Seasonal storage of water for power purposes is not proper riparian use, but appropriation, and ripens into prescriptive right, if continued for statutory time.

2. Waters and water courses ⚷85.

Lower riparian proprietor, whose riparian use of waters is substantially interfered with by upper riparian owner's seasonal storage of water, is entitled to injunction or damages.

3. Waters and water courses ⚷78.

Upper riparian owner cannot dam entire flow of stream, hold water from wet season for use in dry season, and return it to stream at his own will and convenience.

4. Appeal and error ⚷907(3).

Trial court's finding that upper riparian owner's seasonal storage of water would cause substantial damage to lower riparian owner is conclusive on appeal on judgment roll alone.

⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 24 P.2d 495.

5. Waters and water courses ⚷87.

Trial court's finding that upper riparian owner's seasonal storage of waters would cause substantial damage to lower riparian owner *held* not inconsistent with finding that latter's lands would not be injured if water released by former actually reached lower owner's property.

6. Appeal and error ⚷931(1).

All intendments and presumptions are in favor of judgment appealed from.

7. Waters and water courses ⚷86.

Award of $1,000 damages for interference with lower riparian owner's use of water of stream to operate low head power project by upper riparian owner's seasonal storage of waters *held* not excessive, though court found that no damage would result if water released reached lower owner's land.

8. Waters and water courses ⚷87.

Portion of judgment, requiring defendant to release waters stored by it according to plan described in answer as part of compensation for damage to plaintiff's riparian rights, *held* not erroneous.

9. Equity ⚷39(1).

Equity court will determine entire controversy and award full and final relief, if possible.

In Bank.

Appeal from Superior Court, Calaveras County; J. A. Smith, Judge.

Action by the Colorado Power Company against the Pacific Gas & Electric Company. From portions of the judgment rendered, defendant appeals.

Affirmed.

Wm. B. Bosley, of San Francisco (Thos. J. Stuart and Robert H. Gerdes, both of San Francisco, of counsel), for appellant.

Corbet & Selby, F. J. Solinsky, and Edw. R. Solinsky, all of San Francisco (Robert M. Searls, of San Francisco, and Glenn West, of Lodi, of counsel), for respondent.

T. P. Wittschen and L. W. Irving, both of Oakland, amici curiæ for East Bay Municipal Utility District.

WASTE, Chief Justice.

Defendant appeals, on the judgment roll alone, from all but two specified portions of a judgment in an action brought by the plaintiff to enjoin defendant from interfering with the natural flow of the North fork of the Mokelumne river in violation of plaintiff's riparian rights. The action was tried before the court without a jury, and resulted in a verdict denying the injunction on condition defendant pay the plaintiff $1,000 as damages, and giving the plaintiff the further right to compel the defendant to release and discharge the waters involved, substantially in accordance with a plan submitted by defendant and pleaded as a special defense in its amended answer. The trial court retained jurisdiction of the cause for this purpose. Plaintiff does not appeal.

The facts as found by the trial court, and so far as pertinent here, are as follows:

The plaintiff, a California corporation, is the owner of certain lands riparian to the Mokelumne river. These lands are located about ten miles down stream from Electra. So far as defendant is concerned, plaintiff possesses the full riparian rights incidental to its ownership of these lands, subject only to certain vested appropriation rights of defendant, which rights were fully protected by the judgment in this case. The physical characteristics of plaintiff's lands are such as to admit of the economical construction and operation thereon of a low head hydroelectric power project. Plaintiff, for some time, has been planning to construct such a plant on its lands, using the unregulated flow of the stream as motive power. The trial court found that the construction of such a plant was feasible, and was economically justified by the agricultural and industrial demands for electric energy in the territory adjacent to plaintiff's proposed project.

Defendant, also a California corporation, is the owner of a hydroelectric power plant located on the Mokelumne river at Electra, about ten miles up stream from plaintiff's lands. For many years, defendant, by means of reservoirs, ditches, and canals, has impounded a portion of the flow of the Mokelumne river for power purposes and for other public purposes. These water rights were gained by defendant by virtue of valid appropriations, and are not involved on this appeal; the judgment herein fully recognizing defendant's rights therein. Defendant owns certain other lands up stream from Electra and riparian to the North fork of the Mokelumne river and some of its tributaries. The North fork is a tributary of the Mokelumne river and joins the latter a short distance up stream from Electra. For some time prior to the commencement of this action, defendant has been in the process of constructing several large dams and reservoirs on these upper riparian lands for the purpose of impounding, storing, and regulating all of the usual, periodic, and natural flow of the North fork and some of its tributaries, for power purposes. In anticipation of this proposed power development, defendant acquired certain permits issued by the state water commission, acquired a license from the federal power commission, and a certificate from the state railroad commission, to the effect that public convenience and necessity required the construction and operation of this project.

It is defendant's plan to impound and store the water of the North fork and some of its tributaries in these proposed reservoirs annually, to their capacity, and, by means thereof, to regulate artificially the flow of the stream in the manner as specifically set forth in its amended answer, in a special defense. In this defense, defendant set forth that it was its intention to impound and store in its proposed reservoirs during the seasonal periods of high flow so much of the waters of the North fork and its tributaries as would be necessary to fill the reservoirs to their respective capacities, and to release the same in dry seasons of the year so as at all times, so far as possible, to maintain a regulated flow throughout the year. It should be here mentioned that the usual and ordinary flow of the North fork is very irregular.

The trial court also found that the proposed storage would produce artificial changes in the natural and periodic flow of the Mokelumne river where it flows over plaintiff's lands; that such storage "would necessitate changes in plaintiff's present plans for the construction of a power plant, and the use of the waters of the Mokelumne river for the operation of such plant on plaintiff's said riparian lands, and would necessitate changes in plaintiff's proposed beneficial riparian use of the waters of said river, and would cause substantial damage to the plaintiff through the invasion and violation of plaintiff's riparian rights by the establishment of an artificial control of the principal tributary of the Mokelumne river above the lands of the plaintiff, adversely to plaintiff's right to the natural flow of said river."

The court also found that defendant, by means of its dams and reservoirs, and gates and works to be installed therein, will have the power "to impound and store waters in said reservoirs to the capacity thereof, and to release and return the stored water to the river according to its will and convenience. There is no assurance, except such as is afforded by nature and by the law of the land, that the waters to be impounded and stored in said reservoirs and to be discharged therefrom, and to be used and returned to the Mokelumne river at or above the tail-race of Electra Power Plant by the defendant, will actually flow down to and over the lands of the plaintiff and other lower riparian proprietors."

The lower court also found that "considered solely with reference to physical effects" the proposed storage and artificial regulation of the stream, if carried out as proposed by defendant, will not "interfere with any actual or anticipated beneficial use of the waters of the Mokelumne river by the plaintiff upon its said riparian lands, or damage or diminish the value of said lands" if defendant shall actually return the regulated waters into the Mokelumne river in accordance with its proposed plan, and if such waters so released actually shall flow down to plaintiff's riparian lands.

The court concluded that such seasonal storage by defendant was not a riparian use, but constituted an appropriation; that, if continued for the period prescribed by the statute of limitations, it would irreparably impair plaintiff's riparian rights; that pecuniary compensation for all damage to be suffered by plaintiff by reason of the invasion and violation of its riparian rights was readily ascertainable and would afford adequate relief to the plaintiff; that in consideration of permitting defendant to store and regulate the flow of the entire stream plaintiff was entitled to recover $1,000 damages, together with the right to compel defendant to release and discharge the stored water substantially in accordance with the plan set forth by defendant in its special defense.

[1-3] The major contention of defendant is that under the facts of this case the seasonal storage of water for power purposes constitutes a legitimate riparian use. This point has been so recently before this court and so fully and completely disposed of adversely to defendant's contentions that no necessity exists for a lengthy discussion here. Seasonal storage of water for power purposes is not a proper riparian use, but constitutes an appropriation, so that if continued for the time prescribed by the statute of limitations, it will ripen into a prescriptive right. The lower riparian proprietor, in such a case, when such storage substantially interferes with any existing or prospective riparian use of the waters of the stream, is entitled to an injunction to restrain such use, or damages for the invasion of his riparian rights. The above propositions were fully and completely settled in Herminghaus v. Southern California Edison Co., 200 Cal. 81, 252 P. 607, and in Seneca Consolidated Gold Mines Co. v. Great Western Power Company, 209 Cal. 206, 287 P. 93, 70 A. L. R. 210. These two cases set at rest the question of whether an upper riparian owner can, in the exercise of a riparian right, dam the entire flow of a stream and hold the water from the wet season to be used in the dry season, and return the water to the stream at its own will and convenience. These two cases determined that such sequestration of the waters of a stream was not authorized by the riparian right and constituted an appropriation of the waters of the stream. In the Herminghaus Case, the action was by a lower riparian against an upper riparian who proposed to store seasonally and artificially regulate the flow of the waters of the stream. The upper riparian contended that this was a proper riparian use. The point presented for decision was whether or not seasonal storage was a proper riparian use, and this court squarely held that it was not. An injunction in favor of the

lower riparian was affirmed. In that decision this court recognized and now recognizes that the use of the stream for power purposes, even where it is necessary to dam the stream and temporarily detain the water, where the water so detained is presently returned to the stream, is a proper riparian use, but in no uncertain language held that that rule had no application to seasonal storage, resulting in an artificial regulation of the entire flow of a stream.

If there was any doubt as to the holding and effect of the Herminghaus Case, it was fully set at rest by the decision of this court in the Seneca Case. In the Seneca Case, the upper riparian had stored the water for the period required by the statute of limitations. During this entire period, the plaintiff, a lower riparian, had enjoyed the use of all the water of the stream it needed for riparian purposes. The lower riparian contended that, so far as it was concerned, the storage by the upper riparian was in the exercise of the riparian right, and that therefore no prescriptive rights had been acquired by the upper riparian. The trial court, in effect, so held. In reversing the lower court, this court, following the reasoning of the Herminghaus and other cases, unequivocally held that seasonal storage was not a riparian use.

The reasoning used in the above two cases and the decisions therein completely dispose of the contentions of appellant in the present case. It must therefore be held that seasonal storage is not a proper riparian use, but constitutes an appropriation of the waters.

[4-6] We do not find it necessary to decide whether or not an upper riparian owner may appropriate water when such water is in excess of all the reasonable present or prospective needs of lower riparians. In the present case, the trial court found that the proposed storage would cause substantial damage to plaintiff. It found that plaintiff was planning a low head riparian power project, to be operated by using the natural and unregulated flow of the stream; that such a project could be economically operated on plaintiff's land; that the proposed storage would necessitate changes in plaintiff's plans and would interfere with plaintiff's proposed riparian use. The appeal being on the judgment roll, this finding is conclusive. This finding, for obvious reasons, is not inconsistent with the finding that if defendant actually releases the stored water in accordance with its proposed plan of operation, and if the stored water so released actually reaches plaintiff's property, plaintiff's lands will not be injured, but will be benefited. As found by the trial court, there is no assurance that the water so stored and released will actually reach plaintiff's lands. This is so, for the reason that a distance of over ten miles separates the point of the proposed release of the waters and plaintiff's riparian lands. There is no way of now telling what the needs of the intervening riparians may be, or what quantity of the released water will actually reach plaintiff's lands. All intendments and presumptions are in favor of the judgment of the court below. Interpreting the findings in accordance with this salutary rule, we find no inconsistency between them.

[7] The above reasoning is also a complete answer to defendant's contention that since the trial court found no damage would result from the storage, if the water so stored and released actually reached plaintiff's lands, the award of $1,000 damages was excessive. As already stated, the trial court found that the proposed storage would interfere with a proposed riparian use by plaintiff. The damages were awarded for an interference with plaintiff's riparian rights. The evidence not being before us, the award cannot be held to be excessive. Considering the magnitude of the proposed project, and considering the admitted interference with plaintiff's proposed riparian use, the award seems to us quite conservative.

[8, 9] Defendant likewise complains of that portion of the judgment commanding it to operate its reservoirs in a prescribed manner. It contends that it was error thus to enjoin defendant in the absence of any finding that it intended to operate its reservoirs in any other manner. Defendant cites cases holding, in accordance with well-settled principles of equity, that a plaintiff cannot obtain an injunction against mere fancied wrongs nor against possible wrongful acts which the defendant has never attempted or threatened to do. See International Register Co. v. Recording Fare Register Co. (C. C. A.) 151 F. 199; Fackler v. Cincinnati, etc., Co., 229 Ky. 339, 17 S.W.(2d) 194; Lorenz v. Waldron, 96 Cal. 243, 31 P. 54. The rule of those cases has no application to the case at bar. In the instant case, the defendant in its answer, as amended to conform to proof, in a special defense to plaintiff's petition for an injunction, set forth in detail its proposed plan of storage and release of the waters, and prayed that the trial court ascertain and determine the respective rights of the parties. The defendant, in effect, asked the trial court to permit it to store the water upon its offer to release the water stored according to a certain plan. The right of plaintiff to compel defendant to release the waters substantially in accordance with this plan, which was granted by the judgment, was given to plaintiff as a part of the compensation for the damage to its riparian rights. This type of award is substantially in accordance with the procedure authorized by this court in Collier v. Merced Irrigation District, 213 Cal. 554, 2 P.(2d) 790. Moreover, it is a fundamental principle of equity that, if circum-

stances will permit, the equity court will strive to determine the entire controversy and will award full and final relief so as to bring all possible litigation over the subject-matter within the compass of one judicial determination. That principle applies with particular force to the instant case. Defendant, having succeeded in limiting the monetary award to $1,000, upon its announced intention to release the water in accordance with a proposed plan, is objecting to the force of the judgment binding it to so release the water, and would remit the plaintiff to a series of separate actions to protect the benefit which defendant offered plaintiff as a means of reducing the monetary compensation. The judgment as rendered was clearly within the powers of the equity court.

The other contentions made by defendant are so unsubstantial as not to require comment. For the foregoing reasons, those portions of the judgment appealed from are affirmed.

We concur: CURTIS, J.; SEAWELL, J.; SHENK, J.; TYLER, Justice pro tem.

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217 Cal. 436

EDMONDS v. GLENN-COLUSA IRR. DIST.

Sac. 4583.

Supreme Court of California.

Feb. 25, 1933.

1. Judgment ⚷540.

Doctrine of "res judicata" is that an existing final judgment rendered upon the merits, and without fraud or collusion, by court of competent jurisdiction, upon a matter within its jurisdiction, is conclusive of rights of parties or their privies, in all other actions in same or any other judicial tribunal of concurrent jurisdiction, on matters in issue in first suit.

[Ed. Note.—For other definitions of "Res Judicata," see Words and Phrases.]

2. Waters and water courses ⚷262.

Damages to lands from seepage waters are recoverable where they are caused unnecessarily by negligent and improper construction or maintenance of canal.

3. Eminent domain ⚷243(1).

Judgment in condemnation proceeding awarding present and prospective damages to lands from seepage waters from canal *held* res judicata of subsequent action for further damages to lands from seepage.

4. Waters and water courses ⚷263.

In action for damages to lands from seepage waters from canal, evidence *held* not to show that canal was negligently operated.

5. Judgment ⚷576(1).

That judgment was erroneous does not render it any the less a bar to subsequent action involving same question.

In Bank.

Appeal from Superior Court, Colusa County; H. S. Gans, Judge.

Action by Tennie A. Edmonds, sometimes known as T. A. Edmonds, against the Glenn-Colusa Irrigation District, a corporation. From a judgment in favor of plaintiff, defendant appeals.

Reversed.

Hankins & Hankins, of San Francisco, for appellant.

A. G. Bailey and Grant & Bailey, all of Woodland, for respondent.

SEAWELL, Justice.

The trial court gave judgment against Glenn-Colusa Irrigation District, a public utility, in the sum of $750. The court further held that the ditch and canal which was built through plaintiff's lands was carelessly and negligently operated and maintained, but granted a reasonable time within which to correct what it declared to be negligent and careless operation, and further provided that if the nuisance was not abated within a reasonable time the plaintiff would be entitled to an injunction restraining and enjoining the defendant "from maintaining and operating said canal in a negligent and careless manner so as to create a nuisance upon the lands of the plaintiff."

The damage claimed to have been suffered was caused by seepage of water from said ditch and canal into and upon plaintiff's lands. Defendant has appealed from the award of damages, and from the decree restraining the operation of said ditch conditionally or otherwise, and specifies a number of matters as errors and grounds which call for a reversal of the judgment. In addition to a failure of the evidence to support the findings, it is urged by defendant canal or ditch district that every matter of controversy in the present action, particularly as to the question of damage to the same lands from seepage waters, was directly put in issue by the pleadings and litigated at the trial and determined by the judgment in a condemnation proceeding commenced in 1924 by the Williams Irrigation District against Tennie Edmonds, and concluded in 1926; that said condemnation proceeding was brought for the purpose of determining the value of the land actually taken and the damage that would accrue to the balance not taken by reason of the severance, and especially the damages that would accrue to said lands from seepage waters as a result of the construction and maintenance of the kind of a ditch that was to be constructed. The question of seepage water being the only item of damage urged by plaintiff, it is earnestly contended by defendant ditch district that plaintiff is estopped by the judgment of 1926 from relitigating the question by the rule or doctrine of res judicata, which defendant herein invokes. Defendant also adds to the above ground the following: That the defendant has acquired a prescriptive right to continue to carry the water through plaintiff's premises subject to ordinary seepage by reason of a five-year use enjoyed by it; that any seepage shown was the result of necessary, natural, and ordinary operation of the ditch, and is not actionable; that if any negligence is imputable, it was the negligence of the employees of the district, and not chargeable to the district; and that the order of injunction is void.

If the claim of the defendant as to the issue of damages by reason of seepage waters is within the doctrine of res judicata, then the cause is brought to an end, and a decision on any other point becomes unnecessary.

[1] The doctrine of res judicata is stated in a very carefully considered definition in 15 Ruling Case Law, pages 950, 951, in the following language: "Briefly stated, this doctrine is that an existing final judgment or decree rendered upon the merits, and without fraud or collusion, by a court of competent jurisdiction, upon a matter within its jurisdiction, is conclusive of the rights of the parties or their privies, in all other actions or suits in the same or any other judicial tribunal of concurrent jurisdiction, on the points and matters in issue in the first suit. To adopt the language of the English court in announcing the doctrine in an early case, and which has been frequently repeated by the courts, the judgment of a court of concurrent jurisdiction, directly upon the point, is as a plea, a bar, or as evidence, conclusive, between the same parties, upon the same matter, directly in question in another court. In speaking of this rule and the distinctions which appear therein, it has been said that this brief but comprehensive summary furnishes a rule for every case that any complication of circumstances can produce."

Glenn-Colusa Irrigation District became the successor of all the rights of said Williams Irrigation District in a consolidation agreement at about the time said action in condemnation was commenced, and it was substituted in the place of the Williams Irrigation District in said proceeding prior to the time of trial. The history of the subject of controversy between the parties herein is important, and may be briefly told.

Condemnation proceedings were commenced by defendant's predecessor against Tennie A. Edmonds on May 29, 1924, and the plaintiff therein was let into possession of the strip of land, 100 feet in width, sought to be taken for canal purposes upon complying with the provisions of article 1, section 14, State Constitution. The canal, which was of the ordinary dirt construction, was approximately 25 feet in width at the land surface, and approximately 15 feet in width at the bottom. The embankments were set back 10 feet from the channel edge on each side. The physical structure of the canal has not in anywise been changed. The hearing on the condemnation proceeding was had on December 16, 1924. The canal had not then been put to use. The question of damages from seepage waters seems not to have been specifically discussed at the trial, although the character of the soil through which the canal ran was quite minutely described by Mr. Charles de St. Maurice, an engineer called by the defendant, who evinced much familiarity with the soil and the area in which the canal was constructed. In fact he testified to the quality of the soil, the clay compactness in general, and the sandy and loam areas in the proximity of the creek beds. The construction of the ditch as to the heights of embankments, provisions for overflow outlets for the protection of the lands of plaintiff herein, and the value of the land taken and damage done to that not taken, were, however, the chief matters of controversy in the case. Both sides having rested, the trial court filed a written opinion in which it gave notice that it would assess the value of the land actually taken, consisting of 4.29 acres of unimproved land, at $1,072.50, and award $1,790 as severance damages. The entry of judgment was delayed awaiting the settlement of a surveying difficulty. In the meantime the water was turned into the canal, and it was used to its full capacity. The operation of the canal throughout the spring of 1925, and as late as June, according to the witnesses called by the landowner, showed seepage waters standing upon Mrs. Edmonds' lands in ponds here and there. Engineer St. Maurice again made an examination of the lands in suit, and by boring holes and making such other tests as are used to detect seepage waters, fully prepared himself to become a witness on behalf of Mrs. Edmonds. On May 4, 1925, Mrs. Edmonds wrote to the manager of the Glenn-Colusa district a letter in which she called the attention of the district to water standing on her alfalfa field from two to three inches in depth at varying distances from the ditch, rendering the ground so wet that it would not sustain the weight of a person, much less the weight of teams and machinery.

Before the court's written opinion in the condemnation proceeding announcing its intention of awarding damages in the sum of $2,852 took the form of a judgment, Mrs. Edmonds brought an action against the Glenn-Colusa district on account of damages sustained by reason of seepage waters in the sum of $20,000. In her complaint she alleged that the height of the water carried through the canal was above the level of the surrounding country, and during the irrigating season water from said canal had seeped and would continue to seep out of said canal and flood and damage her lands and the whole thereof, and render them unfit, and had then rendered them unfit for agricultural purposes; that by reason of the injury done to the growing crops and to the land itself, and future damage from seepage waters, she would suffer damage in the sum of $20,000. Inasmuch as the judgment in the condemnation proceeding had not been entered, a motion on her behalf to set aside the submission of said cause was noticed to be heard on June 22, 1925, and was granted on October 2, 1925. The motion was expressly made upon the grounds and for the reasons as set forth in her affidavit, that during the month of May, 1925, she had learned that all of her lands were filled with percolating and seepage waters from said canal, and that she had employed an engineer to investigate the same, and was informed by him that her said tract of land would be entirely ruined by said waters seeping from said canal. She prayed that she be permitted to amend her answer by setting up the facts above outlined, and that a new trial be had on the issues raised by said amended answer, and for damages arising thereon. Her motion to amend by "setting forth the damage done to her property by reason of seepage waters from the ditch constructed over and across her property," and "for leave to reopen said cause for the purpose of taking evidence upon said amendment to answer on the question of seepage waters only" was granted, and she accordingly amended her answer. The cause came to trial. Witnesses, both expert and laymen, were examined as to the issues involved, including the question of damages from seepage waters, present and prospective. The trial court, in company with the attorneys, inspected the premises, and rendered its decision awarding the same sum as to the value of the land taken, to wit, $1,072, as indicated in its tentative opinion, but increased the amount above its tentative award of damages by reason of severance and the "construction and operation of the improvement in the manner proposed by the plaintiff," by $400, thereby increasing this item of damage from $1,790 to $2,190.

Mrs. Edmonds not only did not appeal from the above award, but she waived findings and accepted the judgment. Said judgment was filed January 22, 1926.

From a reading of the evidence, it would seem that the instant action is but another proceeding to increase the damages fixed by the trial court in its judgment in the condemnation proceeding of 1925, which has long since become final. That the question of damages from seepage waters, present and prospective, was practically the sole issue in that trial, cannot be seriously controverted. The engineer employed by Mrs. Edmonds, who has had a long experience as an engineer with canal construction in the locality, made extensive soil borings, and water surveys; took levels and elevations, and prepared maps and blueprints showing cross-sections and surface and subsurface conditions, and, to use his own words, made a study of the entire situation. His testimony, as well as the testimony of other witnesses offered by both parties, was specifically directed to the issue of damages arising from actually demonstrated and speculative damages which had accrued or were likely to accrue.

The plans and specifications of the work to be done were put in evidence, and no contention is made that the canal as completed does not conform to said plans and specifications. The record does not contain any evidence as to any structural changes made in the canal since its construction, or as to any structural defects. The canal or ditch is maintained and operated as are other irrigation ditches of a similar character, and no specific act or acts of negligent operation have been pointed out. The most that was shown is that the water in the canal was occasionally raised in order to conduct water to farm lands by laterals to a height of some 12 or 14 inches above its height in 1925, at which time some 10½ acres of plaintiff's lands along or near the canal became permeated with waters which the trial court, in view of the issues presented, undoubtedly found in the condemnation proceeding, was seepage from said canal. Even the respondent's engineer admits that "So far as the earth work itself is concerned, whether it be constructed by dragline or by teams or the methods generally used here [referring to the particular locality in which the canal is constructed], that is constructed in the general and usual manner, but to the entirety of the structure, as I said before, it is incomplete."

The incompleteness which the witness refers to is the caring for seepage waters, which was patent to respondent and to the witness at the time damages were fixed at the condemnation proceeding, and the remedy, as explained by him, consisted of the installation by the defendant canal company of one of three systems which he thought would relieve the respondent from the effects of seepage waters. They are: First, the construction of an interception drainage ditch; second, pumping from wells; third, lining the canal with concrete. The construction of the ditch is of the usual and ordinary type of irrigation ditches existing generally in northern California.

None of the three above-suggested preventive measures were mentioned in the plans and specifications, which were received in evidence at the trial of the condemnation proceeding in 1925, at which trial it was shown that seepage waters had then affected more than ten acres of respondent's lands. That the probability of its annual recurrence, and, indeed, the danger of its developing into a permanent condition were within the actual contemplation of respondent is clearly shown by respondent's repeated assertions before and at said trial. Besides, respondent's engineer testified at said trial that the soil was quite pervious to water, which was additional notice as to anticipated seepage. Sternes v. Sutter Butte Canal Company, 61 Cal. App. 737, 216 P. 66; Id., 99 Cal. App. 465, 278 P. 921. In fact, pools of water claimed to be caused from seepage were then standing on Mrs. Edmonds' lands. The checking of the canal at certain places to raise the water level for the purpose of irrigating farm lands does not seem, under the circumstances, to have been an unreasonable use of the canal, but an incident to its use. If seepage was more likely to occur under such conditions, it would not seem that any particular adjacent owner of land would have the right to demand that the checking be done at such points as would divert seepage waters from her lands to the lands of another, especially in a case, as here, where plaintiff had had her day in court as to the damage she would sustain by reason of seepage waters. No question is made as to overflow or surface waters.

[2, 3] There can exist no question as to the soundness and justness of the rule that damages are recoverable in this class of cases where they are caused unnecessarily by negligent and improper construction of an irrigation ditch or canal, or from negligent or improper maintenance. The authorities cited by plaintiff amply sustain that proposition. The question here is whether a public utility operating a dirt irrigation ditch of the usual and ordinary construction, such as the ditch in the instant case, maintained in the usual manner, can be compelled to lay out a large sum of money to prevent such damages as were shown to inevitably follow its construction and operation, and for which compensation was provided in the condemnation proceeding brought to determine said damages, and upon refusal so to do may be compelled to pay damages for injury to crops which the landowner may annually or occasionally plant near the banks of said ditch in the hope that they may by chance escape anticipated danger. As said in Middlekamp v. Bessemer Irrigating Ditch Co., 46 Colo. 102, 103 P. 280, 23 L. R. A. (N. S.) 795, the result of such a rule would mean in most cases that the costs of means to prevent the seepage would be far in excess of the value of the property so damaged, even in cases where compensation for damages previously had been provided.

The rule governing the right to recover damages caused by seepage waters from irrigation projects, as laid down by numerous decisions of this state and other jurisdictions, estops plaintiff from maintaining the present action. The rule as announced in Sternes v. Sutter Butte Canal Company, 61 Cal. App. 737, 216 P. 66, 69, and approved in Sutro Heights Land Co. v. Merced Irrigation District, 211 Cal. 670, 693, 296 P. 1088, citing supporting decisions, is in the following language:

"In Denver City Irr. Co. v. Middaugh, 12 Colo. 434, 13 Am. St. Rep. 234, 21 P. 565, the court thus expresses its view: 'In assessing damages in condemnation proceedings for lands taken for the purpose of constructing a ditch or reservoir thereon, injuries likely to result from seepage and leakage from such canal or reservoir would naturally be among the first items to occur to a jury.' Further: 'An examination of the reported cases shows that there is no substantial difference in the general rules applicable to the assessment of damages in condemnation proceedings, as announced by the courts of last resort, but in the application of such rules to particular cases the same uniformity has not been observed; still no case has been called to our attention which by any fair construction can be held to be in conflict with the conclusion that damages for seepage and leakage should have been determined in the first proceeding.'

"In the more recent case of Farmers' Reservoir & Irr. Co. v. Cooper, 54 Colo. 402, 130 P. 1004, the Supreme Court of Colorado uses the following language: 'In condemnation proceedings all damages, present and prospective, that are the natural, necessary, or reasonable incident of taking the property sought to be condemned, must be assessed.' It was there held that seepage, and damages resulting from seepage, constituted an incident to be considered by the court or jury whenever land was taken for a right of way to construct a canal."

[4, 5] Neither the complaint, findings, nor judgment make a single specific allegation or finding of negligence, but in the broadest terms allege and find that the canal was so "negligently and carelessly operated as to

cause the damage to plaintiff's crops." No complaint is made as to faulty or imperfect construction of the canal. The evidence is not sufficient to support the general finding of negligence. The damage complained of is but the natural, necessary, and reasonable incident to the use and operation of said canal, and plaintiff, having exhausted her rights in the first action, cannot prevail in the second action. In passing, we take note of the opinion of the learned trial court, which is inserted in the reporter's transcript. It makes the following observation: "From the amount of the award and the circumstances of the second hearing, I cannot believe that the award of $400 was intended to cover the question of seepage for all time and to the extent of covering all plaintiff's lands." Said $400 does not represent the full amount of the award, but the increased amount allowed after a full consideration of the entire damages, from which allowance no appeal was taken. We have no other means of knowing what the trial court that viewed the premises and heard the evidence meant except by the matters disclosed by an examination of the record. The evidence as to the damage from seepage waters was conflicting; but the question was fully litigated and solemnly adjudged. The condemnation proceedings were pleaded in the present action as an estoppel of plaintiff's asserted claims. Whether the award of damages was low or excessively high is immaterial to this action. The policy of the law requires that litigation be brought to an end, and that parties in the enforcement of their rights must take the steps provided by law. "A former judgment between the parties to an action is conclusive, in all subsequent actions involving the same question, not only as to the matters actually decided in the former controversy, but as to all matters belonging to the subject of the controversy and properly within the scope of the issues which also might have been raised and determined." Southern Pacific Co. v. Edmunds, 168 Cal. 415, 143 P. 597, 598; Curtis v. Upton, 175 Cal. 322, 165 P. 935; Philbrook v. Newman, 148 Cal. 172, 82 P. 772; Estate of Harrington, 147 Cal. 124, 81 P. 546, 109 Am. St. Rep. 118. It is none the less a bar if it is erroneous. Lamb v. Wahlenmaier, 144 Cal. 91, 77 P. 765, 103 Am. St. Rep. 66.

The question as to whether the defendant has acquired an easement as to the right to discharge water upon plaintiff's land is not wholly without force, but inasmuch as we have considered the case upon its merits, a consideration of that question and others of a somewhat technical character becomes unnecessary.

The judgment is reversed.

We concur: WASTE, C. J.; SHENK, J.; LANGDON, J.; PRESTON, J.; CURTIS, J.

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130 Cal.App. 222

PEOPLE v. ROVEANO.

Cr. 2324.

District Court of Appeal, Second District, Division 2, California.

March 2, 1933.

Hearing Denied by Supreme Court March 30, 1933.

1. Criminal law ⚷507(7).

In prosecution for statutory rape and for another statutory offense, complaining witness was not an "accomplice" within rule requiring corroboration of accomplices (Pen. Code, §§ 26, 288a).

[Ed. Note.—For other definitions of "Accomplice," see Words and Phrases.]

2. Criminal law ⚷1169(1).

In prosecution for statutory rape and statutory offense, admission of exhibits to corroborate officer's testimony that he examined premises was harmless where accused was unable to show prejudice (Pen. Code, § 288a).

3. Criminal law ⚷982.

Decision of trial judge, after trial on merits, that he would not permit accused, convicted of statutory rape and another statutory offense, to file application for probation, *held* not abuse of discretion (Pen. Code, §§ 288a, 1203).

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Alfred S. Roveano was convicted of the crime of statutory rape and of the offense defined by § 288a of the Penal Code against a female person under age of 18 years and not his wife, and he appeals.

Affirmed.

Alexander L. Oster, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Warner I. Praul, Deputy Atty. Gen., for the People.

CRAIG, Justice.

Upon an information charging the appellant with statutory rape and the offense defined by section 288a of the Penal Code against a female person under the age of eighteen years and not his wife, he was found guilty by the trial court sitting without a jury.

[1, 2] The grounds of appeal consist of asserted insufficiency of the evidence, error in the admission in evidence of an exhibit, and in denying an application to file a petition for probation. The particulars wherein it is claimed that the evidence was not sufficient are predicated upon alleged want of corroboration of the prosecuting witness. It is not only quite apparent that sufficient evidence to

justify the trial court in concluding that the testimony of said witness had been corroborated substantially was introduced, but that the witness was not in such case legally to be deemed an accomplice. Pen. Code, § 26. From examination by the court it developed that said exhibit had no connection with the case other than as corroboration of the officer's statement under oath that he examined the premises. It does not appear that it was considered for any other purpose, nor does the appellant attempt to indicate in what respect, if at all, he was prejudiced by its reception in evidence.

[3] Having heard all of the evidence pertaining to the alleged offenses, the testimony of character witnesses, and that of the defendant, the trial court observed that it would not be inclined to grant an application for probation if filed, stating: "If I had not heard the testimony I would have allowed him to file. Having the facts before me, I do not intend to let him apply for probation. It is not the type of case, in my mind, in which probation should be granted." It is insisted that under the provisions of section 1203 of the Penal Code the appellant was entitled to file his application. While such may have been true prior to a consideration of the appellant's application as though filed, and upon its merits, it would lie within the sound judicial discretion of the court to grant or deny the same if filed, and in the nature of the evidence it cannot be said that to deny an application or the failure to require a useless task of the probation department would constitute an abuse of such discretion.

The judgments are affirmed.

We concur: WORKS, P. J.; ARCHBALD, Justice pro tem.

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130 Cal.App. 136

CUTTING v. McKINLEY et al.

Civ. 8780.

District Court of Appeal, First District, Division 2, California.

Feb. 28, 1933.

Hearing Denied by Supreme Court April 28, 1933.

Municipal corporations 🔑218(2).

Under charter exempting from civil service persons employed on public works "outside city and county," words quoted relate to location of "public works," not place where employees work.

The term "public works" means all fixed works constructed for public use.

[Ed. Note.—For other definitions of "Public Work," see Words and Phrases.]

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Petition by Earl P. Cutting for a writ of mandate against Howard M. McKinley and others, and James J. Maher, to compel the first-named respondent and others, as members of and constituting the Civil Service Commission of the City and County of San Francisco, and to compel the last-named respondent, as secretary of the commission, to approve a pay roll in so far as it affected the salary of the petitioner. From a judgment directing the issuance of a peremptory writ, respondents appeal.

Affirmed.

John J. O'Toole, City Atty., of San Francisco (Harry K. Wolff, of San Francisco, of counsel), for appellants.

John J. Dailey, of San Francisco, for respondent.

SPENCE, Justice.

This is an appeal from a judgment of the trial court directing that a peremptory writ of mandate issue commanding the members of the civil service commission of the city and county of San Francisco to approve the pay roll submitted to them in so far as it affected the salary of petitioner.

In this opinion we will refer to respondents in the trial court as appellants and to the petitioner in the trial court as respondent. The essential facts are not in dispute. Respondent had been employed continuously by the city and county of San Francisco as a draftsman for about ten years next preceding January 8, 1932, the date upon which the new charter of said city and county of San Francisco became effective. All of his work pertained to the Hetch Hetchy project and was performed in part outside of the city and county and in part within the city and county. Section 11 of article XIII of the former charter of said city and county (said article relating to civil service) provides: "The provisions of this article shall apply to the following offices and departments of the city and county. The County Clerk, the Assessor, * * * the Board of Public Works, * * * but the following deputies, clerks and employees in said offices and departments shall be exempted therefrom: the chief deputy of the county clerk * * * *persons employed on public works outside the city and county.*" (Italics ours.) Section 142 of the new charter made no such exemption but provided in part as follows: "Where existing positions that have heretofore been exempt from civil service examinations are now made subject to examination by this charter, the incumbents of such positions who have held such positions for a period of one year continuously next preceding the time that this charter shall go into effect, shall be continued in their positions as if appointed thereto after examination and certification from a list of eligibles and shall be governed thereafter by the provisions of this charter."

Both respondent and appellants concede that the only question involved on this appeal is whether the trial court properly concluded that the position held by respondent was one exempted from the classified civil service by the provisions of said section 11 of article XIII of the former charter, for if said position was exempted thereby it is conceded that respondent was blanketed in by the provisions of said section 142 of the new charter and was entitled to the writ. The determination of this question involves the construction of the clause exempting "persons employed on public works outside the city and county." The respondent contends that any person who was employed on public works which public works were located outside the city and county was exempted by said section regardless of the place where the work of such employee was actually performed. In our opinion the trial court was correct in adopting respondent's contention. It will be noted that the term "public works" is used and that said term immediately precedes the clause "outside the city and county." There is no doubt that the term public works means "all fixed works constructed for public use" (State v. A. H. Read Co., 33 Wyo. 387, 240 P. 208), and we believe that the clause "outside the city and county" relates to the location of such projects rather than to the place of performance of the employees' work on such projects. Grammatical rules bear out this construction. In the recent case of State v. Anderson (Mont.) 13 P.(2d) 231, at page 233, we find the following: "The grammatical construction of a sentence is an aid to its interpretation, and, in the absence of a clear intention, as disclosed by the text, to give to the act a meaning contrary to that disclosed by an analysis of the sentence from a grammatical standpoint, we must elicit the intention of the Legislature from the expressions employed, 'calling to our aid the ordinary rules of grammar.' Jay v. School District, 24 Mont. 219, 61 P. 250, 252. Thus the rules of grammar become rules of law, and this court has said: 'It is a rule of law as old as the law itself, that a relative clause shall be construed to relate to the nearest antecedent that will make sense. * * * Qualifying words, phrases, and clauses are to be applied to the words or phrase immediately preceding, and are not to be construed as extending to or including others more remote, unless such extension is clearly required by a consideration of the entire act.' State v. Centennial Brewing Co., 55 Mont. 500, 179 P. 296, 298."

We find nothing in the charter indicating or requiring a different construction, and we are not impressed with appellants' argument to the effect that such construction would lead to absurd results. Counsel for appellants construes said phrase as though it read "persons *employed outside the city and county* on public works," but we do not believe that this construction is justified.

The judgment is affirmed.

I concur: **NOURSE, P. J.**

130 Cal.App. 32

CALLAHAN v. GENERAL OIL WELL SUPPLY CO.

Civ. 4732.

District Court of Appeal, Third District, California.

Feb. 24, 1933.

1. Estoppel 🔑94(2).

Plaintiff holding option to purchase oil well equipment, permitting associate to represent himself as sole owner when mortgaging equipment, and not asserting his interest at foreclosure, *held* estopped to assert interest against purchaser at sale (Code Civ. Proc. § 1962, subd. 3; Civ. Code, §§ 1589, 3543).

2. Estoppel 🔑70(1).

Owner of interest in oil well equipment, permitting associate to mortgage equipment, and accepting money loaned under mortgage with knowledge associate represented himself as sole owner, *held* estopped to deny associate's title to property (Code Civ. Proc. § 1962, subd. 3; Civ. Code, §§ 1589, 3543).

3. Estoppel 🔑35.

Title acquired out of same mortgage transaction out of which alleged estoppel arose *held* not after-acquired title so as to preclude estoppel against owner thereof asserting title against purchaser at foreclosure sale.

4. Estoppel 🔑94(2).

That purchaser at foreclosure sale only acquired mortgagor's title did not prevent him from invoking estoppel against one claiming interest in mortgaged property.

Appeal from Superior Court, Los Angeles County; Edwin F. Hahn, Judge.

Action by C. B. Callahan against the General Oil Well Supply Company. From a judgment for defendant, plaintiff appeals.

Affirmed.

E. P. Peers and Alfred Kehde, both of Los Angeles, for appellant.

Wood & McArthur, of Long Beach, for respondent.

BURROUGHS, Justice pro tem., delivered the opinion of the court.

This is an appeal by the plaintiff from the judgment in favor of the defendant in an action to partition personal property.

The property sought to be partitioned is certain oil well drilling equipment. It is alleged in the amended complaint that plaintiff is the owner of an undivided five-eighths interest in said equipment, and the defendant owns the remaining interest. The answer denies plaintiff's ownership of any interest in the property, alleges title in defendant, and as an affirmative defense pleads estoppel.

The facts necessary to a decision of the questions involved are substantially as follows: The plaintiff herein, one Johnston, and two other men were joint adventurers in the drilling of an oil well known as Herwig No. 11. Plaintiff and Johnston were interested in buying the equipment described in the pleadings for use in the joint adventure referred to. Said equipment was owned by one Charles F. Sawyer, but was subject to an option held by this plaintiff to purchase the same for the sum of $800. The property was at the time of the execution of the note and mortgage hereinafter referred to in the yard of the copartnership, herein referred to as the Coast Supply Company.

Lacking the necessary funds to close the option, Johnston informed the plaintiff that he could borrow the sum of $500 from the Coast Supply Company, provided plaintiff would allow him to put a mortgage on said equipment. Plaintiff told him to go ahead. After negotiating with the Coast Supply Company, Johnston informed plaintiff that he could only borrow the sum of $300 on the equipment, and again plaintiff told him to go ahead and that he would put up the balance of $500. On July 12, 1928, Johnston executed in his own name a promissory note in the sum of $2,500 and a chattel mortgage on the said equipment to the Coast Supply Company as security for the payment of said note, and he received the sum of $375 from the mortgagee. Of this sum, with the knowledge of the plaintiff, he retained $75 for his own use. In the mortgage thus executed appears the following warranty: "The said mortgagor does hereby state, declare and warrant, that he is the sole and separate owner of all the within mentioned personal property and that there are no liens or incumbrances or adverse claims of any kind whatever on any part thereof." Immediately after the execution of the note and mortgage Johnston took a copy of both of said documents to the plaintiff and delivered them to him, together with the sum of $300. The plaintiff thereupon, and with knowledge of the contents of said instruments, purchased the equipment from the owner and took a bill of sale therefor in his own name and in the name of Johnston. They took possession of the property and caused it to be removed to Herwig No. 11, where it was installed and used. Later on it was removed to another well that Mr. Johnston was drilling, and still later to another one, where it remained until sold under the decree of foreclosure of the mortgage given by Johnston as aforesaid. After its removal to the property last mentioned, the plaintiff posted a notice of nonresponsibility for work being done on the oil well, in which notice he claimed to be the owner of the mortgaged property, and this notice remained posted until after the sale made pursuant to the decree of foreclosure of the mortgage. The debt secured by the chattel mortgage not having been paid, the mortgaged property was sold to satisfy the same, and the defendant in this action became the purchaser. The plaintiff was present at the sale, but did not assert any claim of title to the property.

Under the foregoing state of the case, the court found that the plaintiff was estopped to assert any title to the property in suit. It is this finding that is the subject of attack by the appellant. Section 1962, subdivision 3, Code of Civil Procedure, provides: "Whenever a party has, by his own declaration, act, or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act, or omission, be permitted to falsify it."

In 10 California Jurisprudence, p. 626, it is said: "The whole office of an equitable estoppel is to protect one from a loss which, but for the estoppel, he could not escape. The vital principle of equitable estoppel, it has been said, is that he who by his language or conduct leads another to do what he would not otherwise have done shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change of position involves fraud and falsehood, and the law abhors both."

In Argenti v. City of San Francisco, 16 Cal. 255, and Sussman v. San Luis Obispo County, 126 Cal. 536, 59 P. 24, it is held that, although the actual representations are made by an agent, the consenting principal is estopped.

In 10 California Jurisprudence, pp. 634, 635, it is said that: "Careless and culpable negligence amounting to fraud is equivalent to an intent to deceive and will satisfy the element of fraud necessary to an estoppel."

Section 3543 of the Civil Code reads: "Where one of two innocent persons must suffer by the act of a third, he, by whose negligence it happened, must be the sufferer."

[1] Viewed in the light of the foregoing principles of estoppel, it is clear that this appellant, while holding an option to purchase the property in controversy, agreed that his associate Johnston should place a mortgage on said property to raise money for their joint adventure. Acting upon this permission, Johnston did this very thing, giving the note and mortgage even before either acquired title thereto, representing himself as the sole owner and guaranteed title in himself. Of these facts plaintiff had full notice and knowledge and accepted the money from Johnston, using it to purchase the property in his own name and that of his associate, but without in any manner giving notice of his own claim of title. When the property was sold to satisfy the mortgage debt, plaintiff was present at the sale, and failed to assert any interest or title in the property. We think the foregoing is amply sufficient to sustain the finding of the court. It is claimed by plaintiff that there is no evidence in the record that the mortgagee relied upon plaintiff's conduct in making the loan. True, no witness has testified in so many words that the mortgagee relied upon Johnston's ownership of the property in making the loan, but no other reasonable inference can be drawn from the evidence and conduct of the parties. The fact that the note and mortgage were given with the guaranty of title in Johnston, also the taking of the mortgage before the Coast Supply Company would make the loan, satisfy us that the mortgagee relied upon the title of Johnston.

It does not appear in the record why the note was given for $2,500, nor does it appear, as claimed by appellant, that the property at the time it was mortgaged was in the custody of the Coast Supply Company as bailee or otherwise. It merely appears that at that time it was in one of their yards.

[2] Plaintiff is also estopped to deny Johnston's title to the property by accepting benefits under the chattel mortgage with full knowledge of the facts. Section 1589, Civil Code, provides: "A voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it, so far as the facts are known, or ought to be known, to the person accepting."

Without repeating the facts as above set forth, it is undisputed that appellant knew, when he accepted the money loaned to Johnston by the Coast Supply Company and used it to assist in purchasing the oil well equipment for the benefit of their joint adventure, that the Coast Supply Company had made the loan upon the strength of Johnston's title to the property and he made no effort to enlighten them of any claim held by him. This principle is sustained in 10 California Jurisprudence, pp. 645, § 25, where it is said: "But there are other forms of estoppel in which knowledge on the part of the person invoking the estoppel and reliance upon the fact and a change of situation based upon that reliance are not essential. * * * To constitute this sort of estoppel, the act of the party against whom the estoppel is sought must have gained some advantage for himself, or produced some disadvantage to another; the person invoking the estoppel must have been induced to change his position, or by reason thereof the rights of other parties must have intervened." See, also, sections 3515, 3516, 3517, 3519, and 3521, Civ. Code.

[3, 4] Appellant also contends that he is not estopped because his title to the property was acquired after Johnston gave the note and mortgage. Appellant cites two California cases: Gluckauf v. Reed, 22 Cal. 469, and Marquart v. Bradford, 43 Cal. 526. Both of these cases were decided before the enactment of section 1962 of the Code of Civil Procedure. Further, in the cases cited by appellant, the after-acquired titles were new, and independent titles acquired long after the transaction, out of which the estoppel was alleged to have arisen, had occurred. But in the case at bar the after-acquired title grew out of and was a part of the same transaction and fully completed on the same day, and cannot be said to be an after-acquired title within the meaning of the cited cases. Furthermore, in the cited cases the holders of the after-acquired titles had not encouraged and directed false representations. Appellant also contends that the only title which can be acquired at a foreclosure sale is the title of the mortgagor. There is no doubt that this is the correct rule, but such rule does not prevent a purchaser at such sale, in a proper case, to invoke the doctrine of estoppel.

The decision of the trial court is eminently just and fair, and the judgment must be affirmed. It is so ordered.

We concur: PLUMMER, Acting P. J.; R. L. THOMPSON, J.

130 Cal.App. 109

REVIS v. I. S. CHAPMAN & CO.

Civ. 597.

District Court of Appeal, Fourth District, California.

Feb. 27, 1933.

1. **Waters and water courses** 🔑107(3).

In action for draining percolating waters from plaintiff's land, whether drainage was due to defendant's peat-digging operations on adjoining land *held* for jury.

2. **Waters and water courses** 🔑101.

Each adjoining landowner has correlative right to use reasonable share of percolating waters for any beneficial use upon his land.

3. **Waters and water courses** 🔑107(3).

In action for draining percolating waters from plaintiff's land, loss of crops and expenses incurred in irrigating lands after drainage are in nature of special damages which must be specifically pleaded.

4. **Waters and water courses** 🔑107(3).

In action for drainage of percolating waters from plaintiff's land, evidence *held* insufficient to prove general damages alleged.

5. **Damages** 🔑108.

Measure of damages for injury to realty is difference between market values thereof before and after damage.

Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

Action by A. H. Revis against I. S. Chapman & Company. Judgment for plaintiff, and defendant appeals.

Reversed.

O'Connor & Findlay, of Colton, for appellant.

Emery B. Tyler and Raymond E. Hodge, both of San Bernardino, for respondent.

AMES, Justice pro tem.

This action was brought for the purpose of recovering damages caused by the alleged draining of plaintiff's land by the defendant. A trial by jury was had, in which plaintiff was awarded damages in the sum of $2,500, and from the judgment entered thereon defendant prosecutes this appeal.

Since May, 1909, respondent had been the owner of approximately ten acres of land located in that portion of San Bernardino county known as the artesian belt, and which is aptly described in the opinion of the Supreme Court in the case of Katz v. Walkinshaw, 141 Cal. 116, 70 P. 663, 667, 74 P. 766, 64 L. R. A. 236, 99 Am. St. Rep. 35. The westerly half of this land is not involved here. The easterly half is described as low. damp, swamp land which, under normal climatic conditions, was saturated with water. The respondent testified that upon the surface of his land there was a deposit of red soil varying from eighteen inches to two feet in depth, beneath which was a stratum of peat from twelve to fourteen inches in depth, and beneath that two other strata of peat varying in depth from six to sixteen inches, between which there existed stratifications of silt and sand varying in depth from eight to twelve inches. The general slope of the land is from a northeasterly to a southwesterly direction. The water in the soil is not a part of any stream or subterranean course, but was naturally percolating through the soil. Prior to the operations of appellant, which are hereafter described, water stood freely upon the surface of the ground and within ditches constructed thereon. The presence of the deposits of peat within this soil renders crops planted therein unusually prolific.

The land south of and adjacent to the respondent's property, consisting of about ten acres, together with about thirty acres lying east of and adjacent to respondent's property, is owned by appellant. Upon this property appellant has been engaged for several years in removing the peat deposits from its soil for the purpose of manufacturing fertilizer for commercial purposes, and which is, after its manufacture, removed from the premises of appellant and used for fertilization of the soil in other communities.

Respondent testified that along the south side of his land there was a bluff or elevation from ten to twelve feet in height. In the fall of 1927 appellant removed this elevation, and along the north line of its property constructed a ditch approximately five feet in depth. This ditch throughout the transcript is referred to as ditch "A," and throughout this opinion will be so identified. In the winter of 1927 appellant constructed a ditch along the south line of his property, parallel to and about two hundred feet south of ditch A, which, in the transcript, is referred to as ditch "B," and which will be so identified in this opinion.

In 1924 respondent owned, in addition to the land here involved, the property south of and adjacent to it, which he subsequently conveyed to his wife, and of which appellant is now the owner. He testified that the character of the soil in that parcel of land was similar to the land still owned by him and which is involved in this action. In 1924 he first farmed that portion of his property which is now owned by appellant. During that year he planted crops of melons, peanuts, popcorn, and other agricultural products. The crops planted that year proved to be unprofitable, with the exception of his crop of peanuts, which, he testified, yielded profitable returns, and that the land upon which his crops were planted, together with the land now owned by him, continued to yield profitable crops until the drainage of his land was accomplished by appellant as hereinafter described.

[1] Respondent further testified that he continued to raise profitable crops until the construction of ditch A and ditch B; that after the construction of appellant's ditches the water which had formerly saturated the strata of peat in his lands sunk to a level of five feet below the surface of the ground, as a result of which the peat became dry and the land unproductive; that it was impossible to raise crops upon his land without artificial irrigation. An expert witness, who had been a resident of the artesian area for many years, testified that after water is withdrawn from peat it gets very hard, cracks form in it, and "that it seems impossible to get it wet." That before crops could be grown a saturation of the peat would be necessary and that this could not be accomplished with surface irrigation. Respondent further testified that a portion of the surface of his land sunk by reason of the removal of water from the substrata of the soil; that an artesian well, which formerly flowed on his premises, dried up. Other evidence was introduced tending to prove that the drying of respondent's land was due to the operations of appellant which, however, it will be unnecessary to summarize here.

Appellant, on the contrary, contends that the drainage of respondent's land was not due to its operations but to a series of dry years and the lowering of the water plane in the artesian area due to heavy draughts upon the supply therein contained. The evidence in this respect is in sharp conflict and presents a question of fact for the jury, but appellant further contends that the operations conducted upon its land was a reasonable use of the land and that, conceding that such operations resulted in the drainage of respondent's land, he has no cause of action against appellant.

[2] The doctrine of reasonable use was established in this state in the case of Katz v. Walkinshaw, supra, and has been cited and reaffirmed in many decisions since that time. In that case Mr. Justice Temple, in quoting from the case of Pixley v. Clark, 35 N. Y. 520, 91 Am. Dec. 72, says: "'An owner of the soil may divert percolating water, consume, or cut it off with impunity. It is the same as land, and cannot be distinguished in law from land.' He says this proposition must be admitted, but nevertheless a case cannot be found in this country 'where the right has been upheld in the owner of land to destroy a stream, a spring, or a well upon his neighbor's land, by cutting off the source of its supply, *except it was done in the exercise of a legal right to improve the land, or make some use of it in connection with the enjoyment of the land itself.*' "

In Hudson v. Dailey, 156 Cal. 617, 105 P. 748, 752, the court says, with respect to percolating waters: "The general rule, as now established by the decisions of this court, undoubtedly is that, where two or more persons own different tracts of land, underlaid by porous material extending to and communicating with them all, which is saturated with water moving with more or less freedom therein, each has a common and correlative right to the use of this water upon his land, to the full extent of his needs if the common supply is sufficient, and to the extent of a reasonable share thereof if the supply is so scant that the use by one will affect the supply of the others."

The same principle has been reaffirmed in many decisions in this state. Among them may be cited Cohen v. La Canada Land & Water Company, 142 Cal. 437, 439, 76 P. 47; Montecito, etc., Company v. Santa Barbara, 144 Cal. 578, 585, 77 P. 1113; Burr v. MacClay Rancho Water Company, 154 Cal. 428, 434, 98 P. 260; Barton v. Riverside Water Company, 155 Cal. 509, 101 P. 790, 23 L. R. A. (N. S.) 331.

In the instant case appellant had a correlative right to use a reasonable share of the water percolating under the surface of its soil for any beneficial use upon its land. The evidence showed, and the jury impliedly found, that the quantity of water removed from respondent's land greatly exceeded its reasonable proportion of that drained from the common source. Nor was the water so drained from respondent's soil used to fulfill the needs of appellant. To the contrary, its presence within the soil of appellant was a detriment to its manufacturing operations and was removed from its land and wasted. Under the conflict of evidence which the record in this case presents, it was proper for the court to submit to the jury the question as to whether or not the drying of respondent's land was caused by the operations of appellant.

[3] A more serious contention is advanced by appellant with respect to the measure of damages proved to have been sustained by respondent. Evidence was introduced at the trial which tended to prove the revenue derived by respondent from his various crops both before and after the construction of appellant's ditches. There is also evidence in the record showing the expense of irrigation necessitated by the drying up of the land. The jury could have properly considered this evidence in determining the damage sustained by respondent by reason of the loss of his

crops, and other losses proximately sustained as a result of the drainage of his land, if such had been pleaded. On the subject of damage, the complaint contains only the ad damnum clause alleging the general damages sustained. We think the loss of his crops and the expense incurred in irrigating them are in the nature of special damages which must be specifically pleaded.

In Gomez v. Reed, 178 Cal. 759, 174 P. 658, 660, the court says: "Damages which are the necessary consequence of the wrongful act can be recovered under the general allegation of the amount of damage inflicted. Treadwell v. Whittier, 80 Cal. 579, 13 Am. St. Rep. 175, 5 L. R. A. 498, 22 P. 266. But where there are different elements of damage flowing from the wrong and the amount of damages from each element is capable of exact statement, 'the defendant has the right to be informed of the amount of the claim for each, so that he might be prepared with evidence at the trial to meet the claim.' Mallory v. Thomas, 98 Cal. 647, 33 P. 757; Lamb v. Harbaugh, 105 Cal. 690, 39 P. 56. And if damages ensue because of some particular circumstances existing at the time, though the natural consequence of the wrongful act in connection with the special circumstances, the facts must be specially alleged."

Under the rule established in this case, we think that the damage sustained by loss of crops and the expense incurred in the irrigating of the same are special in their nature and must be pleaded.

Respondent testified that before the ditches were dug by appellant his land was worth $5,000 an acre; that the crops which he had produced prior to the construction of such ditches yielded 8 per cent. on an investment of $5,000 per acre. The following appears in the transcript:

"Q. Since the drainage of your land how much is that land worth? A. It is not worth the taxes.

"Q. Is it good for anything? Is it good for pasturage? A. Absolutely not."

[4] Again he testified that it was worth a little for pasture in the winter; that formerly the grass would grow upon the land in the summer time sufficient for pasturage during the entire winter, but that since the construction of appellant's ditches the ground is barren and bare, and that a good deal of Bermuda grass had died within the last two years. There is no evidence in the record, other than the foregoing, upon which the jury could determine the amount of damages sustained. Since, then, such expenses cannot be recovered in this action, we are confronted with the question as to whether or not the evidence is sufficient to prove the general damages alleged in the complaint.

[5] The measure of damages in California for an injury to the realty is the difference between the market value of the land before and after the damage was sustained. Perkins v. Blauth, 163 Cal. 782, 127 P. 50; Seneca Consol. Gold Mines Co. v. Great Western Power Co., 209 Cal. 206, 287 P. 93, 70 A. L. R. 210.

While there is evidence of the value of this land prior to its drainage, there is no evidence whatever from which the jury could have drawn an inference as to the market value of the land subsequent to that time. It is true that respondent testified that since the drainage of his land it was not worth the taxes. Clearly, that would furnish the jury no criterion upon which to base its opinion as to the value of the land. Whether the taxes were high or whether they were low does not appear from the transcript. It is possible that with a high rate of taxes the land would still possess a considerable market value. Respondent testified that it was not good for pasturage, and again he testified that it was worth a little for pasturage in the winter. There is nothing in this statement to indicate what the market value would be.

In the case of De Freitas v. Town of Suisun City, 170 Cal. 263, 149 P. 553, 554, plaintiff sued for damages resulting from the drying of certain springs in his land caused by the construction of a tunnel by the defendant upon the land belonging to it. The court announced the following rule for determining the measure of damages: "The measure of damages caused by the diversion of water from plaintiffs' springs would be the difference between the value of plaintiffs' land before the diversion complained of and its value if it were permanently deprived of the water so diverted."

The court again says: "Gross income does not determine value. It might be all used up in expenses, in which case, upon the theory proposed, the land would be worthless, although its actual market value might be considerable."

The court again says: "The truth is the amount of actual net revenue does not determine the value of land in every case. The revenue would vary according to the industry, skill, and wisdom of the person cultivating the land. Its net revenue, assuming reasonable skill in cultivation and management, would be the criterion, so far as that element alone is concerned. But other elements, such as the state of the market, the demand and supply of land of the character in question, the prospects of advance, and perhaps other things, would ordinarily affect the question of value and fix it at a sum different from that produced by capitalization of net revenue. The actual market value is the thing to be determined, and while net revenue should be considered, it does not, in general, furnish a conclusive measure of such market value. In the present case, however, the questions, both as to value and damage, were framed upon the erroneous theory that value may be determined from gross revenue alone, and neither of them should have been allowed."

We think the rule announced in that case is peculiarly applicable to the case at bar.

The judgment is reversed.

We concur: BARNARD, P. J.; JENNINGS, J.

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130 Cal.App. 123

GIBBS v. SEEGER et al.

Civ. 845.

District Court of Appeal, Fourth District, California.

Feb. 27, 1933.

Hearing Denied by Supreme Court April 27, 1933.

1. Mines and minerals 🔑77.

Under lease giving lessors, as part of rental, percentage of oil produced from first well across street from leased premises, lessors' right to such percentage ceased when lessee quitclaimed leased property.

> Lease provided that lessee should pay as rental or royalty for the use of land owned by lessors 2 per cent. of all oil produced and saved from second well, and 1 per cent. of all oil produced and saved from first well to be drilled upon described premises, and that lessees could, at any time before discovery of oil on demised premises, quitclaim such property or any part thereof to lessors, and thereupon all rights and obligations of parties thereto, one to the other, should thereupon cease and determine "as to the premises quitclaimed"; and the clause quoted referred to that part or all of leased premises which might thus be quitclaimed and was not intended to and did not preserve interest of lessees in product of first well on other property.

2. Evidence 🔑393(1).

Oil and gas lease having been reduced to writing, nothing could be added.

Appeal from Superior Court, Orange County; G. K. Scovel, Judge.

Action by Mary Gibbs against Nettie L. Seeger and husband. From a judgment for plaintiff, defendants appeal.

Affirmed.

D. A. Knapp, of Los Angeles, for appellants.

McAdoo, Neblett & Clagett and B. H. Neblett, all of Los Angeles, for respondent.

BARNARD, Presiding Justice.

The defendants have appealed from a judgment foreclosing a mortgage given by them to Wm. G. McAdoo and R. T. Colter, and assigned to the plaintiff. This mortgage was given as a part of the transaction described in the case of Wooton v. McAdoo, 110 Cal. App. 48, 293 P. 694. The appellants owned a small lot (25x50 feet) in Huntington Beach, which they leased to McAdoo and Colter in connection with a similar lease of another lot of the same size owned by other parties, for the purpose of drilling for oil on the two lots thus leased, by means of power furnished and brought from a plant used in drilling and operating another well, which throughout the proceedings is called the "first well," which was located across the street from the property owned by appellants and which was controlled by the lessees. At the time these leases were made, the lot owned by the appellants was incumbered by a mortgage for $2,500, and, by agreement of the parties, McAdoo and Colter paid off this $2,500 and in lieu thereof the appellants executed and delivered to them the mortgage here in question. Under the lease referred to, as a part of the rental, the appellants were to have 1 per cent. of the proceeds of the oil produced from the above-mentioned first well, located across the street. Up to the time that lease was canceled by a quitclaim deed, as provided for therein, a part of the proceeds of this 1 per cent. of the production referred to was paid on this mortgage, reducing the principal to $1,194.47. After the lease was canceled this 1 per cent. of the proceeds from the oil produced from the first well was no longer paid to the appellants, the appellants made no further payments upon this mortgage, and this foreclosure action followed.

The appellants state that there were but two issues before the trial court and raise the same two points on this appeal. Appellants thus state these two issues: "One was whether the question of fraud was res adjudicata by reason of the decision concerning the lease. The other was whether the language and facts surrounding the 1 per cent. clause constituted a transfer of a perpetual interest in the first well, or whether it was a mere temporary privilege that terminated with the quitclaim deed covering appellants' land."

The first issue thus referred to was not presented to or passed upon by the trial court. While it appears probable that any question of fraud was res adjudicata, as the only misrepresentations alleged are the same allegations which were held to be not sufficient to establish fraud in Wooton v. McAdoo, supra, such an issue was neither presented to the trial court nor is it sufficiently raised here to enable such a point to be decided. The only thing called to our attention is one question asked of Mrs. Seeger, as to whether she had consulted anyone in connection with this transaction. An objection was made that this was not within the issues raised by the pleadings. In passing upon this objection the court called attention to the fact that the pleadings did not support any claim for misrepresentation. No ruling was made in respect to any matter as having been previously decided. Counsel for appellants remarked: "That disposes of the question of fraud, and we accept the ruling of the court as a matter of record on the point." The trial then proceeded upon the sole question as to whether the appellants were entitled to a perpetual interest in the first well, amounting to 1 per cent. of the proceeds therefrom. While appellants argue that it is fair to assume that there might have been other conversations aside from those passed upon in the previous case, no attempt to offer evidence of the same was made at the trial and no such evidence is here pointed out; the only matters apparently relied upon being the same leases and matters passed upon in the case of Wooton v. McAdoo. While the actual ruling made by the court is not here attacked, we may say that the court's ruling was apparently correct, as the only allegations of fraud set up by the appellants in their pleadings did not go to the question as to whether the mortgage was obtained by fraud, but went to and were incidental to the main defense raised, and what is the gist of the entire pleadings, that there was an agreement that the mortgage should be paid from the amounts coming to the appellants from the 1 per cent. of the proceeds of the first well.

[1, 2] The second issue stated by the appellants as presented to the trial court is the only point properly raised here and, so far as the record shows, is the only point properly presented to the trial court. In support of this contention our attention is called to no evidence of any agreement between the parties other than as set forth in the lease and in the mortgage here involved, and appellants rely entirely upon the claim that a proper construction of the language used in the lease necessarily compels the conclusion that the 1 per cent. of the proceeds of the first well, across the street, was given to the appellants as a bonus for the execution of the lease in question, that the same was not a part of the rental for the lot leased, that the cancellation of the lease through a quitclaim deed, as provided for therein, had no effect upon appellants' perpetual interest in the first well, and that this percentage of the proceeds of the first well, if paid over, would have been sufficient to have paid off this mortgage.

The lease in question provided that "the lessee shall pay as rental or royalty for the use of said land owned by lessors 2 per cent. of all the oil produced and saved from said second well, and 1 per cent. of all the oil produced and saved from the first well to be drilled upon the above described premises, said payment to be made in money or in kind at lessor's option." The lease further provides: "The lessees may at any time before discovery of oil on the demised premises, quitclaim the said property, or any part thereof, to the lessors, their successors or assigns, and thereupon all rights and obligations of the parties hereto, one to the other shall thereupon cease and determine as to the premises quitclaimed."

Before oil was discovered on the leased premises, the lessees abandoned the project and quitclaimed the property to the appellants. While the appellants concede that the 1 per cent. of the oil produced from the first well is named in the lease as a part of the rental or royalty for the use of the land leased, they argue that since this provision for 1 per cent. of all the oil produced and saved from the first well contains no limitation as to time, it is a "downright grant" of this percentage of such oil for all time unless otherwise limited in the lease. It is then urged that there is no such limitation in the lease and that the other clause therein providing that in the event the property should be quitclaimed, then "all rights and obligations of the parties * * * shall thereupon cease and determine *as to the premises quitclaimed*," has no relation to the provision giving to the lessors 1 per cent. of the oil produced from the first well. It is argued that the clause quoted discloses an intention that upon the quitclaiming of the property, the obligation of the parties should cease in so far as the premises quitclaimed were concerned, but that this had no effect upon the obligation of the parties in connection with the first well, which was situated upon land other than that quitclaimed. Therefore, it is argued, the interest in the proceeds of the first well given to the appellants must be interpreted as being a bonus as distinguished from any part of the rental of the land leased.

We think this interpretation of the lease cannot be sustained. The lease does not contain the word "bonus" nor any language equivalent thereto. There is no uncertainty in the language used and it is plainly provided that the 1 per cent. of the oil produced from the first well is to be paid to the lessors as rental or royalty for the use of the land leased. It is no more necessary that the length of time during which this provision shall govern should be specifically stated in that particular clause of the lease than that a similar limitation should be in the same place expressly stated in reference to the 2 per cent. of any oil to be produced from the second well, which was to be located on the property leased. Nor is there anything in the quitclaim provisions of the lease which changes the situation. It is particularly provided that the lessees may, before the discovery of oil on the leased premises, quitclaim the property *or any part thereof* to the lessors, and that thereupon all rights and obligations of the parties *one to the other* shall cease. The additional clause "as to the premises quitclaimed" unquestionably refers to that part, or all, of the leased premises which might thus be quitclaimed, and the same was neither intended to, nor does it, preserve the interest of the lessees in the product of the first well. In addition to all other considerations, taking the lease as a whole, it appears that the only interest given to the lessors in the product of the first well was given by way of rental for the use of the property leased, and when the rights and obligations of the parties ceased as to the property leased, they ceased in their entirety. The contract made by these parties was reduced to writing and nothing may be added thereto. Smith-Booth-Usher Co. v. Los Angeles Ice, etc., Co., 175 Cal. 136, 165 P. 430.

The judgment appealed from is affirmed.

We concur: MARKS, J.; JENNINGS, J.

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130 Cal.App. 43

WASHINGTON v. POLICY HOLDERS' LIFE INS. ASS'N.

Civ. 8827.

District Court of Appeal, First District,
Division 2, California.

Feb. 25, 1933.

Insurance ⚷618.

In beneficiary's action on life policies, county where insured died *held* "county where obligation or liability arises" within constitutional provision regulating venue (Const. art. 12, § 16).

Const. art. 12, § 16, provides that corporation or association may be sued in county where contract is made or is to be performed, or where obligation or liability arises or breach occurs, or in county where principal place of business of corporation is situated.

Appeal from Superior Court, Santa Clara County; F. B. Brown, Judge.

Action by Samuel S. Washington against the Policy Holders' Life Insurance Association, a corporation. From an order denying an application for a change of venue, defendant appeals. Motion to dismiss the appeal or affirm the order.

Motion granted, and order affirmed.

Hugh Martin Young, Charles D. Warner, and Thomas W. Hughes, all of Los Angeles, for appellant.

Charles A. Thompson, of Santa Clara, for respondent.

SPENCE, Acting Presiding Justice.

Plaintiff was the beneficiary under two life insurance policies issued by defendant to Grace May Washington, a resident of Santa Clara county. Following the death of said Grace May Washington, plaintiff filed this action in the Superior Court in Santa Clara county to recover the benefits provided in said policies. At the time of filing a demurrer, defendant made application for a change of place of trial to Los Angeles county, being the county in which defendant had its principal place of business. From the order of the trial court denying said application, defendant appealed.

Following the filing in this court of appellant's brief, respondent made a motion under section 3 of rule V of the Rules of the Supreme Court and District Courts of Appeal to dismiss the appeal or affirm the order. In our opinion this motion should be granted and the order affirmed, as "the questions on which the decision of the cause depends are so unsubstantial as not to need further argument."

In the complaint respondent alleged, among other things, that deceased died in Santa Clara county, and that respondent was at all times a resident of said county. These allegations were not denied in the affidavit filed in support of the application for change of place of trial.

Section 16 of article 12 of the Constitution provides: "A corporation or association may be sued in the county where the contract is made or is to be performed, *or where the obligation or liability arises* or the breach occurs; or in the county where the principal place of business of such corporation is situated, subject to the power of the court to change the place of trial as in other cases." (Italics ours.) The place where the deceased died was the place where the cause of action arose or, in other words, was the place where the "obligation or liability" arose within the meaning of said section of the Constitution, and the trial court properly denied the application. Robinson v. Order of Ry. Employees, 53 Cal. App. 404, 200 P. 87.

The order appealed from is affirmed.

We concur: STURTEVANT, J.; GOODELL, Justice pro tem.

130 Cal.App. 62

PAPPADATOS v. MARKET STREET BLDG. CORPORATION et al.

Civ. 8547.

District Court of Appeal, First District, Division 1, California.

Feb. 27, 1933.

1. Landlord and tenant 🔑37.

Scope, purpose, and effect of lease must be determined from whole lease (Civ. Code, § 1641).

2. Landlord and tenant 🔑37.

Lease must be given interpretation which will make it effective in conformity with intention of parties (Civ. Code, § 1643).

3. Landlord and tenant 🔑37.

If terms of lease are ambiguous, it must be interpreted in sense in which lessee believed, at time of making it, lessor understood it (Civ. Code, § 1649).

4. Landlord and tenant 🔑37.

That construction of clauses of lease must be given which will be most favorable to party in whose favor clauses are made (Code Civ. Proc. § 1864; Civ. Code, § 1654).

5. Landlord and tenant 🔑48(½).

Where property was leased for candy and soda fountain business, and lease provided lessor would not rent any other store in building for "candy business," lease to another for sale of fruit juices *held* violation of agreement.

6. Appeal and error 🔑173(2).

Point that there was no ground for issuing injunction against certain defendant could not be urged for first time on appeal.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by Theodore Pappadatos against the Market Street Building Corporation and another. From an adverse judgment, plaintiff appeals.

Reversed.

Thomas P. O'Brien, Charles A. Christin, and Knight, Boland & Christin, all of San Francisco, for appellant.

Chas. A. Gray, of San Francisco, for respondent Market Street Bldg. Corporation.

Jerome Politzer and Robert C. McGowan, both of San Francisco, for respondent California Orange Drink Co.

PER CURIAM.

This appeal was taken by plaintiff from an adverse judgment in an action to enjoin the respondent Market Street Building Corporation from entering into a lease with the respondent California Orange Drink Company upon the ground that the execution of such a lease would be in violation of the terms of a lease theretofore entered into with appellant.

As a matter of fact, the lease with the California Orange Drink Company had been executed a few days before the complaint herein was filed; however, the action was tried before the term of the tenancy created thereunder had commenced to run; and judgment was entered in favor of appellant. Thereafter motion for new trial was made and came on for hearing before a different judge, and the motion was granted. The second trial was had before still another judge, and, as indicated, judgment was entered in favor of respondents.

Both leases related to the use and occupation of certain stores in the Marshall Square building at the corner of Market and Hyde streets, San Francisco, of which the Market Street Building Corporation was the owner. The ground floor of the building fronting on Market street provided an entrance to a theater, and the remaining frontage, on each side of the theater entrance, was divided into stores. For some time immediately preceding the execution of the lease with appellant, the owner of the building had been operating a candy business, including the sale of ice cream, soda fountain drinks, fruit juices, and light lunches, in the store adjoining the east side of the theater entrance; and in February, 1929, it sold the equipment and fixtures therein to appellant for $5,500, and entered into a written ten-year lease with him for the use of said store. The lease provided for the payment of a rental of $250 a month for the first year, with an annual increase of $25 a month each year up to and including the fifth year; and it contained a provision that the property leased should "be used and occupied only for the manufacture and sale of candy, the service of ice cream, soda fountain drinks, sandwiches and light lunch. * * *" It also contained the following provision: "While the lessee is lawfully in possession of the demised premises hereunder, the lessor agrees not to rent any other store on the Market Street frontage of the Marshall Square Building *for a candy business*." (Italics ours.) Approximately seven months later, and in September, 1929, the owner entered into a seven-year lease with the California Orange Drink Company, the tenancy to begin on October 1, 1929. The lease provided for a monthly rental of $250 for the first three years and $300 a month for the remaining four years; and it contained this provision: "The property hereby leased shall be used and occupied only for the manufacture and sale of citrous fruit drinks, which shall consist of orange, lemon, grapefruit and pineapple juices and other ingredients necessary for the manufacture thereof, but shall not be construed to cover the sale of carbonated drinks or bottled beverages, but shall only give the lessee herein the right to dispense of citrous fruit drinks as commonly sold in orangeade stands."

All of the testimony in the case shows without conflict that in and about San Francisco the sale of fruit juices is considered an essential part of the candy business; even the witness Robinson, the manager for the owner who theretofore had conducted the candy business on behalf of the owner and negotiated the sale thereof and the execution of the lease with appellant, in effect so testified; part of the store equipment the owner sold to appellant was made and used exclusively for the purpose of extracting fruit juices; and at each trial the court in substance found that the sale of fruit juices was part of the candy business. True, at the second trial the court found that it was "a small and incidental part of the business * * *"; but, if the sale of fruit juices was deemed part of the candy business, the amount of the proceeds received from such sales would seem to be immaterial, so far as we are here concerned. As stated by all of the witnesses, the sale of all commodities aside from candy, such as fruit juices, ice cream, soda fountain drinks, etc., serves as an inducement to the sale of candy. Robinson himself testified that, even though a great deal of that particular article was not sold, it was a necessary part of the business in order to satisfy the trade.

[1-4] Respondents would narrow the meaning of the restrictive clause to the "manufacture and sale of candy"; but the lease does not so read. A much broader term is used. The lease prohibited the use of any other store "for a candy business." As said in Edward Barron Estate Co. v. Waterman, 32 Cal. App. 171, 162 P. 410, 411: "The scope, purpose, and effect of the lease, of course, must be determined from a consideration of it as a whole rather than by a resort to any individual clause thereof. Civ. Code, § 1641. So construed, the lease must be given such an interpretation as will make it effective in conformity with the intention of the parties (Civ. Code, § 1643); and if its terms are in any way ambiguous or uncertain, it must be interpreted in the sense in which the lessee believed at the time of making it that the lessor understood it (Civ. Code, § 1649); and if different constructions of its clauses may be otherwise equally proper, that construction must be given which will be most favorable to the party in whose favor the clauses in controversy were made (Code Civ. Proc. § 1864)." Furthermore, section 1654 of the Civil Code provides in part: "* * * The language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist. The promisor is presumed to be such party. * * *"

[5] In the present case the lease was drawn by the owner, and obviously, if it were intended to confine the restrictive clause to the use of other stores for the "manufacture and sale of candy" only, the lease would have been so drawn. Moreover, all of the circumstances leading up to and attending the sale of the business to appellant show clearly that appellant believed that the lease would prevent any competition in that building with the business he was purchasing, and that Robinson likewise so understood it. If, as respondents contend, the term "candy business" be construed to mean only the "manufacture and sale of candy," then, besides renting one store for the sale of fruit juices, the owner could rent other stores for the sale of ice cream, or soda fountain drinks, and thus practically destroy the business sold to appellant. Manifestly such a condition was never contemplated by the parties when the business was purchased by appellant and the lease executed.

[6] Respondents make the further contention that there is no ground for the issuance of an injunction against the California Orange Drink Company because it entered into the lease without notice of the restrictive covenant in appellant's lease. Said company did not file an answer in the case, and the foregoing point was not raised in the trial court; therefore it cannot be urged for the first time on appeal.

For the reasons stated, the judgment is reversed.

PERRY v. D. J. & T. SULLIVAN, Inc., et al.*

Civ. 8444.

District Court of Appeal, First District,
Division 1, California.

Feb. 21, 1933.

Rehearing Denied March 23, 1933.

Hearing Granted by Supreme Court April 21, 1933.

1. Negligence ⚷55.

Independent contractor is liable for injuries to another such contractor's employee, rightfully on premises, because of former's negligence under circumstances reasonably foreseeable so as to avert probable injury by ordinary care.

2. Negligence ⚷55.

Independent contractor owes other contractors' employees, working on same structure, duty to exercise care in performing work probably dangerous to them.

3. Negligence ⚷55.

Independent contractor's duty to inspect and keep safe apparatus and machinery, used and supplied by him, cannot be cast on another such contractor.

4. Negligence ⚷55.

Corporation contracting with company, adding additional story to building, to raise and lower roof, *held* not liable for injuries to latter company's foreman-carpenter by fall from loosened ladder, constructed by himself through opening in elevated roof.

5. Negligence ⚷55.

General contractor's foreman-carpenter could not recover from subcontractor for injuries by fall from ladder, constructed by him, because of assurance of safety by subcontractor's foreman.

There was evidence that plaintiff, before starting up ladder, asked subcontractor's foreman whether ladder was fastened, that latter replied that everything was fixed fine and ready for plaintiff to go up, that plaintiff shook ladder, which seemed all right to him, before ascending, and that bottom thereof was nailed and top looked to be in place.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by Charles L. Perry against D. J. & T. Sullivan, Incorporated, and another. Judgment for plaintiff, and defendants appeal.

Reversed.

Daniel W. Burbank, C. F. Laumeister, William M. Abbott, K. W. Cannon, Cyril Appel, and Ivores R. Dains, all of San Francisco, for appellants.

Ford & Johnson, David A. Fall, and Fletcher A. Cutler, all of San Francisco, for respondent.

PARKER, Justice pro tem.

Action to recover on account of personal injuries sustained through the negligence of defendants. Judgment in the court below, following verdict of jury, was entered in favor of plaintiff in the sum of $22,000. The trial court denied defendants' motion for judgment notwithstanding the verdict and after entry of judgment defendants' motion for a new trial was denied.

The facts are few and little disputed. The Industrial Construction Company was engaged in reconstructing a building under contract with the owner, whereby said Industrial Construction Company was converting said building from a one-story to a two-story brick building. D. J. & T. Sullivan, Inc., which will hereinafter be referred to as the Sullivan company, was engaged in raising the roof of said building under a subcontract with the Industrial Construction Company. Throughout the case and here it is conceded that the Sullivan company was an independent contractor, with all that such a status implies. Here we may detail the nature of the work undertaken by the respective contractors. The Industrial Construction Company was to do and perform all of the work necessary to effect the reconstruction of the building save and except the raising of the roof. As noted, the project was the addition of one story to the building. The method agreed upon was to elevate the entire roof of the building and build up the old walls to a sufficient height and then lower the roof back on to the higher walls. The roof was raised to an elevation of approximately eight inches higher than the intended height, in order to permit the bricklayers and other artisans sufficient room to work. The contract of the Sullivan company was to raise the roof up to the height specified and when the walls were ready, to lower the said roof back to its final position. Accordingly, the work was undertaken. The Sullivan company had raised the roof, secured it in position, and left the job. The work on the walls and floors then proceeded under the contract of the Industrial Construction Company. The Sullivan company had nothing whatsoever to do in connection with the latter work. The plaintiff Perry was an employee of the Industrial Construction Company in the capacity of a foreman-carpenter.

After the roof had been raised there was much work to be done around the building which required access to the top of the building. It was necessary and convenient for workmen to ascend through an opening in the roof up to and upon the top of the building. There was an open skylight in the roof and

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⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 26 P.2d 485.

access to the top of the building was obtained through this skylight. A ladder had been constructed and ran from the second floor up through the skylight. The situation existing was such that this ladder was placed in a position almost perpendicular, the restricted space not permitting its placement at any wider angle. To render use of this ladder more safe, there were braces, nails and slats securing the bottom of the ladder to large timbers on the floor, and also there were large spikes securely holding the top of the ladder to the frame of the skylight in the roof. In addition to these spikes at the top, there were also wooden cleats or collars built around the end to effect greater security. The top of the ladder so fastened to the frame of the skylight was then attached to the elevated roof.

This was the condition existing on August 28, 1929, the day the work had been completed to the point where the roof was to be lowered into place. Accordingly, notice was given to the Sullivan company and a crew was sent to do the work. The roof was lowered and the job, so far as the Sullivan company was concerned, completed. Defendant John B. Smith was the foreman of the Sullivan company and directed the actual work. When the roof was lowered the weight bore down directly on the ladder, and complying with certain definite laws of force, the weakest point yielded. The result was that the nails and cleats holding the top of the ladder pulled out and broke so that when the roof came down the end of the ladder went up, free and loose, through the skylight opening. Also the lower end of the ladder was knocked askew and loosened. Smith, in the presence of plaintiff, nailed back the bottom of the ladder. As it was necessary to use the ladder after the roof was in place, it was left in position. At this point the plaintiff Perry, having occasion to ascend the ladder, came over where Smith stood, just under the skylight and beside the ladder, intent on ascending. Perry noted that the bottom had been refastened and while he was testing the ladder Smith said to him: "Everything is fixed fine, ready for you to go up." Thereupon Perry began the ascent. When near the top, the ladder, loose at the top, swung out and Perry was thrown to the floor two stories down, sustaining serious injuries. The verdict was for plaintiff. Such other facts as may become pertinent will develop as we proceed. Appellants' grounds for reversal will now be noted and determined.

The first contention is that the evidence is insufficient to sustain the verdict. The grounds of this contention are that the accident was proximately caused by plaintiff's own negligence and that no negligence is chargeable to defendants. Here we may elaborate upon the factual set-up. The record discloses, without dispute, that Sullivan company had nothing to do with the construction or erection of the ladder. The work to be performed by the Sullivan company comprised two distinct acts. It was to raise the roof to the specified height. When this work was completed the Sullivan crew left the job, leaving the raised roof resting on jacks. The Industrial Construction Company then resumed full control of the premises up to the time when the roof was to be lowered. The ladder in question was at no time used by the Sullivan company or any of its employees or agents. When the roof was left raised eight inches above the contemplated height of the wall, plaintiff and every one else remaining on the job for the Industrial Construction Company knew that this roof was but temporarily placed and would later be lowered. The ladder was constructed by the plaintiff himself and when placed was inspected by him and by him secured in place. No one connected with the case had as intimate a knowledge of the necessity, use and condition of the ladder as had plaintiff. The Sullivan company, when it returned to lower the roof, did so upon the notification of the construction company that the job was ready. In the process of lowering the roof, at no time was it necessary for Sullivan company employees to go to the top of the building, and there is not even a suggestion that any person, foreman or laborer, connected with or in the employ of the Sullivan company, knew or had reason to assume what the condition of the ladder was on the top of the roof. Plaintiff was present at all times during the lowering of the roof. He saw the men employed by the Sullivan company loosen the ladder at the bottom. Further, plaintiff knew and admitted that it was the work of his own company to prepare the roof so that it could be lowered. Plaintiff admitted, not once but consistently throughout, that he knew the lowering of the roof would necessarily affect this ladder; that in lowering the roof the ladder would necessarily be unfastened at the top or else be broken up from the weight of the roof upon it.

[1] The respondent upholds the judgment on the claim that an independent contractor is liable for injuries received by the employee of another independent contractor where the former has created a situation on the property which is inherently dangerous to said employee, who may thereafter use the property in the way it is intended to be used, even though there is no contractual relation between the person injured and the independent contractor. As a very general statement of the law much authority may be found in support thereof, though not to the extreme for which respondent argues. We think the rule finds better expression in Lisle v. Anderson, 61 Okl. 68, 159 P. 278, 280, L. R. A. 1917A, 128, wherein it is said: "'The principle finds application in that class of cases where the injured party is rightfully on the premises, and is injured by the negligence of another

under such circumstances as could reasonably have been foreseen, been contemplated, and the probable injury averted by ordinary care on the part of the person whose act caused the injury.'" In the same case, the court says on the same subject: "* * * The rule deducible from the authorities, supra, is that, whenever the circumstances attending the situation are such that an ordinarily prudent person could reasonably apprehend that, as the natural and probable consequences of his act, another person, rightfully there, will be in danger of receiving an injury, a duty to exercise ordinary care to prevent such injury arises, and if such care is not exercised by the party on whom the duty rests and injury to another person results therefrom, liability on the part of the negligent party to the person injured will generally exist, in the absence of any other controlling element or fact, and this, too, without regard to the legal relationship of the parties."

[2, 3] Aside from a repetition of these general principles we find no authorities which throw much light on the problem here presented. We find hundreds of cases, each involving different facts and varying elements, wherein the duty of independent contractors to employees of other independent contractors is outlined and defined. But the instant case differs in its essentials from any of the known cases. The general run of cases involves some negligence in the repair or maintenance of premises under the control of the independent contractor or else some act by him performed or omitted. In all of these cases the theory of decision rests upon an express or implied duty. An independent contractor owes to the employees of other contractors working on the same structure the duty of exercising care in performing his work if it is of such a nature that it probably will be a source of danger to other employees while lawfully engaged in work on the structure. Harriman v. New York, etc., R. Co., 253 N. Y. 398, 171 N. E. 686, 687. Paraphrasing from the case of Iacono v. Frank & Frank Contracting Co., 259 N. Y. 377, 182 N. E. 23, it may be said that the duty of inspecting and keeping safe apparatus and machinery used and supplied by one contractor is sought to be cast upon another independent contractor. The imposition of such a burden finds justification neither in principle nor authority.

[4] In the instant case the record discloses nothing that was left undone by the defendants and no change in the premises. The instrumentality involved, the ladder, was not an appliance constructed, placed or used by the Sullivan company in its work or otherwise. The duty of maintaining this ladder was directly upon the plaintiff himself, and this plaintiff admits that he not only knew that the lowering of the roof must disturb the ladder's position, but he actually saw the workmen of the Sullivan Company loosen the ladder at the bottom.

In the absence of knowledge, either actual or imputed, we find no rule or principle that would charge the defendant Sullivan company with any duty as to the repair or refastening of the ladder at the top. Indeed, the only direct evidence on the subject of duty contained in the record is that it was the duty of the employees of the construction company to prepare the roof so that it could be lowered. Assuming this duty to have been performed, the duty of the Sullivan company ended with the lowering of the roof, and it was not called upon to anticipate latent dangers arising from an interference with appliances in use on the building. It seems clear that if a ladder had been fastened to the roof on the outside of the building, without the knowledge or observation of defendants, and a similar accident had occurred, there would be no claim of liability as against the Sullivan company. The situation here is little different. There is nothing to indicate the danger of using the ladder even without the top fastening. Shortly after the accident the record discloses use of the same without any fastening and no injuries resulted. It is our conclusion that there was no duty resting upon the independent contractor to repair or replace the ladder, and the conclusion gains strength from a consideration of the relative position, knowledge, and conduct of the parties.

While we consider the conduct of plaintiff, we do not proceed from the standpoint of contributory negligence on his part viewed as an admission of defendants' negligence. Ordinarily it is taken for granted that contributory negligence is confined to negligence which contributes to negligence already existing. Such, however, is not the theory or thought of the present discussion. The conduct of plaintiff is considered as illustrating the conduct of defendants, and solely with reference to the creation of a condition out of which relative rights and duties might arise. These facts were known to the defendants: that plaintiff was the foreman in charge of the general contract of reconstructing the premises; that he had constructed and erected the ladder in question; and that he had observed the work of lowering the roof and knew the condition resulting. All parties, plaintiff and defendants, knew that defendants were leaving the premises and that the Sullivan company had nothing further to do. There was the ladder squarely in front of plaintiff, who knew its purpose and its disarrangement; plaintiff standing with his hand upon it, took hold of it and tested it. It appeared in proper and safe position, securely fastened at the bottom. The nature of the top fastening, if any, was not within the knowledge or observation of the defendants or either of them, or their employees or coworkers. Under these conditions no further duty devolved upon defendants, and what happened afterwards in the use of this ladder was without fault or negligence on the part of defendants.

[5] There remains, however, another phase of the case. The plaintiff, before he started up the ladder, asked Smith, defendant Sullican company's foreman in charge, if the ladder was fastened. Smith replied: "Everything is fixed fine, ready for you to go up." Then plaintiff took the ladder and shook it, and it seemed all right to him; the bottom was nailed and the top looked to be in place. Here we may note that the alleged negligence sued upon was the unfastening of the top of the ladder, and not the giving of false assurance of safety. Further, any assurance of safety or expression of opinion was without the line of duty or scope of authority of the foreman Smith in so far as any liability of Sullivan company was affected. But beyond all of these reasons the plaintiff was in no sense entitled to rely upon any statement or expression of Smith or any one else on a subject so intimately within his own knowledge and scope of observation. As far as Smith actually knew, everything was fixed fine. He had no knowledge of the fastening at the top nor of the necessity therefor. As stated by plaintiff, he did not rely upon the statement of Smith. He, plaintiff, knowing exactly the former conditions of the ladder, and still standing in a place of safety, undertook for himself to ascertain the safety of the ascent, and from such personal inspection and examination assured himself of the safety of the appliance. It was plaintiff's duty to see that the ladder was in a safe condition and he cannot shift that duty to defendants by relying upon a declaration of opinion. And on this point it may be said that the record fails to disclose that the ladder was not safe to use. The mere fact that plaintiff fell off does not conclude the inquiry. Within a short time thereafter another workman used the same ladder in the same condition and in the same way without fatality. If, after an examination by plaintiff, the ladder looked safe to him, it would hardly be negligence on the part of Smith if he made the same conclusions. Smith was not asked if the top was fastened, and plaintiff knew that it might be and probably was unfastened in lowering the roof. This was a twenty-foot ladder and the slightest motion on the part of plaintiff would have disclosed whether it was secure at the top or loose. In Hoffman v. Southern Pac. Co., 168 Cal. 627, 143 P. 1032, it was sought to charge the company with liability predicated upon the statement of an employee to the effect that plaintiff would have ample time to get out of the way of an expected train. The court said there was no evidence that the employee was required to have any knowledge concerning the movement of trains or to give warning of their approach. He knew nothing and his employment did not require him to know anything about the movement of trains. So here the work of Smith did not require him to have any knowledge of the manner in which plaintiff maintained the ladder, nor did he know. The whole purport of his claimed statement is that in his opinion the ladder was safe. If reliance is placed upon the statement of Smith that he had fixed the ladder, this statement comes after his work had been completed and was merely a narrative of a past event.

The entire case is not without difficulty. It presents a situation where it is possible to gather, here and there, small bits of principle, fragmentary and disconnected, and, by turning a phrase here and inserting a phrase there, we find a completed argument apparently sound but yet unconvincing and working to a conclusion manifestly out of harmony with any sound idea of justice. Let it not be understood that the foregoing is by way of reflection upon counsel; far from it. Rather, it is by way of commending their research and industry.

Modern social and industrial conditions have swamped the courts with negligence cases. New and unusual conditions have arisen and thousands of decisions are coming down monthly from almost a thousand different courts. One case will, in applying an ancient principle to a new situation, enlarge a little on the doctrine and spread it to cover a then present condition of fact. The next case will attempt to distinguish between doctrines and open up a new field of application. All of the cases seem well reasoned and do, perhaps, mete out the justice required, but the general result has been that diligent research will reward the student with a plausible and convincing array of authority to support almost any contention. Yet withal, we cannot conceive of a rule which in effect would decree that the last witness to an accident is liable for any damage resulting therefrom; nor can we discover any rule which absolves one with full knowledge of the situation from any diligence looking to his own protection.

The judgment is reversed.

We concur: TYLER, P. J.; KNIGHT, J.

130 Cal.App. 206

BENI v. ABRONS.

Civ. 8480.

District Court of Appeal, First District, Division 1, California.

March 2, 1933.

1. **Physicians and surgeons** ⚷15.

Where due care, diligence, judgment, and skill are exercised, mere failure to diagnose correctly does not render physician liable.

2. **Trial** ⚷145.

Instruction that only issue was whether Caesarian operation was necessary was proper where there was no evidence in support of other allegations of complaint and no charge that Caesarian operation was negligently performed.

3. **Trial** ⚷296(3).

Instruction that, if physician was careful in view of such knowledge of apparent facts as he then possessed and followed good current obstetrical practice, he was not guilty of negligence, *held* not misleading, in view of other instruction as to exercise of due care.

4. **Trial** ⚷295(1).

Trial court's failure to embody all issuable elements of a case in any single instruction is not prejudicial error, if instructions as a whole fully and fairly present the case.

5. **Physicians and surgeons** ⚷14(4).

Care and skill required of physician and surgeon is that ordinarily used and possessed by physicians and surgeons practicing in same locality.

6. **Physicians and surgeons** ⚷18(7).

Question whether, if symphyseotomy had been performed, child would have been born through the natural channel, was immaterial in action for unnecessary performance of Caesarian operation.

7. **Physicians and surgeons** ⚷18(7).

Question whether patient would have lived if surgeon had used ordinary care and skill was immaterial in malpractice case because, if surgeon had used ordinary care and skill, he would not be guilty of negligence, regardless of result.

Appeal from Superior Court, Alameda County; J. D. Murphey, Judge.

Action by Antonio Beni against Harry Abrons. From judgment for defendant, plaintiff appeals.

Affirmed.

H. W. Brunk, of Berkeley, and Alfred Nelson, of Oakland, for appellant.

Dutton & Gilkey, of Oakland (Lewis E. Lercara, of Oakland, of counsel), for respondent.

JAMISON, Justice pro tem.

This action for damages was brought by plaintiff for the death of his wife, Speme Beni, which he alleges resulted from the negligence of defendant.

Plaintiff alleges in his amended complaint that defendant is a physician and surgeon, and that as such he employed him to attend upon his wife during her pregnancy and the birth of the child; that during the period of pregnancy of his wife she was suffering from a tumorous growth in or about her uterus; that defendant failed, through his carelessness and negligence and lack of skill, to discover said tumorous growth, and permitted his wife to arrive at her time of delivery while suffering from said tumorous growth, and attempted to deliver her of said child while in that condition; that his wife was in labor for twelve hours, and, while the child was partly delivered, said physician and surgeon negligently performed a Caesarian operation upon her; that as a result of said negligence and unskillfulness his wife suffered severe physical shock which caused her death. Defendant answered, denying the allegations of the complaint. The case was tried by a jury; a verdict was returned for defendant, and from the judgment thereon plaintiff appeals.

Appellants contends that the trial court erred in giving instruction No. XXV for defendant, which is as follows: "The only issue to be submitted to you for your determination in this case is concerning the mere fact that a Caesarian operation was performed by defendant herein. No complaint is made of anything else and in fact no complaint at all is made of the technique employed or of the manner or way in which the operation was performed, nor of any prior or after care or treatment. The sole complaint is that the Caesarian operation was performed at all."

The facts in substance are as follows: On July 29, 1928, appellant's wife became pregnant, and thereupon respondent was employed by appellant to attend upon the wife during her pregnancy and childbirth. Thereafter from time to time respondent examined the patient and found her condition satisfactory. On April 26, 1929, he was notified that she was commencing to have labor pains preliminary to childbirth, and he attended her at the Berkeley General Hospital, where she had gone in anticipation of that event. Shortly thereafter, the labor pains becoming frequent, he followed the usual and customary method for delivery of the child by first endeavoring to produce the delivery by manipulation. That failing, he resorted to the use of forceps, and, after unsuccessful efforts with the forceps, he finally, about 5 a. m., on April 27, 1929, called in consultation Dr. Robert Hector, a physician and surgeon of many years' experience in obstetric cases. As a result of this consultation, it was decided that it was necessary to perform a Caesarian operation for the delivery of the child. This operation they proceeded to perform and delivered the child. Dr. Hector testified that, after the child was delivered and the afterbirth was taken out, they found a large fibroid mass; that is, a large fibroid tumor, in the posterior, in the back wall of the uterus or the womb, so that the child could not come out by way of the natural channel.

[1, 2] No evidence was offered by appellant in support of the allegations contained in the complaint that respondent, through negligence or lack of skill, failed to discover this tumorous growth prior to said operation, or that by the exercise of ordinary care he could have discovered it. Mere proof that the diagnosis was wrong would not support a verdict, and, when due care, diligence, judgment, and skill are exercised, a mere failure to diagnose correctly does not render a physician liable. Patterson v. Marcus, 203 Cal. 550, 265 P. 222. It is not claimed by appellant that the Caesarian operation was negligently or unskillfully performed, but he contends that it should not have been performed at all. Apparently he abandoned his claim that respondent was guilty of negligence in not discovering the tumorous growth prior to the operation, and relies solely upon the ground that the Caesarian operation should not have been performed at all. He produced as a witness Dr. H. R. Smith, who testified that in his opinion the tumor would not have prevented the delivery of the child in the natural way; that the Caesarian operation was unnecessary, and should not have been performed; that, if there were obstructions that prevented delivery, a symphyseotomy should have been performed.

On the other hand, respondent produced three physicians, Drs. Robert Hector, E. N. Ewer, and Ergo A. Majors, who qualified as experts in obstetrics, and who testified that a symphyseotomy in cases of childbirth was obsolete, and was no longer used by the medical profession; that it was highly dangerous and liable to leave the patient a cripple, and entailed other serious consequences; that the Caesarian operation was universally used when delivery of the child could not be made through the natural channel. They further testified that the course pursued by respondent in delivering the child was in accordance with good current obstetrical practice in use by the medical profession at that time and place, and that respondent did not fail to do anything which he should have done in compliance with that standard; that the death of said Speme Beni was not caused by anything respondent did or failed to do.

[3] Appellant also claims that the court erred in giving the following instruction: "It is not claimed that defendant should have discovered the tumor before he operated, or that he failed to learn anything else about the patient which he should have learned before operating. He operated in the light of only what he then knew and cannot be held responsible in relation to knowledge of facts acquired after that time. If he was careful in view of such knowledge of the apparent facts as he had at the time, and followed good current obstetrical practice of and at the time and place, and used his best judgment accordingly, he was not guilty of negligence." Appellant claims that this instruction does not take into account the physician's duty to exercise ordinary care in diagnosing as well as treating the case. While this instruction is not to be commended, we are of the opinion that the jury was not misled by anything therein contained.

[4, 5] In the other instructions given, the court clearly and plainly set forth the duties and obligations the physician and surgeon owed to his patient, and that if, in the treatment of appellant's wife during her pregnancy or in childbirth, respondent failed to exercise the care and skill required of him as such physician and surgeon, he was guilty of negligence. It is a well-recognized rule that the trial court is not required to embody all the issuable elements of the case in any single instruction, and its failure so to do will not be held to be prejudicial error if, from a consideration of the whole body of the instructions, it appears that the jury was fully and fairly instructed. Hall v. Steele, 193 Cal. 602, 226 P. 854. The care and skill required of a physician and surgeon is that ordinarily possessed and used by physicians and surgeons practicing in the same locality. Johnson v. Clarke, 98 Cal. App. 358, 276 P. 1052; Markart v. Zeimer, 67 Cal. App. 363, 227 P. 683. The three physicians who testified as witnesses for respondent practiced in the same locality where respondent was engaged in practice.

[6, 7] The trial court sustained objections to two questions asked by appellant's counsel, which ruling of the court is claimed to be erroneous. One was that, if a symphyseotomy had been performed, would the child have been born through the natural channel; and the other was that, assuming respondent had used the ordinary care and skill described, would the patient have lived? As to the first question, it is immaterial, for it did not tend in any manner to show negligence or want of skill upon the part of respondent. The second question is also immaterial, for, if the respondent used ordinary care and skill in performing the operation, or in determining that an operation was necessary, he would not be guilty of negligence, regardless of the result that followed. Linn v. Piersol, 37 Cal. App. 171, 173 P. 763; Nicholas v. Jacobson, 113 Cal. App. 382, 298 P. 505; Patterson v Marcus, supra; Hall v. Steele, supra. The

undisputed evidence is that appellant's wife did continue to live some sixty hours after the said operation.

The judgment is affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

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130 Cal.App. 16

BOGUE v. CENTURY INDEMNITY CO.

(two cases).

Civ. 7796, 7957.

District Court of Appeal, First District, Division 1, California.

Feb. 24, 1933.

Rehearing Denied March 25, 1933.

Hearing Denied by Supreme Court April 24, 1933.

1. Appeal and error ⚷790(3).

Where judgment determining claimants' rights against surety on bond and enjoining execution on former judgment became final, questions on appeals from restraining order and from former judgment in claimants' action against surety, involving same claims, became moot.

2. Appeal and error ⚷781(2).

Appeal from restraining order, presenting moot questions, need not be decided to prevent contempt proceedings, where order did not restrain appellant from continuing proceedings alleged to constitute contempt.

Appeals from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

Action by George Bogue against the Century Indemnity Company. From an order granting a preliminary restraining order, and from a judgment for plaintiff, defendant appeals.

Appeals dismissed.

Redman, Alexander & Bacon, George J. Zech, and Herbert Chamberlin, all of San Francisco, and Bohnett, Hill & Campbell, of San Jose, for appellant.

Alfred Aram, of San Jose, for respondent.

PER CURIAM.

Two appeals are presented in this action; one from an order of the trial court denominated "Preliminary Restraining Order," which appeal is numbered in this court Civ. 7796; and the other from a judgment afterwards entered, which is numbered in this court Civ. 7957. Believing that the questions involved in these appeals might have become moot by reason of the subsequent entry of a judgment which has become final in the superior court in and for the city and county of San Francisco, in an action in which appellant herein, Century Indemnity Company, was plaintiff, and the respondent, George Bogue, and others were defendants, which action was numbered in the records of said superior court No. 220,709, this court on its own motion made and issued an order to show cause why the appeals should not be dismissed. On the return day this court directed the county clerk of the city and county of San Francisco to transmit the judgment roll in the latter action to this court, and that judgment roll is now before us. For convenience of reference we shall hereafter refer to the action in which these appeals were taken as the Santa Clara county action and the other action as the San Francisco action.

The Santa Clara county action was commenced by respondent, George Bogue, against appellant, Century Indemnity Company, to recover upon a stockbroker's bond furnished by appellant as surety for W. H. Young & Bros., Inc., a corporation. The San Francisco action was commenced by Century Indemnity Company, appellant herein, against respondent, George Bogue, and other claimants under said bond to determine and marshal their respective claims, limit the total recovery of all such claimants to the sum of $5,000, the penal sum of the bond, and determine the portion of such sum of $5,000 to which each claimant was entitled.

An inspection of the judgment roll in the San Francisco action shows that judgment was entered therein fixing and determining the amount of the claim of each of the defendants, including the respondent, Bogue, the amount of whose claim was therein determined to be $2,087.51; determining the total liability of appellant, Century Indemnity Company, to all claimants under the bond to be $5,000, and decreeing that after the payment of costs out of this amount the several defendants were entitled to the payment of the residue of such sum of $5,000 according to certain percentages therein fixed, the percentage so fixed for Bogue being 11.698 per cent. The judgment further decrees that upon payment to the several defendants as therein ordered the plaintiff shall be released and discharged from all liability to the defendants and each of them arising upon said bond, and said bond shall thereupon be exonerated and the plaintiff released and discharged from all liability thereon; and enjoins and restrains the defendants or any one acting under or through them from asserting or claiming against plaintiff upon or under said bond any other or greater sum or amount than the proportions or percentages therein decreed, and from levying execution upon any judgment that may have been obtained for any greater proportions or percentages, and from commencing, maintaining, or prosecuting any action or actions beyond such amount upon any bond or undertaking given to stay or prevent execution on any such judgment. This judgment has become final as to respondent Bogue, appellant Century Indemnity Company, and all other parties thereto.

While the Santa Clara county action was pending, Century Indemnity Company obtained from the superior court in the San Francisco action a temporary restraining order and order to show cause why a temporary injunction should not issue directed to Bogue. By this order Bogue was restrained and enjoined from proceeding further with the prosecution of the Santa Clara county action until the order to show cause could be heard, and to show cause why a temporary injunction should not issue imposing upon him a like restraint during the pendency of the San Francisco action. This order to show cause was afterwards discharged and the temporary restraining order dismissed, apparently because a continuance of the hearing of the order to show cause was had without Bogue's consent thereto. Appellant herein was preparing to take steps to obtain a new order to show cause and restraining order in the San Francisco action when Bogue applied to the court in the Santa Clara county action for the order herein appealed from in Civ. 7796. By this order, which was made pursuant to such application, the court purported to enjoin Century Indemnity Company permanently "from doing or causing to be done any act or acts designed, intended or calculated or likely to prevent and delay or in anywise hinder the prosecution and progress" of the Santa Clara county action, and "from commencing or instituting any action or actions or judicial proceedings involving the same parties and the same subject-matter of litigation in any court other than this court intended, designed, calculated, or likely to hinder, delay or otherwise interfere with the proceedings in the above entitled cause."

Thereafter the Santa Clara county action proceeded to trial and judgment was entered in favor of respondent Bogue, and against appellant Century Indemnity Company, for $2,127.54. This sum, so the findings show, represents the principal sum of $2,087.51, with interest thereon to the date of entry of judgment. From this judgment appellant has prosecuted the appeal numbered Civ. 7957. Judgment in the Santa Clara county action was entered October 6, 1930, and judgment in the San Francisco action was entered in December of the same year.

[1] It was appellant's contention throughout the litigation in both the Santa Clara county action and the San Francisco action that the total limit of its liability to all claimants was the penal sum of the bond, $5,000, and that since the aggregate claims of the several claimants far exceeded this amount, it was entitled to have recourse to a court of equity to limit its total liability to $5,000 and to apportion that sum among the several claimants. It was respondent's contention, on the other hand, that each claimant was entitled to recover up to the penal sum of $5,000 even though the aggregate of such recoveries might far exceed that sum. We do not feel called upon to decide between these contentions or to construe the bond and the statute under which it was given. By the judgment in the San Francisco action, which has become final as to both parties, it has been adjudicated so far as the claim of respondent Bogue is concerned that the construction of the bond and the statute under which it was given contended for by appellant herein is the proper construction. The San Francisco court, sitting as a court of equity, has determined that Bogue's claim against appellant amounts to the sum of $2,087.51, but that the limit of Bogue's recovery shall be 11.698 per cent. of the penal sum of the bond, after first deducting from such sum the costs of the San Francisco action. It has further enjoined Bogue or any person acting through or under him from levying execution on the judgment theretofore obtained by him in the Santa Clara county action in excess of that amount and from taking any proceedings to recover anything beyond that amount upon any bond given by appellant to stay execution on the judgment entered in the Santa Clara county action. Both parties to this appeal have permitted the judgment in the San Francisco action to become final. It has thereby become a final adjudication between them of the rights of respondent Bogue and the obligations of appellant Century Indemnity Company, and the extent of both, arising out of the claim involved in the Santa Clara county action. If the judgment herein appealed from should be reversed, Bogue would still be entitled to enforce against appellant the judgment in the San Francisco action. If the judgment herein appealed from should be affirmed, Bogue would still be restrained by the judgment in the San Francisco action from enforcing his judgment beyond the point fixed by the judgment in the San Francisco action. It thus appears to us that by permitting the judgment in the San Francisco action to become final the parties to this appeal have rendered the questions involved in the appeal from the judgment in the Santa Clara county action moot.

In so far as the appeal from the injunctive order is concerned, it seems equally clear that the questions therein involved have likewise become moot. The judgment in the San Francisco action, as heretofore pointed out, has finally determined the respective rights of the parties in the controversy, and neither the affirmance nor the reversal of the injunctive order can affect that determination.

[2] It was suggested that that appeal should be decided by this court because respondent Bogue was threatening contempt proceedings

against appellant based upon its further prosecution of the San Francisco action after the injunctive order appealed from was made. We are satisfied that nothing in the order appealed from may be construed as enjoining appellant from so doing. Indeed, respondent, Bogue, admits as much in his brief on this appeal, wherein he says: "We are in doubt whether this appeal does not present a moot question. The restraining order appealed from did not restrain appellants from continuing with any proceedings they had commenced. * * * The action commenced in San Francisco by appellant * * * was not in any way hindered by the restraining order."

For the reasons hereinabove given, both appeals are dismissed.

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129 Cal.App. 670

OLSON v. MEACHAM.

Civ. 4707.

District Court of Appeal, Third District, California.

Feb. 17, 1933.

Rehearing Denied Mar. 18, 1933.

Hearing Denied by Supreme Court April 18, 1933.

1. Evidence 🔑359(2).

Photographs of wounds on deceased's body *held* admissible to support theory that death was caused by coming in contact with projecting objects found broken on defendant's automobile.

> Question whether it was defendant's automobile that struck deceased being in issue, plaintiff endeavored to show, in addition to other evidence, that wound on leg of deceased was in position to lead to conclusion that it was caused by contact with bumper of defendant's car, that wound on hip was of height indicating it was inflicted by coming in contact with handle of left door, which handle was shown to have been broken, and that wound on ear was caused by coming in contact with rear outlook mirror bracket which had been broken off. Height on body of car of these particular objects was shown to be of the height of wounds on body of deceased by testimony which was introduced.

2. Evidence 🔑359(1).

Photograph shown to be faithful representation of what it purports to reproduce is admissible as appropriate aid in applying evidence.

3. Appeal and error 🔑970(2).

It is for trial court to determine whether photograph is correct representation of object, and its ruling will be sustained, unless there is abuse of discretion.

4. Death 🔑99(4).

$7,500 to wife for death of husband whose annual income had been $3,500 *held* not excessive.

5. Evidence 🔑207(4).

Defendant's plea of guilty to criminal complaint charging negligent driving of automobile, though not conclusive, *held* admissible as admission in support of allegation of negligent driving in subsequent action for death of pedestrian.

6. Death 🔑60.

Permitting attorney for plaintiff in death action to read in evidence count in criminal complaint charging manslaughter, to which defendant entered plea of not guilty, and which was dismissed, *held* error.

7. Appeal and error 🔑1050(1).

Error in permitting plaintiff's attorney in death action to read in evidence count of criminal complaint charging manslaughter *held* not to require reversal, where evidence showed beyond reasonable doubt that defendant's negligent driving of automobile caused death.

8. Death 🔑67.

In death action, admitting in evidence deceased's bank book showing receipts and expenditures for seven years, to show his earning capacity on issue of damages, *held* not error.

9. Death 🔑86(1).

In death action, deceased's earning capacity may properly be considered in determining amount of verdict.

10. Automobiles 🔑153.

Driving automobile on wrong side of road when there was no necessity therefor constituted negligence.

11. Automobiles 🔑246(4).

Instruction that, if motorist was driving on wrong side of road "without legal cause," jury could consider such act in determining whether motorist was negligent, *held* not prejudicial to motorist because of quoted words (St. 1923, p. 557, § 122, as amended by St. 1929, p. 540, § 50).

> Facts disclosed that highway on which defendant motorist was driving consisted of an oiled portion 16 feet wide with graveled shoulders 3 feet 3 inches wide on each side, and that deceased pedestrian was struck down while walking on graveled shoulder on left side of road, and record did not show any obstruction on right-hand side of highway where defendant's car should have been. Under circumstances, use of words "legal cause" was not prejudicial, since jurors must have un-

derstood as matter of common knowledge that such words merely meant that law requires driver to keep on right-hand side, except where there are obstructions rendering it impracticable so to drive.

2. Automobiles ⚿218.

Pedestrian walking on graveled shoulder on left side of highway *held* under no legal duty to look back to see whether he was in danger of being run down by automobile approaching from rear (St. 1923, p. 517, § 150½, as added by St. 1929, p. 546, § 66).

Appeal from Superior Court, Stanislaus County; L. W. Fulkerth, Judge.

Action by Johanna K. Olson against Charles R. Meacham. Judgment for plaintiff, and defendant appeals.

Affirmed.

Charles W. Haswell, of San Francisco, and Thomas C. Boone, of Modesto, for appellant.

R. R. Fowler, of Modesto, and Joseph A. Brown, of San Francisco, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

In this action the plaintiff had judgment against the defendant in the sum of $7,500 as damages for the death of the plaintiff's husband, Nels Olson, caused by an automobile driven by the defendant. From this judgment the defendant appeals.

The complaint in this action alleges that on or about the 17th day of May, 1931, while Nels Olson, the husband of the plaintiff, was walking westerly on the southerly side of a certain road or street known as Los Palmas avenue in the town of Patterson, Stanislaus county, he was struck down and instantly killed by a certain Ford truck then and there owned and being driven by the defendant, carelessly, recklessly, and negligently. The plaintiff then asked for damages, and was awarded, by a jury, the sum above named.

No question is made upon this appeal that the evidence is not sufficient to support the verdict. No testimony is printed in the brief of appellant, nor as an appendix thereto, nor is any reference made to the transcript relative to the testimony, other than that relating to the introduction of certain photographs. Errors in the admission of testimony and in the instructions given by the court to the jury are relied upon only as grounds of reversal.

[1] The first assignment of error relates to the admission of certain photographs. In support of this contention the appellant sets forth the evidence of a certain physician that there would be changes in the color of the wounds after death; in other words, while there would be no change as to the location of the wounds, they would become somewhat darker, and around the wounds the flesh would become more or less discolored.

As opposed to this testimony, the respondent calls attention to the testimony of the same doctor to the effect that the location of the wounds were the same as those shown in the photographs; that the matter of discoloration would not in anywise affect the photographs as showing the location thereof.

The record shows that, while the defendant had twice admitted that his Ford truck struck down the deceased, the answer in this case entered a denial thereof.

The purpose of the introduction of the photographs was to prove that the Ford car driven by the appellant was the one that caused the death of Nels Olson, and this purpose is well stated in the respondent's brief as follows: "The question of whether or not it was the defendant's car that struck the deceased being in issue, plaintiff endeavored to meet this by showing, in addition to other evidence, that the wound on the leg of the deceased was in a position to lead to the conclusion it was caused by contact with the bumper of the defendant's car; that the wound on the hip was of a height that indicated it was inflicted by coming in contact with the handle of the left door, which handle it was shown had been broken; and that the wound on the ear was caused by coming in contact with the rear outlook mirror bracket which had been broken off." The height on the body of the car of these particular objects was shown to be of the height of the wounds on the body of the deceased, by the testimony which was introduced in evidence, and then photographs of each particular wound were introduced in support of the theory of the plaintiff that Nels Olson's death had been caused by his body coming in contact with the projecting objects found to be broken on the defendant's car. That the photographs were clearly admissible we think is shown by the case of Hayes v. Emerson, 110 Cal. App. 470, 294 P. 765, where this court held that photographs of skid marks made by automobile tires were admissible, even though the skid marks had been covered over by paint in order to enable the photographs to be taken.

[2, 3] In 10 California Jurisprudence, p. 896, par. 169, the rule is stated as follows: "Where a photograph is shown to be a faithful representation of what it purports to reproduce, it is admissible as an appropriate aid in applying the evidence, and this is equally true whether the photograph be of persons, things or places. * * * It is for the trial court to determine whether a photograph offered is a correct representation of the object or scene in question, and its ruling will

be sustained on appeal unless it is apparent that there has been an abuse of discretion."

[4] Even in the case of O'Meara v. Haiden, 204 Cal. 354, 268 P. 334, 60 A. L. R. 1381, relied upon by the respondent, the admission of the photographs was not held prejudicial error. It appears that in that case the court was of the opinion that the admission of a photograph could only have had for its purpose the augmenting of the damages sought to be recovered, but, as the damages allowed were only for the sum of $10,250, for the death of the plaintiff's son, it was held that, as the damages were not excessive, no injury had resulted. In the instant case, as we have stated, the damages allowed were the sum of $7,500, which certainly is not excessive for the loss of the husband, where the record shows that his annual income was the sum of $3,500.

[5] The second assignment of error is based upon the admission of a certain criminal complaint and the plea of the defendant thereto. The record shows that the defendant was arrested upon a criminal complaint containing two counts, one charging manslaughter and the other charging an assault. The count charging manslaughter was dismissed by the district attorney, and, to the count charging assault, the defendant entered a plea of guilty. The count to which the defendant entered a plea of guilty is as follows: "That the said C. R. Meacham, on or about the 17th day of May, 1931, at and in the said County of Stanislaus, State of California, did then and there with a certain deadly weapon or instrument, to-wit, an automobile, which he was then and there wilfully and knowingly driving and operating, without due caution or circumspection and in such a manner as to endanger the life, limb and property of other persons, and in a careless and imprudent manner, and without proper regard to the traffic, surface and width of the said highway, and during the night time, and by means and force likely to produce great bodily injury, wilfully, wrongfully, unlawfully, negligently and feloniously make an assault in and upon the person of Nels Olson, by then and there wilfully, wrongfully, negligently, unlawfully and feloniously riding, driving and operating said automobile into, against and upon the person of said Nels Olson, a human being," etc.

The record shows that, at the time of the striking down of the said Nels Olson by the Ford car, Olson was walking along the left-hand side in a westerly direction on the avenue referred to, and that the defendant's car, by some means or other, was over on the left-hand side of said highway, and, as charged in the complaint and by the jury, was being negligently driven on the left-hand side of the highway at the time in question. In support of this assignment of error, the appellant cites a number of cases to the effect that a verdict of the jury convicting the defendant of an assault is not admissible in evidence. There is no reason to question the correctness of the decision in any of the cases referred to by the appellant, but none of the cases cited by the appellant is applicable to the circumstances here presented.

The defendant in the second count of the complaint which we have just set forth was charged with negligent driving of the Ford car. In the complaint for damages, he was again charged with negligent driving. The defendant to the criminal complaint charging negligent driving entered a plea of guilty. It is true that the complaint charged more than negligent driving. Nevertheless, it charged negligence. To this charge the defendant entered a plea of guilty. While such plea is not held by the courts to be conclusive, it is an admission on the part of the defendant, and as such is admissible in support of the allegation of negligent driving. A verdict of a jury in such cases would only be hearsay testimony, but a plea of guilty entered by the defendant is a personal admission, and as such is held admissible by all the states where the question has arisen.

In 31 A. L. R. p. 278, is a list of decisions from twenty-four different states supporting the following statement: "An exception to the rule that a judgment in a criminal prosecution cannot be received in a civil action, to establish the truth of the facts on which it was rendered, has been held to arise where the defendant in the criminal case pleaded guilty, and the record showing such plea is offered in evidence in a civil action against him growing out of the same offense, such a record being admitted not as a judgment establishing the fact, but as the deliberate declaration or admission against interest that the fact is so, or, in other words, a solemn confession of the very matter charged in the civil action."

[6, 7] The only difference in the conclusions reached by the different states is that in some of them such an admission is held to be conclusive. The court was in error, however, in permitting the attorney for the plaintiff to read the first count in the criminal complaint to which the defendant had entered a plea of not guilty, and which was subsequently dismissed, but, in view of the fact that no question is raised as to the sufficiency of the evidence to support the verdict, and in view of the fact that a reading of the testimony shows beyond any reasonable question that Nels Olson came to his death by reason of the negligent driving of the Ford automobile by the defendant, it must be held that the admission of such testimony wholly fails to warrant a reversal of the judgment.

[8] Over the objection of the appellant, the plaintiff was allowed to introduce in evidence bank books of the deceased, showing his re-

ceipts and expenditures for a period of seven years, and, in support of appellant's contention that the admission of such testimony is erroneous, cases are cited referring to prospective profits. We do not need to review the cases cited by the appellant because they are wholly inapplicable.

[9] In addition to allowing damages for loss of society, protection, etc., the following cases show that testimony as to the earning capacity of the deceased may properly be taken into consideration in determining the amount of the verdict: Evarts v. Santa Barbara R. Co., 3 Cal. App. 712, 86 P. 830; Bonneau v. North Shore R. Co., 152 Cal. at page 413, 93 P. 106, 125 Am. St. Rep. 68; Peters v. S. P. Co., 160 Cal. at page 70, 116 P. 400; Diller v. Northern Cal. Power Co., 162 Cal. at page 536, 123 P. 359, Ann. Cas. 1913D, 908. Other cases might be cited, but these are sufficient.

[10] At the request of the plaintiff, the court instructed the jury as follows: "It is negligence as a matter of law to violate a provision of the law, and therefore, if you believe from the evidence that the defendant Meacham violated the law by driving on the southerly or left-hand side of the road in a westerly direction, in the absence of any necessity therefor, then in such case it is your duty to find that the defendant Meacham is guilty of negligence." Here, again, the appellant supports its contention of error by the citation of cases which are inapplicable.

A reference to the case of Lawrence v. S. P. Co., 189 Cal. 434, 208 P. 966, one of the cases upon which the appellant relies, shows that the instruction given by the court in the instant case is readily distinguishable from the instruction condemned in the cases relied upon by the appellant. In the Lawrence Case, in addition to stating what was negligence, the court instructed the jury that the defendant was liable for all damages sustained by the plaintiff, etc. There is nothing of that kind in the instruction which we have just quoted. There is nothing in that instruction which fixes the liability upon the defendant. It simply states that a violation of law constitutes, under certain circumstances, negligence. In this case, driving on the wrong side of the road when there was no necessity therefor constituted negligence. Nor is there anything in the instruction given in the instant case comparable to the instruction given in the case of Starr v. Los Angeles R. Corp., 187 Cal. 270, 201 P. 599.

[11] At the request of the plaintiff, the court gave to the jury the following instruction, which is assigned as prejudicially erroneous, to wit: "You are instructed that it is the law of this State that a person operating a motor vehicle upon a public highway is required to remain on the right-hand side of the roadway in the direction being traveled; therefore, I instruct you that if you believe the vehicle in question, at the time and place in question, was being operated by the defendant, Charles R. Meacham, in a westerly direction, it was his duty to keep to the right hand, or northerly side of the road; that if you believe he drove to the southerly side of the road westerly bound, without legal cause, such act may be considered by you in determining whether or not said Meacham was negligent; that if you find he was negligent, and such negligence was the proximate cause of the death of deceased, Nels Olson (without contributory negligence on his part), then plaintiffs are entitled to a verdict for such sum as under the evidence you may find them entitled to receive." The alleged error consists in the use of the words "without legal cause."

Section 122 of the California Vehicle Act (as amended by St. 1929, p. 540, § 50), at the time of the occurrences herein considered, read as follows: "Upon all highways of sufficient width except upon one way streets, the driver of a vehicle shall drive the same upon the right half of the highway and close to the right hand edge or curb of such highway, unless it is impracticable to travel on such side of the highway, and except when overtaking and passing other vehicles," etc.

The highway upon which the defendant was driving, and where Nels Olson met his death, consisted of an oiled portion 16 feet wide with gravel shoulders 3 feet 3 inches on each side, giving a driving width of 22½ feet. The record shows that the deceased was struck down while walking along the graveled portion on the southerly side of Los Palmas avenue at the time of his death, drawing a small hand wagon. The deceased was not upon the oiled portion, which gave the defendant, if driving carefully, sufficient room to pass by the deceased without injuring him. The record does not show any obstruction on the right-hand side of the highway, where the defendant's car should have been. Under these circumstances we do not very well see how the use of the words "legal cause" can be held to be prejudicial, as the jury understood, and as we must hold it to be common knowledge, all jurors understand from the common use of automobiles, that the words "legal cause" simply meant what the law requires of a driver of an automobile, to keep on the right-hand side except when there are obstructions which render it impracticable so to drive. There is nothing in the record indicating that it was impracticable for the automobile which the defendant was driving to have traveled upon the right-hand side of the highway. The body of the deceased was found lying a few feet south of the south shoulder of the improved highway, showing that the automobile which ran him down was not only on the wrong side of the highway, but was traveling partly on the south shoulder.

While no contention is made concerning the sufficiency of the testimony to support the verdict, we may add that the record shows that the breath of the defendant immediately after the accident was impregnated with the odor of alcohol. The defendant himself admitted that earlier in the day he had had two drinks of whisky. The record also shows that on the morning after the accident the defendant's automobile was taken by his wife and son to the city of Stockton, and repairs there made to the damaged portions which we have mentioned. The jury, of course, in common with all others, was well aware that the city of Modesto is geographically much closer to the town of Patterson than the city of Stockton.

[12] The appellant also complains of the following instruction given to the jury at the request of the plaintiff, to wit: "You are instructed that a pedestrian is not necessarily under legal duty to look back or watch behind to see whether he or she is in danger of being struck or run down by any vehicle approaching him or her from the rear."

Section 150½ of the California Vehicle Act (as added by St. 1929, p. 546, § 66) requires pedestrians on the highway to walk along the left-hand side and near the outer edge. The deceased was not only where he had a legal right to be, but where the provisions of the California Vehicle Act required that he should be.

In Devecchio v. Ricketts, 66 Cal. App. 334, 226 P. 11, this court had under consideration the rights of pedestrians before the adoption of the section of the California Vehicle Act which we have quoted. We there said: "A pedestrian walking along a public highway is not guilty of contributory negligence, as a matter of law, because of failure to look behind him and discover an approaching car which may heedlessly run him down."

In Rinker v. Carl, 102 Cal. App. 436, 283 P. 317, 319, a case involving the crossing of a highway by a pedestrian, where he was run down by an automobile being driven on the wrong side thereof, this court said: "Under these circumstances it is now well established that it is not contributory negligence as a matter of law for one crossing a paved highway from the south to the north not to look to the left or to the west after reaching the medial line; that the rules of the road require east-bound traffic to travel on the southerly half and west-bound traffic on the northerly half, and it is the duty of the pedestrian, when he reaches the southerly line walking northerly, to look to the right and safeguard himself against stepping in front of west-bound automobile."

In Towne v. Godeau, 70 Cal. App. 148, 232 P. 1010, where a similar question was involved, the court held: That a plaintiff had a right to assume that no automobile driver would run him down from the left, or what, under the circumstances of that case, would be driving an automobile on the wrong side of the street.

To the same effect is the case of Hatzakorzian v. Rucker-Fuller Desk Co., 197 Cal. 82, 239 P. 709, 713, 41 A. L. R. 1027. It was there held that a pedestrian had a right to travel anywhere upon the highway, the law requiring a pedestrian to travel on the left-hand side having been incorporated into the California Vehicle Act at a later date. The opinion of the Supreme Court, however, used the following language as supported by the cases which we have cited, to wit: "Nor is a pedestrian under legal duty to look back or watch behind to see whether he or she is in danger of being struck or run down by any vehicle approaching him or her from the rear." This is conceived to be the law when a pedestrian is walking on that portion of the highway designated for him by section 150½ of the California Vehicle Act.

In addition to what we have said, the jury was very fully instructed as to the doctrine of contributory negligence. In fact, the jury was far more fully instructed on the subject of contributory negligence than the circumstances required. Seventy-two instructions were given by the court to the jury, of which twenty referred to the doctrine of contributory negligence. The only criticism called for in view of the number of instructions given on the subject of contributory negligence is that, with the addition of a few lines to one of them, nineteen others could have been omitted without any prejudice to the defendant.

With no contention made that the evidence is insufficient to support the verdict, nor that the judgment is excessive, section 4½ of article 6 of the Constitution would prevent a reversal, even though all of the appellant's contentions were admitted to be good. None of them, however, is tenable.

The judgment is affirmed.

We concur: PULLEN, P. J.; R. L. THOMPSON, J.

130 Cal.App. 172

McFATE v. ZUCKERMAN et al.

Civ. 1001.

District Court of Appeal, Fourth District, California.

Feb. 28, 1933.

Rehearing Denied March 30, 1933.

Hearing Denied by Supreme Court April 28, 1933.

1. Fraud ⚿58(1).

Evidence *held* to support verdict awarding $25,000 damages for fraudulent representations inducing exchange of ranch for apartment house.

> There was evidence that apartment house property would have been worth between $176,000 and $180,000, had representations that there was $100,000 mortgage thereon been true, that it was actually worth between $132,000 and $136,000 at time of negotiations for exchange, but that plaintiff's equity therein was increased to extent of $25,000 because mortgage did secure loan of $75,000.

2. Appeal and error ⚿699(4).

Trial court's failure to give instruction cannot be reviewed on appeal, unless record specifies instruction and shows that it was requested and refused.

3. Appeal and error ⚿216(1).

Failure to give instruction, not requested by plaintiff, on measure of damages, *held* not error, where award was not inadequate and was supported by evidence.

Appeal from Superior Court, Los Angeles County; Harry R. Archbald, Judge.

Action by Joseph N. McFate, Jr., against H. Lew Zuckerman and others. From a judgment for plaintiff in an unsatisfactory amount, he appeals.

Affirmed.

W. I. Gilbert and Troy Pace, both of Los Angeles (by Troy Pace, of Los Angeles), for appellant.

S. W. Newman and P. B. D'Orr, both of Los Angeles, for respondent H. Lew Zuckerman.

Thos. A. Reynolds, of Los Angeles, for respondent S. E. Gordon.

Freston & Files, of Los Angeles, for defendant Bank of America.

JENNINGS, Justice.

This is an appeal by the plaintiff from a judgment in his favor in the amount of $25,000. The sole ground of the appeal is inadequacy of damages.

Plaintiff instituted this action to recover from defendants the sum of $148,880.55 damages alleged to have been suffered by him as the result of certain false and fraudulent representations made to him by defendants Zuckerman and Gordon whereby he was induced to exchange ranch property at Paso Robles, Cal., for an apartment house in the city of Los Angeles owned by defendant Zuckerman. The false representations upon which it is alleged that plaintiff relied and which induced him to make the exchange related to the value of the apartment house and to the income derived therefrom through rentals of apartments. In addition to damages, plaintiff also sought equitable relief through the cancellation of a certain note and mortgage executed by defendant Zuckerman and his wife in favor of defendant Merchants' National Trust & Savings Bank and a second note and deed of trust executed by plaintiff and his wife in favor of defendant Zuckerman. The issue of damages was tried before a jury, which returned a verdict in plaintiff's favor in the amount of $25,000. Thereafter the court made findings of fact and therefrom drew its conclusions of law and rendered judgment permitting recovery of the amount specified by the verdict which was ordered to be applied upon the note executed by plaintiff in favor of defendant Zuckerman and denying to plaintiff the equitable relief of cancellation demanded by him in his complaint.

The record herein which is presented by means of a bill of exceptions shows that in the month of November, 1926, Joseph N. McFate, Sr., plaintiff's father, read an advertisement in the Los Angeles Times and that he thereupon entered into the negotiations which finally resulted in the exchange of properties. It was stipulated during the trial of the action that during these negotiations plaintiff's father acted as agent for plaintiff. The advertisement was in the following language: "Business Property. Will trade an apt. house down town between 8th and 9th for a clear ranch or lot. Income over $22,000 a year. Mtg. $125,000 7%. Lot worth $180,000. Ask Gordon. Ritz Hotel." J. N. McFate, Sr., thereupon addressed a letter to Gordon, Ritz Hotel, giving a brief description of the ranch property and calling attention to the advertisement regarding the apartment house, a copy of which was attached to the letter. An interchange of correspondence between J. N. McFate, Sr., and Gordon then ensued, and on December 8, 1926, Gordon addressed to J. N. McFate, Sr., a letter, the pertinent part of which was in the following language: "The apt. house is not leased. We have a manager and we pay him 75 a month. The tax is 2000 a year. The furniture is clear, most of the furniture is new, we changed the entire inside. The lot 45 x 158 to 25 foot alley. We claim the lot is worth 4500 (per) foot. The building is 20 yrs. old, frame, and the front is brick 3 storys. It has 77 rooms and 38 renters. The income varies from 1700 to 1850 a month. The first mortgage is Hellman Bank for 100000 at 7% and the second is at 7% 25000 (thousand) for 5 years payable 250 a month. The first is always for one year as the Hellman Bank cant make a loan for longer than one year—but we renew it every year. We are renewing there now for the same amount." On December 28, 1926, J. N. McFate, Sr., went to Los Angeles and met defendant S. E. Gordon, agent for Zuckerman, who showed him the apartment house, and represented to him that the property was mortgaged for $100,000; that it had been so mortgaged for several years; that the bank which had made the loan had carried it during this period as a permanent investment, but because of legal regulations pertaining to banks the loan had to be renewed from year to year; and that it had been so renewed during the month of December. Thereupon J. N. McFate, Sr., made an offer in writing to exchange the ranch property for the apartment house subject to a first mortgage of $100,000 in favor of the Hellman Bank of Los Angeles and subject also to a deed of trust for $25,000 to be executed by plaintiff in favor of defendant Zuckerman. Defendant Zuckerman made a visit to plaintiff's ranch at Paso Robles on December 29, 1926, at which time he expressed himself as being well pleased with the ranch, but stated that a property having sufficient value to carry a bank loan of $100,000 was good property, and that the ranch property would not carry such a loan. During the early part of February, 1927, S. E. Gordon went to Paso Robles and brought J. N. McFate, Sr., to Los Angeles. At this time Gordon informed McFate that Zuckerman would not consider making the exchange on the basis of McFate executing a deed of trust of the apartment house in the amount of $25,000, but that he would exchange if McFate would execute a deed of trust of the apartment house to secure payment of the sum of $35,000. J. N. McFate, Sr., assented to this, and signed a second written offer of exchange in which he agreed to execute a deed of trust of the apartment house to secure the sum of $35,000 payable in 5 years at the rate of $100 per month, plus interest at the rate of 7 per cent. This offer was accepted, and the parties entered into escrow at the Merchants' National Trust & Savings Bank in Los Angeles for the purpose of concluding the exchange.

J. N. McFate, Sr., testified that, while the properties were in escrow pending completion of the exchange agreement, he made no effort to discover from the public records whether there was a first mortgage of $100,000 against the apartment house, but that he did go to a Mr. Savier in the Bank of Italy for the purpose of having an appraisal made of the apartment house, and that Mr. Savier told him that, if the Hellman Bank was carrying a loan of $100,000 on the property, it was worth $250,000, and that he could save an appraisal charge of $150 by accepting the figure of $250,000 as a basis of valuation.

The evidence produced during the trial showed that there was not an existing loan of $100,000 secured by a first mortgage of the apartment house. It also showed that during the latter part of the month of January, 1927, defendant H. L. Zuckerman went to the Merchants' National Trust & Savings Bank and applied for a loan of $100,000 on the apartment house; that the bank had the property appraised; that the appraisal showed that the apartment house had a value of $132,000 at that time; that the bank informed Zuckerman it could not make a loan of $100,000, but that, in view of his being a customer of long standing, it would make a loan of $75,000 on the security of the apartment house; that Zuckerman stated that there was then pending an agreement for the exchange of the property which contemplated the existence of a mortgage against it to secure a loan of $100,000 and the execution of a trust deed to secure payment of an additional sum of $35,000; that the officer of the bank with whom Zuckerman was negotiating then advised him that it would be agreeable to the bank for Zuckerman to execute a mortgage purporting to secure a loan of $100,000; and that the bank would advance the sum of $75,000 upon such mortgage.

From the above narrated facts it clearly appears that there was a misrepresentation by defendant Zuckerman and his agent, Gordon, first, of the fact that there was, at the time the negotiations were begun, an existing, outstanding mortgage against the apartment house securing a loan previously made of $100,000; and, second, of the fact that there was ever a mortgage securing such a loan. A mortgage which purported to secure a loan of this amount was indeed executed by Zuckerman, but, in reality, the loan which was secured thereby was a loan of $75,000.

[1] Plaintiff concedes that the correct rule for the measurement of damages in a case of this character permits an award to the person defrauded of an amount which consists of the difference between the actual value of the property and the value which it would have had if the false representation as to its value had been true. Hines v. Brode, 168 Cal. 507, 143 P. 729. It is urged that the representation that there was a mortgage against the property of $100,000 amounted to a representation that the property had a value of $250,000. This is said to be established by the undisputed testimony of the witness, J. N. McFate, Sr., that Mr. Savier, manager of the real estate department of the Bank of Italy, informed him that, if the Hellman Bank was carrying a loan of $100,000 on the property, it had a value of $250,000. There was, however, no showing of any connection between the Bank of Italy or the manager

of its real estate department and the defendants Zuckerman and Gordon. The statement of Savier may not, therefore, be considered as a representation by defendants that the value of the apartment house was $250,000. At best the statement amounted to a mere opinion of the individual who made it, based on the information that a certain bank had loaned a specified amount on the security of the apartment house. Plaintiff appears to assume that this testimony established the existence of a fixed, constant relationship between market value of property and bank loans, and that the latter invariably equals 40 per cent. of the former. The existence of so constant and definite a relationship is contradicted by the testimony of plaintiff's witness, C. R. Bell, that the Merchants' National Trust & Savings Bank appraised the apartment house as having a value of $132,000, and proceeded to make a loan upon it of $75,000, or approximately 57 per cent. of its appraised value.

This latter evidence was likewise evidence which the jury was entitled to consider in arriving at a determination of what value the apartment house would have had if the representation respecting the existence of a valid loan of $100,000 had been true. In this event, using the same percentage as a factor in the calculation, it appears that, to warrant a loan of $100,000, the value of the apartment house would have had to amount to approximately $176,000.

Furthermore, there is some evidence in the record which points rather strongly to a valuation of approximately the last-mentioned figure for the apartment house if the representation of an existing mortgage of $100,000 had been true. The advertisement in the Los Angeles Times contained the statement "Lot worth $180,000." In the letter of December 8, 1926, addressed by defendant Gordon to J. N. McFate, Sr., the following statement is made: "We claim the lot is worth 4500 (per) foot." In this letter the information was also conveyed that the building was a 3-story frame building with a brick front, and that it was then 20 years old. Although no representation was made, either in the advertisement or in the letter, as to the value of the apartment house itself apart from the lot, the jury may well have concluded that a 20-year-old frame building would have little, if any, value, and that the bald statement in the advertisement that the lot was worth $180,000 amounted to an outright representation of the value of the property on which plaintiff's agent was authorized to rely. So far as appears, no representation was made as to the value of the furniture contained in the apartment house, and no evidence was produced tending to show its value.

It appears, therefore, that there was evidence presented during the trial of the action from which the jury could have arrived at the conclusion that the apartment house property would have had a value of between $176,000 and $180,000 if the representation that there was an existing mortgage of $100,000 upon it had been true; there was also evidence that the actual value of the property at the time the negotiations for the exchange were being carried on was between $132,000 and $136,000. In accordance with the hereinabove stated rule for the measurement of damages in cases of this character, plaintiff would therefore be entitled to an award of approximately $50,000. However, the jury was also entitled to take into consideration, as they undoubtedly did, that plaintiff was benefited to the extent of $25,000 by reason of the fact that the mortgage executed by defendant Zuckerman, while it purported to secure a loan of $100,000, in reality secured a loan of $75,000. Since plaintiff's equity in the property was thereby increased to the extent of $25,000, the jury was warranted in reducing by this figure the amount representing the difference between the real value of the property and the value it would have had if the false representation had been true. We conclude, therefore, that the jury's award of $25,000 is not unsupported by the evidence.

[2, 3] Plaintiff further contends that the jury should have been instructed that from whatever award it might give because of the fraud it should deduct the unpaid part of the purchase price represented by plaintiff's note for $35,000 secured by the deed of trust. It is conceded that no instruction to this effect was requested, and that the failure of the court so to instruct the jury is not specified as an error of the court on this appeal. The rule is well established that the failure of a trial court to give an instruction may not be reviewed on appeal, unless the record specifies the instruction and shows that it was requested and refused. Hand v. Scodeletti, 128 Cal. 674, 61 P. 373; Estate of Higgins, 156 Cal. 257, 104 P. 6; Gilbert v. Peck, 162 Cal. 54, 121 P. 315, Ann. Cas. 1913C, 1349. Plaintiff, nevertheless contends that an inherent duty rested upon the trial court to instruct the jury as suggested, and that the failure of the court to perform this duty was the direct cause of the return by the jury of a verdict for an inadequate amount. Since we entertain the opinion, as hereinabove stated, that the award was not inadequate, and that it is supported by the evidence, it necessarily follows that we are of the opinion that no error was committed by the court in failing to give an instruction admittedly not requested.

Pending the appeal herein by plaintiff, the defendant Bank of America of California moved to dismiss the appeal or to affirm the judgment. Since this opinion disposes of the appeal on its merits, it is unnecessary to consider the motion. Barbour v. Flick, 126 Cal. 628, 635, 59 P. 122.

For the reasons stated herein, the judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

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130 Cal.App. 106

MENNE v. P. J. FRIERMUTH CO. et al.

Civ. 4424.

District Court of Appeal, Third District, California.

Feb. 27, 1933.

1. **Appeal and error** ⟹977(3).

Trial court's action in granting new trial will not be disturbed on appeal, except for manifest abuse of discretion.

2. **New trial** ⟹6.

Discretion to grant new trial is not right to exert mere personal or arbitrary will of judge, but is governed by fixed rules of law to be reasonably exercised for accomplishment of justice.

3. **Appeal and error** ⟹933(4).

Every intendment is indulged by appellate court in support of trial court's action in granting new trial on ground verdict is excessive.

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Action by Charles A. Menne against the P. J. Friermuth Company and others. From an order granting defendants' motion for a new trial after verdict for plaintiff, plaintiff appeals.

Affirmed.

B. M. Bainbridge, of Stockton, George A. Work, of San Francisco, and A. H. Carpenter, of Stockton, for appellant.

J. B. Freeman and Gumpert & Mazzera, all of Stockton, for respondents.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This is an action brought to recover damages against the defendants for the malicious prosecution of plaintiff on a charge of petit theft, upon the trial of which a jury found the defendants not guilty. This action for damages for malicious prosecution was filed as a result thereof, and a jury rendered a verdict in favor of plaintiff in the sum of $2,500.

Thereafter the defendants moved for a new trial on the grounds of insufficiency of evidence to support the verdict, excessive damages, and errors of law occurring at the trial. The trial court granted a new trial, and plaintiff is appealing from that order.

[1, 2] Mr. Justice Van Fleet, in the case of Harrison v. Sutter Street Railway Company, 116 Cal. 156, 47 P. 1019, 1020, so clearly expresses the power and scope of an appellate court on a motion for a new trial that we quote the following:

"That the granting of a new trial is a thing resting so largely in the discretion of the trial court that its action in that regard will not be disturbed except upon the disclosure of a manifest and unmistakable abuse, has become axiomatic, and requires no citation of authority in its support. It is true that such discretion is not a right to the exertion of the mere personal or arbitrary will of the judge, but is a power governed by fixed rules of law, and to be reasonably exercised within those rules, to the accomplishment of justice. But, so long as a case made presents an instance showing a reasonable, or even fairly debatable, justification under the law for the action taken, such action will not be here set aside, even if, as a question of first impression, we might feel inclined to take a different view from that of the court below as to the propriety of its action. More especially is this true where, as here, the question rests largely in fact, and involves the proper deduction to be drawn from the evidence. The opportunities of the trial court in such instances for reaching just conclusions are, as a general thing, so superior to our own that we will not presume to set our judgment against that of the former where there appears any reasonable room for difference. * * *

"As to the suggestion that the evidence touching 'the amount of damages' was without conflict, we are not wholly certain that we appreciate exactly what counsel means. There was no evidence given as to the amount of the damages suffered. The damages sued for were in their nature unliquidated, and no witness pretended to fix the precise amount plaintiff should recover. * * *

[3] "But appellant urges that it is only where the verdict is so grossly disproportionate to any reasonable limit of compensation warranted by the facts as to shock the sense of justice, and raise at once a strong presumption that it is based on prejudice or passion rather than sober judgment, that the judge is at liberty to interpose his judgment as against that of the jury; and that such an instance is not shown. The rule invoked is correct, as addressed to the function of the trial court, or when asking this court to set aside the verdict where it has been refused by the court below. But when we are asked to review the act of that court, where, in the exercise of its discretionary power, it has

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⟹For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes seen fit to set aside the verdict on this ground, a very different rule prevails. Every intendment is to be indulged here in support of the action of the court below, and, as elsewhere suggested, it will not be disturbed if the question of its propriety be open to debate."

Respondents, in justifying the new trial, point to errors of the court in ruling on the admissibility of evidence, and contend also the evidence was insufficient to sustain the verdict against the corporate defendants or defendant George P. Friermuth, in that there was no evidence in the record to show by what authority, if any, defendant Greer acted in respect to the prosecution which formed the basis of the case at bar.

We have read the transcript, and agree with respondents that the evidence connecting the defendants other than Greer with the criminal prosecution is insufficient to justify a judgment as against them. We also believe the instructions of the court dealing with malice and probable cause under the rule as enunciated in Ball v. Rawles, 93 Cal. 222, 28 P. 937, 27 Am. St. Rep. 174, are sufficient to justify the trial court in the granting of a new trial.

The trial judge, having seen and heard the witnesses, was authorized and required by law to weigh the sufficiency of the evidence to sustain the verdict. He may not have been impressed, as one must be who reads only the cold record, with the utter disregard of the rights of plaintiff evinced by defendant Greer, but he may also have doubted the sincerity of the testimony of opposing witnesses; it is not for us to speculate. We find no abuse in the exercise of the discretion vested in the trial court.

The order granting a new trial is hereby affirmed.

We concur: PLUMMER, J.; R. L. THOMPSON, J.

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130 Cal.App. 145

PEOPLE v. ASHRAWY.

Cr. 2231.

District Court of Appeal, Second District, Division 2, California.

Feb. 28, 1933.

Hearing Denied by Supreme Court March 30, 1933.

1. Criminal law 🔑295.

Jury's finding adverse to plea of not guilty of grand theft by reason of former acquittal *held* warranted.

Trial of prior indictment charging grand theft of merchandise was had on theory that, after defendant had been robbed of merchandise which he had acquired under consignment agreements, he bought back goods from robbers, and thereafter converted them, whereas second trial under similar indictment was had on theory that robbery was fake robbery, and that goods involved never left defendant's possession. Furthermore, some of the merchandise involved in the second trial was alleged to belong to certain firms not mentioned in first indictment.

2. Judgment 🔑751.

Judgment of conviction in criminal case is final and conclusive only as to matters actually submitted to jury.

3. Embezzlement 🔑48(1).

In prosecution for grand theft tried on theory that alleged robbery from defendant was fake, instruction that if jury believed defendant received merchandise involved on or about day he claimed to have received it back from alleged robbers, and thereafter converted it, he would be guilty of grand theft, *held* improperly given.

4. Criminal law 🔑1172(1).

Error in instructing that if accused received merchandise on or about date he claimed to have received goods back from alleged robbers, and thereafter converted it, he would be guilty of grand theft, *held* not prejudicial.

5. Criminal law 🔑1170½(5).

Cross-examination of accused as to who was with him in his apartment when he was arrested, even if actuated by hope of improperly eliciting matter impeaching witness, *held* not prejudicial, where defendant by answering question interrupted colloquy as to whether question should be answered (Code Civ. Proc. § 2051).

Appeal from Superior Court, Los Angeles County; William T. Aggeler, Judge.

Thomas Ashrawy was convicted of grand theft, and he appeals.

Affirmed.

Robert H. Patton, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., Frank Richards, Deputy Atty. Gen., and Buron Fitts, Dist. Atty., and William R. McKay, Deputy Dist. Atty., both of Los Angeles, for the People.

ARCHBALD, Justice pro tem.

Defendant was charged with the crime of grand theft in an information containing two counts, the first of which charged the theft on or about August 7, 1930, of merchandise of the value of $3,200 belonging to the firm of Dibbs & Maloof, and the second the theft of merchandise of the value of $1,750 belonging to the firm of Haboush Brothers & Kaydouh, on the same date. The plea was not guilty, and not guilty by reason of a previous acquittal, to both counts. The jury returned a verdict of not guilty on the second count, and of guilty on the first. Motion for new trial as to count one was denied, and judgment of conviction having been entered thereon, defendant has appealed.

Appellant was charged in a prior indictment with three counts of grand theft; such indictment being the same as in the instant case except that here the theft of different merchandise belonging to two firms not mentioned in the first instance is charged. At the present trial counsel for appellant offered a stipulation, which was accepted by the prosecution, to the effect that the people offered testimony at the first trial in support of substantially the following facts: That during the year 1928 defendant obtained merchandise of the value alleged and under consignment agreements similar to those in the instant case from the three firms named in the first indictment, of the general character of laces, linens, fancy tablecloths, tapestries, and imported merchandise of like character; that thereafter and on August 7, 1930, he left the city of Los Angeles in his automobile in the company of one Soby Hallas; that about twenty miles east of Needles, Cal., he was held up and robbed of all the merchandise he had taken in his machine; that defendant returned to Los Angeles and reported his loss to the police; that certain of such merchandise was insured against loss by the owner, and defendant told an insurance adjuster, prior to the time same was recovered by the police and while it was on display where it was found. that he had not heard anything of his merchandise; that in October of 1931 defendant went with two police officers to a place in Pasadena, owned and operated by one Alita Dulane, and found merchandise of the description theretofore given as that of which he had been robbed, which was segregated into three piles, and a part of which was afterwards identified as being a portion of the merchandise mentioned in the first indictment.

Appellant in his brief says that the evidence was the same in both cases, with the exception of that with reference to the ownership of the goods and the fact that at the first trial Soby Hallas testified for the prosecution that the robbery actually occurred on the desert, and that the merchandise was taken; while on the second trial he testified that it was a fake robbery, and that appellant left his goods at the Appleton apartments in Los Angeles, and had none with him at the time. Respondent does not deny that otherwise than as stated the evidence was the same in each case, but does state that the theory in the first proceeding was that an actual robbery had been committed, and that the goods were thereafter bought back from the robbers by appellant, who thereafter converted them.

It appears from the evidence introduced in the instant case that appellant was living in apartment 501 of the Appleton apartments; that he told the manager, one MacLane, that he intended to make a business trip by automobile to New York, and that on August 6, 1930, he surrendered apartment 501 and rented another, No. 104, in the same building, not under his name, but under one which he asked MacLane to select for him, which was "Harrison." Appellant then had the merchandise in his possession, stored in his apartment, and asked MacLane to assist him in making the transfer. This the latter did, and the change was made on the night of the 6th; appellant having his own lock put on apartment 104. Appellant apparently left early the next morning, although he evidently slept in apartment 501 the preceding night. The merchandise was piled on the floor of apartment 104 at the time of the change above noted. The next day MacLane's attention was called to the fact that a light had been burning all night in apartment 104, and he thereupon called the locksmith who had previously changed the lock at Ashrawy's request and had him make a key for the room. He then opened it and found that "all the articles which were stored in the room the night before, that is, in the center of the room, were evidently removed, and either back in the closet and the bathroom, the stall shower, which it was—had evidently been packed in there, which there was a plug key placed in the door." MacLane said of the articles which he had helped carry into the room: "Some were in traveling cases and some were loose tapestries, folded up"; also that there were a number of laces similar to those introduced in evidence, "wrapped up in a sheet, which sheet was tied into four knots, the four covers tied, which I could see them, though." Some time after this occurrence MacLane was changed to the Harvard Terrace apartments in Los Angeles, and on January 3, 1931, Ashrawy moved into an apartment in that establishment, and later, in February of 1931, moved the goods from apartment 104 of the Appleton, which he had kept rented until then, to his new location. MacLane said appellant told him he had moved in everything from the Appleton apartments, and that he afterwards helped appellant move the merchandise from his apartment to a locker room in the basement of the building; that, again, there were "some of the same cases, some of the same type of linen, draperies and tapestries"; that appellant took a sheet in which some of them were wrapped to cover a window, and that "it was one of the sheets from the Appleton apartments which the stuff had been stored in at the Appleton apartments."

[1] With the weak identification by MacLane, and with Hallas and appellant both testifying that the merchandise in question was in the car and was stolen, the district attor-

ney had no alternative, at the first trial, but to rely on an embezzlement of the goods after they were recovered from the robbers as claimed by Ashrawy.

In the instant case the trial court treated the question of former acquittal as one of fact and left it to the jury under appropriate instructions, which, among other things, charged them that if they found as a matter of fact that the merchandise involved in the case before them was taken by the defendant at the same time and place and as a part of the same act and transaction as the merchandise involved in the first trial, and with the same intent, they then must find for the defendant as to his plea of former acquittal. The determination of this plea was undoubtedly left to the jury, for the reason that if the jury believed there was an actual robbery there was evidence from which it might also find that the merchandise in the instant case was not placed in the automobile, but remained in the Appleton Apartments until it was moved to the Harvard Terrace apartments. In our opinion the verdict of the jury as to such plea was correct. The first trial was based entirely on a taking after the alleged robbery, and in view of the very indefinite description of the goods remaining in the Appleton apartments a jury could not be expected to find which of them were involved in the robbery and which remained at appellant's apartment. The theory on which the case was tried, under the circumstances of the first prosecution of appellant, was as much a fact in the issue determined by the jury as the evidence presented; and under the facts, in our opinion, the issue which was so clearly before the jury in the instant case—with evidence which indicated in no uncertain terms that the robbery was a fake and that all the goods remained in the Appleton apartments—was not before the jury in the first proceeding.

[2] While it is true in regard to a judgment in a civil action that it "is final and conclusive not only as to the matter actually determined, but as to every other matter which the parties might have litigated and have had decided as incident to, or essentially connected with, the subject-matter of the litigation, and every matter coming within the legitimate purview of the original action, both in respect to matters of claim and of defense" (Estate of Bell, 153 Cal. 331, 340, 95 P. 372, 376), we do not think the rule applies to the same extent in a criminal action. We think the rule there should be limited to matters actually submitted to the jury for its determination; otherwise we would, as in the instant case, bind the state, by successful subornation of perjury, where the same issue might have been but was not presented to the jury because of such criminal act. Such a conclusion is unthinkable under the facts of the two cases here involved.

[3, 4] We fail to see how the jury could have been misled by the modification of appellant's requested instruction relative to former acquittal. The law was clearly stated in the instruction as given, and the jurors, even though not possessed of legally trained minds, could have had no difficulty in applying it to the facts.

The court instructed the jury in effect that if they believed from the evidence that appellant received the merchandise mentioned in count one "on or about June 1, 1931," and thereafter converted it to his own use knowing the same belonged to said firm of Dibbs & Maloof, he would be guilty of grand theft. June 1, 1931, is the date appellant claimed to have received the goods back from the alleged robbers. August 7, 1930, is the date when all of the merchandise, including that involved in the first indictment, was changed to room 104 of the Appleton apartments, and when the plan to conceal it apparently first took form and substance. Appellant urges that half of the jury, under such instruction, might have believed the robbery story and the other half might not have done so, and yet all might have believed that the merchandise was converted after June 1st, as even under the theory of a fake robbery there was a continuous concealment and conversion. The instant case was tried on the theory that the robbery was a fake, and that meant necessarily that the conversion began on the earlier date. The instruction in question, then, was inconsistent with such theory, and was evidently used by the district attorney as an anchor to the windward in case the jury might believe appellant's story. In our opinion the instruction should not have been given, but we fail to see how appellant could have been prejudiced thereby in view of the verdict under the instruction relative to former acquittal, as the offense, without the fake robbery, had its inception at least in one act of concealment and certainly in one intent, viz., to take all the goods in appellant's possession from the various owners. We do not see how the jury, under all the evidence, could have stamped the story of such robbery with the symbol of truth. The same is true as to the instruction with reference to the date of the offense.

We are also of the opinion that the modification of the instruction proposed by appellant as to the passing of title to the merchandise left such instruction clearly stating the law from defendant's theory of the case.

We see no error in the court's instruction as to the meaning of the word "consignment."

Appellant urges that the evidence failed to establish a fiduciary relationship between Dibbs & Maloof, the alleged owners of the property mentioned in count 1, and also failed to show any conversion thereof to appellant's use. It is true the evidence shows no demand by Dibbs & Maloof for the goods; nor does it show that they knew what was going on. The record, however, is one that affords ample support to the conclusion that the jury must have reached on both points.

[5] The prosecuting attorney asked the defendant "who was with him" in his apartment when he was arrested. The question was objected to, but no ground of objection was stated. Counsel for defendant instructed him not to answer on the ground that "he is incriminating himself." A colloquy ensued during which the court apparently said to the attorney: "You are anxious to go to jail?" The attorney replied, "Not anxious, of course," whereupon the witness said, "I will answer it; I will answer it. Mr. Patton, don't get into trouble. You are breaking up my home, Mr. McKay. You broke my home in this last trial, and now you are breaking my home. I was with a girl friend; I had a girl friend with me." Thereupon the prosecutor said: "That is all I am asking." Subsequently the defendant, who was apparently somewhat excited, reiterated, without question being asked, that he had a girl friend with him, and that the district attorney was breaking up his home. The question and its answer seemed to have no proper place in the examination, and we are of opinion that if a proper objection had been interposed the court would have sustained it. It would seem, however, that defendant himself put the damaging construction upon it. We cannot believe under all the evidence, however, that the question was prejudicial, much as we regret that any public official would ask a question that he must know is incompetent, actuated solely by the hope or knowledge that something will come out that may in some way disparage the witness and thus attempt an impeachment which he knows could not be made under section 2051 of the Code of Civil Procedure.

Judgment and order affirmed.

We concur, WORKS, P. J.; STEPHENS, J.

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130 Cal.App. 38

BEUTTLER v. MANN et al.

Civ. 8691.

District Court of Appeal, First District, Division 2, California.

Feb. 25, 1933.

Rehearing Denied March 27, 1933.

Hearing Denied by Supreme Court April 25, 1933.

1. Appeal and error ⚿1066.

Instructions on sudden peril, though erroneous because containing no limitation that principle may be relied on only by one free from negligence, *held* not to warrant reversal, where instructions were foreign to issues.

2. Trial ⚿296(4, 5).

Instruction relative to violation of law requiring trailer to have rear light and plaintiff's contributory negligence with respect thereto, and closing with statement directing verdict for plaintiff on "this issue," *held* not erroneous as formula instruction which omitted many elements, in view of other instructions (St. 1923, p. 546, § 99).

> Instruction recited that if defendant operated a truck and trailer upon a public highway during period from half hour after sunset to half hour before sunrise and trailer did not carry at the rear thereof a lighted lamp exhibiting a red light plainly visible under normal atmospheric conditions for a distance of 500 feet, then defendant was violating a state law, and if plaintiff failed to foresee that defendant would violate such law, then plaintiff was not guilty of contributory negligence as a matter of law, and jury's verdict must be in favor of plaintiff on this issue.

3. Trial ⚿228(1).

That instruction was strictly confined to one element of case is no ground for complaint.

4. Trial ⚿251(8).

Instructions that defendants were not liable if negligence of driver in whose truck plaintiff rode caused collision with defendants' truck *held* properly refused, where driver had been dismissed by verdict on former trial.

5. Damages ⚿130(2).

$20,000, to one whose expectancy was 28.90 years, for medical expenses, loss in wages, and broken bone in arm which had not knit when trial was had 58 months after accident, *held* not excessive.

Appeal from Superior Court, San Benito County; E. N. Rector, Judge.

Action by Albert J. Beuttler against Arthur H. Mann and others. From a judgment in favor of plaintiff,. defendants, except named defendant, appeal.

Affirmed.

J. Hampton Hoge, of San Francisco (A. Dal Thomson, of San Francisco, of counsel), for appellants.

James Snell, of Hollister (Chester E. Ross, of Hollister, of counsel), for respondent.

STURTEVANT, Justice.

In an action to recover damages for personal injuries, the jury returned a verdict in favor of the plaintiff, and, from the judgment based thereon, Ritchfield Oil Company of California, a corporation; Ritchfield Oil Company, a corporation, and G. Barone have appealed.

On the evening of the 23d of January, 1927, the defendant A. H. Mann was driving a Ford truck south on the state highway at a point immediately south of the bridge across San Benito river. The plaintiff was seated at his right and was riding with him. When they reached the point above mentioned the defendant G. Barone, as the employee of the corporate defendants, was driving an oil truck, with trailer attached, in the same direction. The Ford truck collided with the rear end of the trailer, and the plaintiff was injured. He commenced his action against A. H. Mann who was driving the Ford truck, and against G. Barone and the latter's corporate employers, charging all of them with negligence. On a former trial the jury returned a verdict in favor of the defendant A. H. Mann. In presenting their evidence the parties respectively claimed that the other party was guilty of several different acts of negligence. The plaintiff claimed that Barone and his employers were guilty of negligence because (1) in violation of the statute (section 99, California Vehicle Act [St. 1923, p. 546]) the oil truck and trailer did not have rear lights; and (2) that said truck and trailer were at the time of the accident parked on the traveled portion of the highway and not off thereof as required by the statute (section 136). The defendants claimed that the plaintiff was guilty of contributory negligence (1) for continuing to ride with a driver after he knew the driver was drunk; and (2) for continuing to ride with a driver after he knew the driver was not a careful driver, because after dark he drove at a high and excessive rate of speed, although his headlights were so defective he could not see objects in the highway.

[1] Acting upon the request of the plaintiff, the trial court gave two instructions on the subject of sudden peril. Neither one contained a limitation that that principle may be relied on only by one who is himself free of negligence. The defendants assign both instructions as prejudicial error. Under the facts of this case the contention may not be sustained. Before Mann overtook the trailer there was no evidence that a sudden peril existed at any time. No claim was made that at that time the plaintiff should have jumped to save himself. When the plaintiff first saw the trailer he testified he was twenty feet away and traveling thirty miles per hour. Therefore neither instruction was addressed to any issue made by the pleadings nor to the proof. The driver, Mann, was not suing as plaintiff, but he was being sued. Furthermore, he had been dismissed by the verdict of another jury. The instructions complained of were, as between the parties then before the court, foreign to the case. Freely conceding that both instructions were incomplete statements of the law, neither could have been a help nor a hindrance to the jury in arriving at a verdict on the issues that were before that body. Such errors are not prejudicial, and do not warrant a reversal on appeal. Armstrong v. Day, 103 Cal. App. 465, 470, 284 P. 1083; 2 Cal. Jur., p. 1026.

[2, 3] The defendants also complain of another instruction given at the request of the plaintiff. It is claimed that it is a formula instruction, and objectionable because it omits many elements. Pierce v. United Gas & Electric Co., 161 Cal. 176, 118 P. 700. However, we think a fair reading of the language used shows the instruction does not purport to direct a verdict, and therefore it is not objectionable under the authority cited. It closes with the statement that "your verdict must be in favor of the plaintiff on this issue." That language is quite plain that it was intended to omit all items but one. If it was correct on that one, then the court did not commit prejudicial error in giving it. The issue treated in the instruction was as follows: "I instruct you that if you find from the evidence that the said defendant G. Barone was operating a truck and trailer upon a public highway in this state during the period from a half hour after sunset to a half hour before sunrise, and that said trailer did not carry at the rear thereof a lighted lamp exhibiting a red light plainly visible under normal atmospheric conditions for a distance of five hundred feet, then the said defendant was violating a law of this state. * * *" We think that language was sound law as far as it went. But the defendants claim it omitted all mention of proximate cause and all mention about said violation having been excused. If the instruction had purported to define the negligence of the defendants, those objections would be good; but to say it so purported is to read words into it that are not there. It merely purports to define what constitutes one specific violation of law. Continuing the instruction was as follows: "* * * And if you further find from the evidence that the alleged contributory negligence on the part of the plaintiff consisted solely in a failure on his part to anticipate or foresee that the said defendant would so violate such law, then the plaintiff was not guilty of contributory negligence as a matter of law and your verdict must be in favor of the plaintiff on this issue." That part is also sound. But, the defendants claim, it omits many other acts of commission or omission on the part of the plaintiff claimed by defendants to constitute contributory negligence. But merely because the language is strictly confined to one element does not justify the defendants in complaining. The plaintiff was not bound to have all of his instructions embodied or condensed into one.

Turning to the other instructions which were given, it is perfectly clear that the other acts complained of were elsewhere covered, and that the instructions, all read together, were a full and complete statement of the law applicable to the case.

[4] The defendants also complain because the trial court refused to give four of their requested instructions; XIX to XXII, both inclusive. The second and third purported to state that if the negligence of Mann was the cause of the accident these defendants were not liable. The negligence, if any, of these defendants had been covered in several instructions that were full and complete. The defendant Mann had been dismissed by verdict. Those requests were properly refused. Muller v. Hale, 138 Cal. 163, 168, 71 P. 81. The other two requested instructions were to the effect that if the jury found the accident was caused by the negligence of Mann and that these defendants were not negligent then these defendants would not be liable. The reasoning applicable to the first two applies to the remaining two.

[5] The verdict returned fixed the plaintiff's damages in the sum of $20,000. The defendants complain that said sum is excessive. The accident happened January 23, 1927; the trial was had November 16, 1931. After the accident the plaintiff was taken to a hospital where apparently he received good care, and in the hands of Dr. Hull received expert treatment. In an attempt to knit the broken bone Dr. Hull put the arm in an aeroplane sling for eight weeks. The bone did not knit. He then put on metal splints. Result was the same. Patient was then sent to Letterman Hospital. There a silver plate was attached. The bone did not knit, and the plate was removed. Furthermore, after several weeks had passed and the bone had not knit, an operation of bone grafting was had. Nevertheless the bone did not knit, and such was the condition at the time of the trial. Dr. Hull testified that another operation was necessary. He stated that either a metallic plate should be attached to the bone or that another attempt should be made to obtain an effective grafting of bone. The plaintiff employed a competent physician and had followed his orders in every respect. If and when another operation is had the plaintiff will suffer more pain and incur further expenses. The plaintiff testified that in all respects he had obeyed the orders of his physicians. At the time of the trial he had incurred medical expenses to the amount of $361.25. The period elapsing from the date of the accident was fifty-eight months. At $225 per month the loss in wages was $13,050. During that same period he earned $2,180, leaving a net loss of nearly $11,000. Special damages down to the date of the trial amounted to about $11,500. Deducting that amount from the sum fixed in the verdict leaves $8,500 as the amount of the award for general damages and special damages to be hereafter sustained. The plaintiff's expectancy was 28.90 years. All of these circumstances being considered, we may not say the verdict was excessive. Kelley v. Hodge Transportation System, 197 Cal. 598, 610, 242 P. 76.

The judgment is affirmed.

We concur: SPENCE, Acting **P. J.**; GOODELL, Justice pro tem.

130 Cal.App. 128

KELLER et al. v. SMITH, County Clerk, etc.

Civ. 1419.

District Court of Appeal, Fourth District, California.

Feb. 27, 1933.

1. Judgment ⚷256(5).

Jury's intention to find for defendants not mentioned in verdict against codefendant cannot be inferred or presumed, but must be expressly declared to require entry of judgment for them.

2. Trial ⚷327.

Jury's verdict against one defendant, without referring to codefendants, *held* not implied finding for latter.

The jury failed to return either a preceding suggested form of verdict against all defendants or following suggested finding for defendants not mentioned in verdict returned.

Application by F. M. Keller and another for a writ of mandate to F. E. Smith, as County Clerk of the County of Kern and ex officio Clerk of the Superior Court thereof.

Petition denied.

Borton & Petrini, of Bakersfield, for petitioners.

Ray Bailey, Dist. Atty., W. A. McGinn, Deputy Dist. Atty., and Rowen Irwin, all of Bakersfield, Chas. R. McCarty, of Los Angeles, Kenneth Lilly, of Bakersfield, and Francis A. Gabel, of Los Angeles, for respondent.

BARNARD, Presiding Justice.

This is an application for a writ of mandate to compel the respondent clerk to enter a judgment in favor of the petitioners in an action brought in the superior court of Kern county by one Laura A. Hamilton, as plaintiff, against

J. L. Dykes and these petitioners, as defendants. The action was one to recover for damages sustained by the plaintiff in a collision between an automobile in which she was a passenger and driven by Dykes and another automobile alleged to have been driven by these petitioners, Dykes being charged with willful misconduct and these petitioners with negligence. The jury was instructed that it might find in favor of all of the defendants, or that it might find in favor of the plaintiff as against all of the defendants, or as against Dykes alone, or as against the Kellers or either of them, in accordance with its finding as to the truth of certain facts, respectively. The court submitted to the jury a blank form containing several forms of verdict which, except for the words and figures here inclosed in parentheses, reads as follows:

"In the Superior Court of the State of California in and for the County of Kern.

"Laura A. Hamilton, Plaintiff, vs. J. L. Dykes et al., Defendants. No. 25246 Dept. 1. Verdict of Jury-Civil. Bakersfield, Cal. Oct. 1932.

"We, the jury impanelled to try the above entitled cause, find for the plaintiff, Laura A. Hamilton, and against the defendants J. L. Dykes, F. M. Keller, and Eunice Keller, and assess her damages in the sum of ...... Dollars.

"————, Foreman.

"We, the jury impanelled to try the above entitled cause, find for the defendants.

"————, Foreman.

"We, the jury impanelled to try the above entitled cause, find for the plaintiff, Laura A. Hamilton. and against the defendant J. L. Dykes, and assess her damages in the sum of ($3800.00) Dollars.

"(Mamie V. Hayes), Foreman.

"We, the jury impanelled to try the above entitled cause, find for the defendants F. M. Keller, and Eunice Keller.

"————, Foreman.

"We, the jury impanelled to try the above entitled cause, find for the plaintiff, Laura A. Hamilton, and against the defendants F. M. Keller and Eunice Keller, and assess her damages in the sum of $...... Dollars.

"————, Foreman.

"We, the jury impanelled to try the above entitled cause, find for the defendant J. L. Dykes.

"————, Foreman."

The jury inserted the figures "$3800.00" in the third suggested verdict on this form and the same was signed by the foreman and returned as the verdict of the jury, whereupon the clerk entered a judgment in favor of the plaintiff and against the defendant Dykes, in the sum of $3,800, making no entry of any verdict in respect to the defendants Keller. Subsequently a motion was made by these petitioners for an order directing the clerk to enter a judgment upon said verdict in their favor, which motion was by the court denied, and this proceeding followed.

The petitioners concede that it has been definitely held in this state that in an action against two or more defendants who have separately answered, a verdict of the jury in favor of the plaintiff and against one of the defendants, without specifically finding for or against another defendant, is a failure to find upon one of the material issues of the case. Benson v. Southern Pacific Co., 177 Cal. 777, 171 P. 948; Rankin v. Central Pacific R. Co., 73 Cal. 93, 15 P. 57; Benjamin v. Stewart, 61 Cal. 605; Lloyd v. Boulevard Express, 79 Cal. App. 406, 249 P. 837; McMahon v. Hetch Hetchy & Y. V. R. Co., 2 Cal. App. 400, 84 P. 350.

However, the petitioners contend that this rule has no application in a case where a proper construction of the verdict rendered discloses that the jury has not failed to find upon one of the issues presented, but where the verdict may be construed to be, in fact, also in favor of a defendant not mentioned therein, and that such a situation here appears. Reliance is placed upon the case of Crain v. Sumida, 59 Cal. App. 590, 211 P. 479, 480, where, after finding for the plaintiff and against one of two defendants, and fixing the amount of the damages, the verdict concluded as follows: "And we further find in favor of defendant ——— that plaintiff take nothing." In that case the court stated that the intention of the jury, to find in favor of the defendant whose name was not inserted, appeared from the record since there were but two defendants and, after finding against one of them, the jury found in favor of the other, and that the identity of the other was plain although his name was not inserted in the blank provided therefor. It was then held that any irregularity thus appearing in the verdict could not be taken advantage of by the defendant against whom the jury specifically found. Petitioners maintain that the principles applied in the case of Crain v. Sumida are controlling here, and that this is a case involving the *construction* of a verdict rather than one concerning the effect of a verdict which requires no construction. It is argued that we must presume that the jury read the two forms of verdict preceding the one signed; that in signing that particular one it was carrying out the instructions given, that it might find against one defendant and in favor of the other; that, having thus followed the instructions given, it is not necessarily to be presumed that the jurors read the remaining forms of verdict set forth in the form given them; and that, thus construed in the light of the record, it appears that the verdict here found was in fact in favor of petitioners.

[1, 2] In the case now before us, not only are the petitioners seeking to establish the signed verdict as one in their favor, but the verdict as returned, instead of merely omitting their names while specifically finding for them, in fact finds in reference to the other defendant alone, without referring to the petitioners by name or otherwise. We can see no controlling difference between a case where several suggested forms of verdict are on one paper and a case where the suggested forms are on separate papers. Any inference or presumption that the jury has read and considered the respective forms applies equally in both cases. The rule of construction suggested in the case of Crain v. Sumida could not be exactly applied here, since nowhere did the jury in this case express any finding in favor of the petitioners. To hold that they so found requires an inference that they intended to do something they have not expressly done. Even though the court instructed the jury that it might find against one and at the same time in favor of the other defendants, while such an instruction strengthens the inference suggested, it is by no means conclusive in the absence of some expression showing the intention of the jury. There is a wide difference between drawing the only possible conclusion, where there is an expressed finding against one defendant and another in favor of the only other defendant although the name of the other is not inserted, and drawing an inference, probable though it may be, as to the intention of a jury in regard to a matter that has been entirely omitted from its verdict. It is just as possible to draw the inference that the jury in this case read and rejected the proposed verdict next following the one it caused to be signed as that it read and considered those preceding it. In this particular case an inference or presumption could be drawn either way. While it may be true that the greater probability lies with the view that this jury intended to find in favor of these petitioners, if the question of the intention of the jury could be left to inference or presumption, the established rule seems to be that the intention of the jury must not be left to inference or presumption, that it must be expressly declared, and that where it is not expressly declared in reference to any one of several defendants who have separately answered, it must be taken that the jury has failed to pass upon that particular issue.

We think that this is the situation here and that even such a construction as suggested in Crain v. Sumida cannot apply here, since there is an entire absence of any expression on the part of the jury which requires or permits any addition by construction. We conclude that this is not a case where we may, by construction, say that the jury has expressly passed upon the particular question here involved. While it might seem desirable to permit the drawing of such an inference where the same seems more reasonable and more probable than a contrary inference, we think this may not be done under the established rule.

For the reasons given the petition is denied.

We concur: MARKS, J.; JENNINGS, J.

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129 Cal.App. 751

PACIFIC COMMERCIAL CO. v. GREER.

Civ. 8362.

District Court of Appeal, First District, Division 1, California.

Feb. 23, 1933.

1. Sales 🔑72(4).

Where parties agree that quality of thing sold shall be determined by particular person, such determination is conclusive, absent fraud, collusion, or palpable arbitrariness.

2. Sales 🔑72(4).

Parties to sale may agree that approval of merchandise by third person shall be deemed sufficient, and vendees will be bound by such approval given in good faith.

3. Sales 🔑176(4).

Generally, to excuse lack of inspection on part of buyer it must be wholly impracticable and not merely inconvenient.

4. Sales 🔑285(2).

Where more than year elapsed before buyer made inspection in own warehouse, although merchandise had been favorably passed by its inspector before shipment, and no notice of rejection was given until nearly two years after delivery, delay was so unreasonable as to bar action for alleged breach of warranty.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by the Pacific Commercial Company against James A. Greer. From a judgment for defendant, plaintiff appeals.

Affirmed.

Pillsbury, Madison & Sutro, of San Francisco, for appellant.

Henry E. Monroe, of San Francisco (Julia M. Easley, of San Francisco, of counsel), for respondent.

JAMISON, Justice pro tem.

This action was for damages for the alleged breach of defendant's warranties in the sale to plaintiff of certain wire rope.

The amended complaint alleges that on June 14, 1918, defendant, by his letter of that date, offered to sell to plaintiff certain secondhand wire rope upon the terms and conditions and for the price set forth therein, and that on the 28th of June, 1918, plaintiff accepted the said offer; that thereafter defendant delivered said wire rope f. o. b. dock, San Francisco, for shipment to Manila, and in due course it was shipped to and received by plaintiff at its warehouse in Manila; that the said offer of defendant contained in his letter of June 14, 1918, stated that the wire rope so offered for sale to plaintiff was in serviceable condition, and was in lengths of from 300 feet to 1,500 feet; that the agreed price of said rope was paid by plaintiff to defendant; that said rope was wound upon reels, and therefore plaintiff was unable to ascertain its condition when the same was delivered by defendant, but that said rope in the interior of said reels was in short lengths, badly worn, rusted, and broken, and not more than 30 per cent. efficient.

Defendant by his answer denied that the said rope did not comply with the orders of plaintiff for same, and denied that said rope was in short lengths of less than 500 feet, or that it was badly worn or at all worn, rusted, or broken, or that it was not more than 30 per cent. efficient, or that it was not 90 per cent. efficient; and for an affirmative defense alleged that said rope was wound upon reels by order of the appellant under the inspection of Hunt & Co., the agent of plaintiff, and that plaintiff accepted the rope after such inspection, and by his amendment to the answer be denied that plaintiff had accepted the offer made by him as alleged in the complaint.

It appears from the evidence that plaintiff was engaged in business at Manila in the Philippine Islands, and that H. S. Masterton, of Alameda, Cal., was in the employ of plaintiff as the general manager of its export department, and was its buying agent; that defendant was engaged in the general brokerage business, and that he was not a dealer in wire rope except as a broker; that prior to June 14, 1918, he and Masterton entered into negotiations for the purchase, through defendant, of secondhand wire rope; that defendant had an offer from the Judson Iron Works of wire rope, and on June 14th wrote Masterton a letter (being the same letter to which reference is made in the complaint), specifying therein that the rope was serviceable and in lengths of from 300 to 1,500 feet, shipments to commence within ten days from San Francisco; that plaintiff did not accept this offer; that later Masterton again opened negotiations with defendant for the purchase of secondhand rope and was informed by defendant that he would see if some could be procured; that he found he could procure rope from the Compson Bridge Company, and so informed Masterton. Masterton also testified that the offer contained in defendant's letter of June 14, 1918, was not accepted by plaintiff.

Thereafter, on June 28, July 26, and October 15, 1918, plaintiff ordered from defendant used wire rope, specifying in said orders the lengths to be from 300 to 1,500 feet, to be packed on reels, with Hunt's inspection. In the order of June 28, 1918, there was incorporated an order for two lengths of said rope to be 2,000 feet each. Defendant began filling these orders on August 1, 1918; the last delivery being made on January 9, 1919.

Masterton testified that he examined the rope purchased from defendant before it was reeled; that it seemed to be in perfect condition and that he was fully satisfied it met the requirements of the orders. William B. Gester, a witness for defendant, testified that he was a civil engineer in the employ of Hunt & Co., and as such employee made the inspection of a large portion of said rope; that he saw the rope unwound from the old spools and rewound on new ones; that the rope was in good condition for secondhand rope; that while he could not state just how much of the rope he saw unwound and again rewound, he was engaged in seeing this done a number of days.

Each shipment of the rope was accompanied by a certificate of Hunt & Co., and each of said certificates contained the following statement: "The following coils of steel wire have been inspected and accepted according to cable contract and in our opinion based on our experience and judgment, are within the limits of the specifications furnished by client." A note followed in these words: "Careful superficial inspection of outside and end surfaces of these coils shows them to be of excellent quality and condition for second hand wire cable. All of the reels are new * * * and the cable is well coiled."

E. E. Diot, a witness for plaintiff, testified that he was the manager of the warehouse and traffic department of plaintiff, and that on April 20, 1920, he examined the said rope and discovered that 75 per cent. of it was of no value; that the entire lot was useless for ordinary purposes; and that any one having regard for human life would not sell same for hoisting, haulage, or transmission purposes, and yet on September 30, 1920, plaintiff wrote a letter to the Kailan Mining Administration, offering to sell it the said wire rope, in which was the following statement: "The rope has been used but has been very well preserved and is in excellent condition. An inspection made before the rope was shipped from the United States developed in the opinion of the inspector an efficiency of 80 per cent." This rope was delivered to plaintiff f. o. b. at San Francisco dock.

Plaintiff produced the depositions of several witnesses. It appears from the testimony of these witnesses that on November 12, 1920, plaintiff sold to the Kailan Mining Administration 3,736 lineal feet of 1⅛ inch wire rope purchased from defendant, and 3,000 lineal feet of 1 inch rope so purchased; that it was rejected and returned to plaintiff for the reason that it was in short unspliced lengths, was unserviceable for hauling, and could only be used as scrap; that in April, 1923, plaintiff sold said rope to H. C. Heald, a resident of Baguio, P. I., as junk. Shortly after its purchase Heald examined it and found it was of short lengths and badly worn; the lengths of the rope being as follows: 30 per cent. under 100 feet, 50 per cent. between 100 and 200 feet, and 20 per cent. over 200 feet; the longest piece being 1,250 feet in length.

The case was tried before the court and judgment was rendered for defendant, and from this judgment plaintiff appeals.

Appellant contends that respondent warranted that the rope was serviceable and that it was in lengths of not less than 300 feet, and that the undisputed evidence shows a breach of the warranty in that there is no evidence to support the findings of the court that the rope was not worn, rusted, or broken; that the breaches of these warranties were not waived by any act of appellant in receiving the rope or otherwise.

The court found that when the wire rope was delivered by defendant it was wound upon reels, and so wound by order of plaintiff; that before it was wound upon reels, it was open to plaintiff's inspection and was inspected by plaintiff; that it was wound upon reels under the inspection of Hunt & Co., the agent of plaintiff for such inspection, and was accepted by plaintiff on the inspection certificates issued by Hunt & Co., and furnished to plaintiff pursuant to its orders; and that said wire rope fully complied with said orders. The court further found that said wire rope in the interior of the said reels, or any of said rope, was not in pieces less than 300 feet in length, and that said pieces, or any of said wire rope was not badly, or at all, worn, rusted, or broken, and that it was 90 per cent. efficient. These findings are supported by substantial evidence.

The undisputed testimony of both the respondent and Masterton, plaintiff's agent, was to the effect that the offer contained in respondent's letter of June 14, 1918, was never accepted by appellant. It is upon this letter that appellant bases its claim that respondent warranted the quality and length of the wire rope. The amended complaint contains no allegation that respondent warranted the quality or length of said rope, or that appellant relied upon the warranty in its acceptance, and the court made no specific finding that there was no warranty by respondent. However, by the findings made by the court, it impliedly found that there was no warranty.

Each of appellant's orders contained the requirement that the rope should be inspected by Hunt & Co. This inspection was made before the delivery of the rope. Therefore appellant did not rely upon respondent's judgment of the quality or length of said rope, but, on the contrary, upon the inspection made by Hunt & Co.

In California Sugar, etc., Agency v. Penoyar, 167 Cal. 274, 279, 139 P. 671, 673, the court said: "Nothing is better settled than the rule that where the parties agree that the performance or nonperformance of the terms of a contract, or the quantity, price, or quality of goods sold, is to be left to the determination of a third person, his judgment or estimate is binding, in the absence of fraud or mistake." (Citing authorities.)

[1, 2] There is no evidence in the case at bar that there was either fraud or mistake upon the part of Hunt & Co. Where parties to a contract agree that the quality of the thing sold shall be determined by a particular person, such determination is conclusive on the parties and cannot be impeached except for fraud, collusion, or palpably arbitrary action. Dickson v. Darnell, 98 Wash. 301, 167 P. 937. So it may be agreed that the approval of a third person shall be deemed sufficient, and when this is pronounced in good faith the vendee will be bound by the decision given. Herdic v. Bilger, 47 Pa. 60; Herman H. Hettler Lumber Co. v. Olds (C. C. A.) 221 F. 612; Hurley-Mason Co. v. Stebbins, Walker & Spinning, 79 Wash. 366, 140 P. 381, L. R. A. 1915B, 1131, Ann. Cas. 1916A, 948; Sherman v. Sheffield Cast Iron & Foundry Co., 50 Okl. 109, 150 P. 1062.

[3] The first delivery of the said wire rope to appellant was made on August 1, 1918, and the last delivery was on January 9, 1919. More than a year elapsed before appellant made any inspection of any of said rope. On April 20, 1920, Diot, an employee of appellant, namely, its warehouse manager, inspected the rope, and claims to have discovered it to be in short lengths and unserviceable. Appellant attempts to excuse the delay in making inspection of the rope on the ground that it was wound on reels. The general rule is that in order to excuse the lack of inspection upon the part of the buyer, it must be wholly impracticable. 55 Cor. Jur. 720. The buyer cannot relieve himself on the ground that the examination will occupy time, or that it may be attended with inconvenience and labor. Bailey Trading Co. v. Levy, 72 Cal. App. 339, 237 P. 408, and authorities cited; Jackson v. Porter Land & Water Co., 151 Cal. 32, 90 P. 122; Byrne v. Jansen, 50 Cal. 624; Gladium Co., Inc., v. Thatcher, 95 Cal. App. 85, 272 P. 340, 343. In this last case the court quoted with approval 23 Ruling Case

Law, 1434, section 257, where it is said: " 'Without doubt the buyer's retention of the goods beyond a reasonable time for examination and communication with the seller, standing alone, will be regarded as warranting the conclusion that he has accepted the goods and thus become liable, especially if the delay has worked prejudice to the seller. * * * Receipt (of the goods) will become acceptance if the right of rejection is not exercised within a reasonable time, or if anything has been done by the buyer which he would have no right to do unless he were the owner of the goods.' 23 R. C. L. 1436, § 259."

Furthermore, some seven months after appellant's warehouseman claimed to have discovered that the rope was defective, appellant sold a portion of said rope to the Kailan Mining Administration, representing that the rope was in excellent condition.

[4] Failure to notify the seller of the rejection of the article within two months after knowledge of the defect has been held to be an unreasonable delay. Jackson v. Porter Land & Water Co., supra. In the instant case, apparently no notice of the rejection of the rope was given to respondent until after the rejection of the portion purchased by the Kailan Mining Administration in November, 1920. This was an unreasonable delay.

We are of the opinion that there was sufficient evidence to support the findings, and therefore the judgment is affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

217 Cal. 487

WILLIAMS v. STILLWELL et al.

Sac. 4631.

Supreme Court of California.
March 1, 1933.

1. Equity 🔑67.

Equity abhors stale claims, and, unless litigant shows he acted with reasonable diligence in assertion of equitable rights, court will deny relief.

2. Quieting title 🔑29.

Where mother verbally gave plaintiff land, and he complied with conditions and lived thereon without objection, action to quiet title, commenced forty years after gift, *held* not barred by laches under evidence.

> Evidence disclosed that mother made verbal gift of real property to plaintiff, and that plaintiff was put in possession on condition that he would build home thereon, and that he built home and remained in possession during life of his mother and after her death during life of his sisters, who were grantees in deed executed by mother to 800-acre tract, which included 160 acres given son, and that right to possession of land and to enjoy fruits thereof was never questioned during lifetime of his mother and sisters, and not until defendants, executrices of sister's estate, acquired some color of title to land and attempted to interfere with plaintiff's possession, which he had enjoyed uninterruptedly for forty years.

3. Quieting title 🔑27.

Action to quiet title *held* proper remedy, where plaintiff claimed under parol gift from deceased mother, and defendants claimed as executrices of grantee of plaintiff's mother.

4. Adverse possession 🔑94.

If record owners paid taxes to county collector, and one possessing land under parol gift reimbursed them in money or labor, it was in effect "payment."

5. Adverse possession 🔑57, 95.

In action to quiet title, evidence warranted trial court's finding that plaintiff paid taxes and had adverse possession of land claimed under parol gift for more than five years, although uncultivated strip on one side of tract was not "substantial inclosure," within statute (Code Civ. Proc. § 325, subds. 1, 2).

[Ed. Note.—For other definitions of "Substantial Inclosure," see Words and Phrases.]

6. Adverse possession 🔑115(5).

In action to quiet title, question of plaintiff's payment of taxes and cultivation of land, necessary to prove title by adverse possession, *held* fact questions for court trying case (Code Civ. Proc. § 325, subd. 2).

7. Adverse possession 🔑13.

Plaintiff entering into possession of land under parol gift, and showing he was in adverse possession for over five years, during which period he paid all taxes, became owner by adverse possession (Code Civ. Proc. § 325, subd. 2).

In Bank.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by Frank L. Williams against Lola C. W. Stillwell and another, as executrices of the last will and testament of Mary V. Graham, deceased. From a judgment for plaintiff, defendants appeal.

Affirmed.

Robert H. Schwab and Charles J. Hasman, both of Sacramento, for appellants.

Ralph H. Lewis and George L. Popert, both of Sacramento, for respondent.

CURTIS, Justice.

Plaintiff brought this action to quiet his title as against the defendants to certain real property described in his complaint and situated in the county of Sacramento. Defendants answered, denying plaintiff's title. A trial was had before the court, and at the conclusion thereof the plaintiff was given leave to file an amended complaint to conform to the proofs. Thereupon plaintiff filed such a pleading wherein he restated his cause of action in his original complaint to quiet title and added a second cause of action setting up an executed parol gift of said real property from his mother. Thereupon the court made findings and rendered judgment in favor of the plaintiff upon the cause of action set forth in said amended complaint based upon an executed parol gift of said real property. From this judgment the defendants have appealed.

Plaintiff is the father of the two defendants, Lola C. W. Stillwell and Hazel K. W. Shepard. Said defendants are sued as the executrices of the last will and testament of Mary V. Graham, deceased. Plaintiff was the son of Mrs. M. C. Williams, who was the owner of 800 acres of land in Sacramento county. Besides the plaintiff, Mrs. Williams was the mother of Sarah A. Graham and Mary V. Graham, children by a former marriage. Plaintiff was married in 1890, and went to live with his mother on said 800-acre tract of land. He testified, and there is no contradiction to his testimony, that during that year, and shortly after his marriage, his mother verbally gave him a government quarter section out of her larger tract of land, being the land now in dispute, provided he would build a house and make his home thereon. He immediately built a small house on said 160-acre tract, and he and his wife moved thereon, and lived there until her death some six years thereafter. In addition to said dwelling house, he built on said land outbuildings, a barn, pumping plant, and other structures. He inclosed some 30 acres in a pasture. During this time the two defendants were born. After the death of his wife he ceased to make his home on said land for a period of ten years. During his absences, he leased said land for six years and received the rental therefrom. The place remained idle during the remaining four years, for the reason that he was unable to find a tenant. In the meantime he had married a second time, and in the year 1906 returned to said land and lived thereon with his wife from that time on to the trial of this action. His mother with her two daughters, the Graham sisters, resided on the old home place adjoining the land in dispute. She never executed any deed to said 160-acre tract in plaintiff's favor. In 1900 she deeded to her two daughters the entire 800 acres, which included the 160 acres claimed by plaintiff. She continued to live with them in the old home place until her death in 1915. Sarah A. Graham died in 1920, and by will devised all property owned by her to her sister. The latter died in 1929, leaving a last will in which the two defendants were named as the executrices thereof, and were thereafter duly appointed and qualified as such executrices. After their appointment, they sought to dispossess the plaintiff of said 160-acre tract of land; whereupon he instituted this action to establish his ownership thereof. As stated above, the trial court rendered judgment in his favor.

[1, 2] It is first contended by defendants that plaintiff's right to said land, if he ever had any, was barred by laches; that he waited until after the death of his mother and the two Graham sisters before taking any legal steps to establish his ownership of said land; these three being the only persons beside himself who knew the true facts of the transaction between plaintiff and his mother regarding the gift of said land.

It is one of the aphorisms of equity that it abhors stale claims. 10 Cal. Jur. p. 521. Unless a litigant can show that he acted with reasonable diligence in the assertion of his equitable rights, a court of equity will turn a deaf ear to his plea. In this case almost forty years elapsed between the time plaintiff alleges his mother made him a verbal gift of said real property and the commencement of this action. Ordinarily, such delay would defeat any claim to relief in a court of equity. But there exists in this case peculiar and unusual circumstances which, in our opinion, take this case out of the general rule. The plaintiff was put in possession of the land in controversy by his mother under a promise to give the land to him if he would build a home thereon. He complied with this condition. He remained in possession of said land during the life of his mother, and after her death during the life of his two sisters except as stated above. It appears from the evidence that his right to the possession of said land and to enjoy the fruits thereof was never questioned during the lifetime of his mother and sisters, and not until the defendants acquired some color of right to said land was there any interference made by any one to his quiet and peaceable enjoyment and possession of said land. It does not appear that there was any discussion between plaintiff and his mother or sisters regarding a deed to said land. Plaintiff never asked for a deed, and the other parties never refused to execute one. From the conduct of the parties in this regard, it may well be inferred that the plaintiff did not think it necessary that he should have any written evidence of his ownership of said land, deeming the word of his mother, taken in conjunction with her subsequent conduct in permitting him to occupy and enjoy said land as his own during the years of her life, sufficient evidence of his ownership without the formal written documents ordinarily required by law to invest one with the title to real property. Under these circumstances, we do not think that the plea of laches is well taken. This action probably never would have been brought had the defendants pursued toward the plaintiff the same attitude which his mother and the Graham sisters had followed. It was only when defendants attempted to interfere with plaintiff's possession of said real property which he had enjoyed uninterruptedly for forty years that the latter found it necessary to take legal steps to protect his rights. The following authorities sustain our conclusion: Barroilhet v. Anspacher, 68 Cal. 116, 8 P. 804, and Liebrand v. Otto, 56 Cal. 242.

[3] It is next contended that plaintiff has mistaken his remedy and that he should have brought an action to enforce specific performance rather than the action he did. A number of authorities are cited by defendants which hold that an action for specific performance will lie in behalf of one claiming real property under a parol executed gift. Defendants concede that, had plaintiff brought his action in specific performance, he would have failed as the promisor, his mother, had died. The logic of defendants' argument is that specific performance was plaintiff's only remedy, but, as his mother is dead, even this remedy is denied plaintiff, and he is left remediless. We cannot subscribe to this doctrine. Defendants have cited us to no authority which holds that the remedy pursued by plaintiff is not applicable. Had his mother been alive, and had she refused to perform her promise, plaintiff, if the facts had warranted it, could have compelled her to per-

form. Her death has not deprived him of his right to perfect whatever title he had to said real property. We think the remedy pursued by him is a proper one. He has set forth in his amended complaint the precise facts upon which he bases his ownership of said land. The trial court found these allegations to be true, and gave judgment in his favor, decreeing plaintiff to be the owner of said land, and that defendants held the record title to said land in trust for the plaintiff and directing that they convey the same to the plaintiff. We think this proceeding a proper one and the judgment entered a valid judgment.

[4-7] Defendants next contend that there was a failure on plaintiff's part to prove payment of taxes on said real property, and that he held adverse possession thereof during the time he claimed to be the owner thereof. These acts would become essential to plaintiff's recovery, provided he relied exclusively on title by adverse possession. He is claiming title primarily under a gift to him by his mother and not by adverse possession. However, the plaintiff testified that he paid the taxes on said real property during all the years he was in possession thereof until the year 1927, when the defendants assumed to be owners of said property under the will of Mary V. Graham, deceased. He said that during the first six years of his occupancy of said real property he paid the taxes thereon direct to the county assessor, and thereafter he repaid them either to his mother or to his sisters in money or by labor, after they had paid them to the tax collector of Sacramento county. Defendants introduced in evidence the official tax receipts showing that the taxes on said real property had been paid either by Mrs. Williams or her daughters, the Graham sisters, from 1890 to 1927, except a year or so when the taxes were paid by a mortgagee of said lands. These original receipts have been forwarded to this court, and are now before us. They tend to disprove plaintiff's statement in so far as he testified that he paid the taxes for the first six years of his occupancy of said real property. They may be in conflict with his testimony that he paid the taxes up to the year 1927, but not necessarily so. His mother and sisters may have paid said taxes during those years in the first instance to the county tax collector, and, if he thereafter reimbursed them for such payments either in money or in labor, this was in effect a payment by him. Gray v. Walker, 157 Cal. 381, 108 P. 278. As to the question of adverse possession, the evidence shows that the 160 acres of land which plaintiff lays claim to was inclosed with a fence on three sides thereof. On the fourth side said tract joined land formerly owned by his mother, and which was a part of her original 800-acre tract. Between the 160 acres and the land adjoining it on this fourth side there was left an unplowed and uncultivated strip of land separating the two tracts of land, which to a certain extent marked the dividing line between these two tracts. While this uncultivated strip of land cannot be considered a "substantial enclosure" in the sense that these words are used in section 325, subd. 1, Code of Civil Procedure, yet there is evidence that the plaintiff cultivated the 160 acres up to this unplowed strip. This evidence is sufficient, if accepted by the trial court, to prove, in connection with his payment of taxes, adverse possession under subdivision 2 of said section 325, Code of Civil Procedure. The question of the payment of taxes and of the cultivation of the land were questions of fact to be decided by the trial court. There was sufficient evidence upon each of these issues to support the findings of the trial court favorable to the plaintiff. The plaintiff, having shown that he entered into possession of said real property under a parol gift thereof from his mother, and having further shown that he was in adverse possession of said real property for five years and over, and that during said period of time he paid all taxes assessed against said real property, became the owner of the legal title to said real property by adverse possession. Bakersfield T. H. Ass'n, v. Chester, 55 Cal. 98, 102, 103. Plaintiff's claim of title, therefore, is supported not only by the parol gift from his mother but also by adverse possession of said real property.

There are other questions raised by the defendants, but they possess so little merit that the mere statement of them would prove their own refutation. No useful purpose could be accomplished by any detailed discussion of them. We find no error in the record, and are of the opinion that the judgment should be affirmed. It is so ordered.

We concur: PRESTON, J.; SHENK, J.; LANGDON, J.; IRA F. THOMPSON, J.; SEAWELL, J.

217 Cal. 493

PEDRO v. HUMBOLDT COUNTY et al.

Sac. 4588.

Supreme Court of California.
March 1, 1933.

1. Covenants 🔑68.

Agreement by county, grantee of highway strip, to keep in good repair floodgates and ditch, not being covenant for benefit of land conveyed, was not "covenant running with land" (Civ. Code, § 1462).

[Ed. Note.—For other definitions of "Covenant Running with the Land," see Words and Phrases.]

2. Easements 🔑1.

Agreement by county, grantee of highway strip, to keep in good repair floodgates and ditch, was not condition or restriction on use of land conveyed, and did not create easement for benefit of grantor.

3. Covenants 🔑7.

Agreement recited in deed by county, grantee of highway strip, to keep in good repair floodgates and outlet to ditch, was personal undertaking of county as grantee part of consideration, binding upon county by acceptance of deed.

4. Covenants 🔑79(1).

Benefit of provision of deed to highway strip requiring county grantee to keep floodgates and ditch in repair *held* assignable without technical words authorizing assignment.

> Agreement, in substance, that grantee county would maintain and keep open ditch along side of right of way granted to county and would keep in good repair floodgates and outlet to ditch on side of right of way, and also construct road from cow barn to field on property, was assignable because nature and subject-matter were conclusive that fulfillment of agreement was intended to benefit land retained by grantor and therefore to benefit persons succeeding to ownership of land and to agreement made for benefit thereof.

5. Covenants 🔑79(1).

Assignee of benefit of county's covenant in deed to keep floodgates and ditch in repair could enforce covenant.

6. Estoppel 🔑62(3).

County could not retain benefit of conveyance of strip for highway and repudiate agreement to keep floodgates and ditch in repair.

7. Covenants 🔑114(1).

Complaint alleging county failed to maintain floodgates and ditch in repair as agreed, resulting in flooding of land, *held* good against general demurrer.

> Complaint alleged that county failed and refused to maintain floodgates and ditch in good condition and repair in accordance with covenant contained in deed to strip for highway, and as consequence cultivable lands of plaintiff, consisting of certain number of acres, became flooded with salt water and became valueless, that, prior to commencement of action, plaintiff filed with board of supervisors a claim for damages, which was rejected, and plaintiff prayed for equitable relief under terms of agreement and for damages.

8. Counties 🔑214.

That claim filed against county before bringing action was not itemized *held* no defense, where answer did not show rejection was not upon merits (Pol. Code, § 4075).

9. Damages 🔑140.

$3,250 for breach of agreement to keep floodgates and ditch in good repair, resulting in flooding with salt water 11 acres of cultivable land, *held* not excessive.

10. Appeal and error 🔑1064(1).

Instruction including loss of profits as item of damages for breach of covenant resulting in flooding of land *held* not prejudicial.

> Instruction was, in substance, that, as compensation for breach of county's agreement to keep floodgates and ditch in repair, resulting in flooding of lands with salt water, plaintiff was entitled to recover for loss of profits and rental value of property, in addition to cost of restoring land and other reasonable damage naturally flowing from county's failure to perform agreement.

In Bank.

Appeal from Superior Court, Humboldt County; T. H. Selvage, Judge.

Action by John Pedro against Humboldt County and others. From a judgment for plaintiff, defendants appeal.

Affirmed.

J. T. Fraser, Dist. Atty. and Delos A. Mace, Deputy Dist. Atty., both of Eureka, for appellants.

J. Logan Beamer, of Eureka, for respondent.

SHENK, Justice.

This is an appeal by the defendant county of Humboldt from a judgment against it in an action to enforce the terms of a certain deed accepted by the county from the plaintiff's grantor, and for damages.

In November, 1921, Elizabeth Marks was the owner of a ranch in Humboldt county comprising upwards of 240 acres, consisting of some timbered areas and some low reclaimed marshland used for agricultural purposes. On the 15th day of that month she executed and delivered to the county of Humboldt, and the county accepted from her, a deed to a forty-foot strip for road purposes running along the easterly boundary of her ranch, and the strip was thereafter included in the construction of the Samoa-Arcata highway. That deed recited a consideration of $10 and contained the following provisions: "It is understood and agreed that the grantee is to maintain and keep open a ditch along the east side of said right of way. Also to keep in good repair the flood gates and the outlet to ditch on east side of said right of way, and also to construct a road from cow barn to field on upper end of said property."

Subsequently and in July, 1924, Elizabeth Marks entered into a contract of sale of said ranch to the plaintiff herein for the total purchase price of $7,000 payable in certain annual installments. In February, 1930, the purchase price having been paid, Elizabeth Marks deeded the ranch to the plaintiff, excepting from the grant certain lands theretofore deeded, including the 40-foot strip to the county of Humboldt, but specifying that the provision in the deed to the county "relating to ditches, fences, floodgates, and road are not excepted," but that the interest of the grantor therein was assigned to the plaintiff.

The complaint alleged that the defendants have failed and refused to maintain the floodgates and ditch in good condition and repair, as a consequence of which the cultivable lands of the plaintiff, consisting of eleven or more acres, have become flooded with salt water and have become valueless. It was also alleged that prior to the commencement of the action the plaintiff filed with the defendant board of supervisors a claim in due and regular order for damages, which was rejected by the board. The plaintiff prayed for equitable relief under the terms of the agreement and for damages. At the trial, however, the plaintiff abandoned any right to equitable relief, and sought only the recovery of damages by reason of the defendants' failure to perform the contract. The jury returned a verdict for the plaintiff in the sum of $3,250.

The main contention on this appeal is that the provision contained in the deed of Elizabeth Marks to the county of Humboldt is not a covenant running with the land, but is a personal covenant running only in favor of Elizabeth Marks.

[1-5] It must here be noted that the floodgates and ditch in question are not on any part of the land conveyed to the county of Humboldt, but were maintained on the right of way of the Northwestern Pacific Railroad Company alongside and easterly of the forty-foot strip conveyed to the county. But whether or not the floodgates and ditch were upon the real property conveyed to the county, the agreement contained in the deed to the county, inasmuch as it is not a covenant for the benefit of the land conveyed, is not a covenant running with the land as defined by section 1462 of the Civil Code. Lyford v. North Pac. Coast R. R. Co., 92 Cal. 95, 28 P. 103. Neither is the agreement a condition or restriction on the use of the land conveyed, nor does it create an easement therein for the use or benefit of the grantor. It is a personal undertaking on the part of the county, as the grantee and covenantor, obviously given as part of the consideration for the deed, and is binding upon it by its acceptance of the deed as fully as if it had itself executed the instrument of conveyance. 3 Thompson on Real Property, § 1985. Whether the agreement, that is, the obligation to perform the agreement, would bind assigns of the covenantor, is not a question involved in this case. But it may not avail the defendant to say that the benefit of the contract between the original parties may not be enforced by the person entitled thereto by assignment from the covenantee. The defendants contend that, in order to make the benefit of the contract assignable, technical words showing an intention to benefit the heirs or assigns of the grantor or covenantee are necessary. But, as in the case involving the benefit of a covenant running with the land (Sacramento Suburban Fruit Lands Co. v. Whaley, 50 Cal. App. 125, 194 P. 1054; 7 Cal. Jur., pp. 737 and 728), technical words should not be necessary to show an intent that the benefit is transferable, if that intent can be shown by the nature and subject-matter of the agreement; and if, as in the present case, the benefit of the covenant has been assigned, the assignee is entitled to enforce it.

The nature and subject-matter of the agreement are themselves conclusive that the fulfillment of the agreement was not intended to benefit the covenantee only, but that it was intended also to benefit the land retained by the covenantee at the time she deeded the forty-foot strip to the defendants, and therefore to benefit the person or persons who may succeed to the ownership of the land and to the agreement made for the benefit thereof. The defendants do not question that the intent to benefit the land retained by the grantor is thus expressed by the agreement. The language of the covenant does not support a conclusion that the grantor exacted a promise and that the covenantor agreed to maintain the floodgates and ditch for the benefit of the land conveyed, that is, the county road, or that the road to be constructed from the cow barn to the field on the upper end of the "property" referred to any part of the property conveyed. That it was intended to benefit the land retained, or some part thereof, is clear.

[6] Furthermore, it has been held that counties may not accept and retain the benefit of such conveyances and thereafter repudiate

the reasonable burdens undertaken by them as a part of the consideration therefor (Hill v. City of Oxnard, 46 Cal. App. 624, 189 P. 825), and no good reason is suggested why that principle should not be applied in the present case. Neither do the defendants question the reasonableness of the covenant imposed by the acceptance of the grant.

[7] The contention is also made that the complaint does not state facts sufficient to constitute a cause of action, inasmuch as, so it is claimed, matters of substance are not alleged in direct terms but are included by inference to be deduced from exhibits attached to the complaint. The criticism might properly have been made the subject of a special demurrer, but, since such a demurrer to the complaint or to the supplemental complaint was not filed, no further discussion of it will be indulged. 21 Cal. Jur., p. 41. The pleadings were sufficient as against a general demurrer.

[8] Neither should any merit be accorded to the contention that the claim filed by the plaintiff with the board of supervisors prior to bringing action was not itemized, as required by law. The defendants by their answer sought to predicate a defense upon that ground. But the answer does not show that the rejection of the claim by the board was not upon its merits, so as to entitle the defendants to an adjudication on the issue raised by that defense. As provided by section 4075 of the Political Code, the time when the board of supervisors may raise this point is before the final acceptance or rejection of the claim on the merits, by notice to the claimant giving further time to have the demand properly itemized, etc.

[9, 10] The only remaining point requiring discussion is that the damages are excessive and that the court erred in its instructions to the jury as to the items of damage which the plaintiff would be entitled to recover. The court instructed the jury that the plaintiff would be entitled to recover for loss of profits and the rental value of the property, in addition to the cost of restoring the land and other reasonable damage naturally flowing from the defendants' failure to perform its agreement, suffered or to be suffered by the plaintiff. The only evidence called to our attention on the subject of damages is the showing on behalf of the plaintiff that the rental value of the land, before it was flooded with ocean water, was $25 per acre per annum, and that it would take from eight to ten years to reclaim the land after the water was shut off. Also that the value of the land before flooding was from $350 to $400 per acre and after flooding was not more than $100 per acre. Computed either way the verdict does not appear to be grossly excessive. The area overflowed was the only portion of the plaintiff's land that was valuable. While loss of profits was improperly included in the instruction as an item of damages, we cannot say from the evidence presented that such inclusion was prejudicial.

The judgment is affirmed.

We concur: WASTE, C. J.; SEAWELL, J.; LANGDON, J.; PRESTON, J.; IRA F. THOMPSON, J.; CURTIS, J.

In re THORNTON'S ESTATE.

GARRY v. CRESWELL et al. *

S. F. 14262.

Supreme Court of California.
March 1, 1933.

Rehearing Granted March 30, 1933.

1. Domicile 🔑**4(2).**

Domicile is largely question of intent.

2. Domicile 🔑**10.**

As regards domicile, acts of person are given more weight than declarations, even though they be written declarations.

3. Husband and wife 🔑**264.**

As regards question whether certain personal property was community property, evidence showed deceased husband was domiciled in Montana when property was acquired, and not in California.

Alleged declarations of deceased as to intention ultimately to return to California established at most a mere "floating intention" to return to California, and could not, when considered in connection with other facts and circumstances, be held sufficient to establish retention of California domicile.

4. Husband and wife 🔑**246.**

Mutual rights of husband and wife in personal marital property are ordinarily governed by law of matrimonial domicile at time of its acquisition.

Under principles of comity, these rights gained under law of sister state are not affected by subsequent change of domicile to another state where different laws exist.

5. Courts 🔑**511.**

Recognition of foreign laws cannot be claimed as right, but only as favor or courtesy, principles of comity being overruled by positive law.

6. Courts 🔑**511.**

In absence of any constitutional prohibition, Legislature may change principles of

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*For subsequent opinion see 33 P.2d 1.

comity as it sees fit, without violating duty owed to other states.

7. Constitutional law 🔑96.

As regards constitutionality of statute converting separate property into community property when brought within state, limitations on power of disposal of such property *held* to constitute deprivation of vested property rights (Civ. Code, §§ 172, 172a, and § 164, as amended by St. 1917, p. 827).

> When property was converted into community property, husband who had previously owned property could no longer give it away without wife's written consent, and, if he invested personal property in real property, he could not convey or encumber it without wife's consent.

8. Constitutional law 🔑93(1).

Testamentary power is not essential incident of property, and depriving or limiting owner of such power over property already acquired does not constitute deprivation of vested rights.

9. Domicile 🔑4(2).

Persons within state temporarily for purposes of health without intent to remain do not acquire domicile there.

10. Constitutional law 🔑277(1).
Husband and wife 🔑247.

Amended statute converting husband's separate property into community property when brought into state by husband who had become domiciled within state, *held* valid in so far as applying to personal property acquired after marriage in another state where it was separate property and brought into this state after effective date of amendment (Civ. Code, § 164, as amended by St. 1917, p. 827; Const. U. S. Amend. 14; Const. Cal. art. 1, § 13).

11. Constitutional law 🔑277(1).

Prohibition against deprivation of property without due process means that no state can deprive person of vested property rights which he possesses in that jurisdiction (Const. U. S. Amend. 14; Const. Cal. art. 1, § 13).

> Thus the due process clause does not compel state to recognize property rights which have been acquired in a sister state, solely because the owner of the property happened to be domiciled in that state when the property was acquired, after the owner has left that state and brought property to another state, and acquired new domicile.

12. Husband and wife 🔑247.

Statute converting husband's separate property into community property when husband brings property within state and acquires domicile within state, *held* permissible under Legislature's power to control and regulate marriage relation and incidental property rights (Civ. Code, § 164, as amended by St. 1917, p. 827).

13. Husband and wife 🔑246.

By voluntary assumption of residence within state and voluntarily bringing separate property within state, husband *held* to have impliedly consented to statutory conversion of such separate property into community property (Civ. Code, § 164, as amended by St. 1917, p. 827).

In Bank.

Appeal from Superior Court, Alameda County; Lincoln S. Church, Judge.

In the matter of the Estate of William M. Thornton, deceased. Petition by Joseph A. Garry, as executor of the will of Helen H. Thornton, deceased, for decree of distribution of the Estate of William M. Thornton, deceased, which was opposed by Lucy Creswell and others. From an order denying the application for distribution, petitioner appeals.

Reversed.

Prior opinion, see 12 P.(2d) 674.

Joseph A. Garry, of San Francisco (J. L. Royle, of Oakland, of counsel), for appellant.

Treadwell, Van Fleet & Laughlin and Carey Van Fleet, all of San Francisco, for respondent beneficiaries.

Pillsbury, Madison & Sutro, Frank D. Madison, and Marshall P. Madison, all of San Francisco (Maurice D. L. Fuller, of San Francisco, of counsel), for respondent Bank of California.

WASTE, Chief Justice.

Helen H. Thornton, the widow of the above-named decedent, appeals from an order denying her petition for distribution of one-half the estate of her deceased husband. The petition is based on the theory that the entire estate of the decedent is the community property of the deceased and petitioner. The husband, by will, attempted to dispose of the entire estate as if it were his separate property. The trial court found that all of the property of which William M. Thornton died possessed was his sole and separate property and, therefore, held that all of said property was subject to his testamentary control. The petitioner, Helen H. Thornton, having died pending this appeal, her executor has been duly and properly substituted as appellant.

[1-3] The sole question presented on this appeal is whether the property involved was in fact the separate property of Mr. Thornton, or whether it was the community property of Mr. Thornton and petitioner. The proper determination of this question depends, first, upon whether the decedent was

domiciled in California or Montana when the property was acquired, and, secondly, if the property was acquired while the decedent was domiciled in Montana, upon the constitutionality and effect of section 164 of the Civil Code, as amended in 1917 and 1923 (St. 1917, p. 827, and St. 1923, p. 746).

It is admitted on this appeal that all of the property involved was acquired by Mr. Thornton after marriage, during the periods 1885–1899 and 1906–1919, while he was living in Montana. The trial court found that Mr. Thornton was domiciled in Montana during the above two periods and further held that section 164 of the Civil Code could not affect the status of the property when it was brought into this state in 1919, when Mr. Thornton became domiciled here.

After reading the record, we are convinced that the findings of the trial court that the Thorntons were domiciled in Montana during the periods 1885–1899 and 1906–1919, during which periods the property involved was acquired, are amply supported by the record.

All of the physical facts and the conduct of Mr. Thornton indicate that he was domiciled in Montana during these two periods. As opposed to these facts, the only evidence indicating that the California domicile was retained is the testimony of Mrs. Thornton, the petitioner, that the decedent always intended to return to California and that in his mind California was his home, and that they kept open accounts in the San Francisco stores. It is of course true that domicile is largely a question of intent, but it is equally true that in determining that intent the acts of the person involved are to be given more weight than his declarations, even though they be written declarations. Thus, in Estate of Harkness, 176 Cal. 537, 542, 169 P. 78, 80, in discussing this point, it is stated: "Even written declarations must give way if inconsistent with actual conduct." See, also, Bullis v. Staniford, 178 Cal. 40, 45, 171 P. 1064; Estate of Damke, 133 Cal. 433, 436, 65 P. 888; Estate of Sweet, 2 Coffey's Probate Decisions 460, 462.

At most, the alleged declarations of decedent as to his intention ultimately to return to California establish what the decisions have held to be a mere "floating intention" to return to this state and cannot, when considered in connection with the other facts and circumstances above set forth, be held to be sufficient to establish the retention of the California domicile. Baker v. Baker, Eccles & Co., 162 Ky. 683, 173 S. W. 109, 118, L. R. A. 1917C, 171; Semple v. Commonwealth, 181 Ky. 675, 205 S. W. 789, 791; Bullis v. Staniford, supra; Gilbert v. David, 235 U. S. 561, 569, 35 S. Ct. 164, 59 L. Ed. 360.

It is admitted that, under Montana law, the property here involved, although acquired after marriage, was Mr. Thornton's separate property, subject, however, to Mrs. Thornton's dower rights.

We turn now to the second and most important question presented, namely, whether the personal property acquired in Montana, where it was the separate property of Mr. Thornton, was converted into community property when Mr. Thornton brought it to this state in 1919 and acquired a domicile here, under the provisions of section 164 of the Civil Code, as amended in 1917 (St. 1917, p. 827). There can be no doubt that the provisions of that section purport so to convert the property. The real question turns upon the constitutionality of that section.

Section 164 is the section of the Civil Code which defines community property. Sections 162 and 163 define the separate property of the spouses. Before it was amended in 1917, section 164, so far as pertinent here, provided that "all other property acquired after marriage by either husband or wife, or both, * * * is community property." As so worded, the section did not purport to apply to property acquired in a sister state while domiciled there, and later brought into this state. In 1917, however, the section was amended so as to provide specifically that property acquired in a sister state after marriage while domiciled there, other than property as defined in sections 162 and 163, became community property if later brought into this state by a person who becomes domiciled here. As amended in 1917 (St. 1917, p. 827), the section defined community property as follows: "All other property acquired after marriage by either husband or wife, or both, including real property situated in this state, and personal property wherever situated, acquired while domiciled elsewhere, which would not have been the separate property of either if acquired while domiciled in this state, is community property." In 1923 the section was again amended by adding the words "heretofore or hereafter" before the words "acquired while domiciled elsewhere."

The question thus presented is whether or not California, constitutionally, can thus convert property which was the separate property of the husband when acquired into community property, if the property is subsequently brought into this state by the husband who acquires a domicile here after 1917. It is to be noted that section 164 purports, apparently, not only to apply to personal property brought into this state, but also to personal property left in the sister state after a domicile is acquired here. We are not now concerned with the constitutionality of that portion of the section. We are here concerned solely with property acquired in Montana, under whose laws it was the separate property of the husband, subject to the wife's dower rights, and brought into this state in 1919 by a husband who acquired a domicile here in 1919.

[4-8] Before directly discussing the constitutionality of the section in so far as it applies to such property, certain general principles involved must first be mentioned. It should be emphasized that the question here presented is solely a constitutional question and does not involve any question of comity or of conflict of laws. It is a general principle of conflict of laws that the mutual rights of husband and wife in personal marital property are governed by the law of the matrimonial domicile at the time of its acquisition. Under principles of comity, these rights, gained under the law of a sister state, are not affected by any subsequent change of domicile to another state where a different law exists. Before the amendment to section 164 of the Civil Code in 1917, California recognized this principle of comity, and, accordingly, it was well settled that, if personal property was acquired after marriage by a husband and wife while domiciled in a state under whose laws it was the separate property of the husband, the status of that property was not changed if the property was later brought here, even if the parties became domiciled here. In other words, before 1917, if the property was the separate property of the husband under the laws of the state where it was acquired, it remained separate property when the husband subsequently brought it into this state and became domiciled here. Kraemer v. Kraemer, 52 Cal. 302; Estate of Burrows, 136 Cal. 113, 68 P. 488; Estate of Niccolls, 164 Cal. 368, 129 P. 278; Estate of Boselly, 178 Cal. 715, 175 P. 4; see, generally, Rush v. Landers, 107 La. 549, 32 So. 95, 57 L. R. A. 353; In re Estate of Majot, 199 N. Y. 29, 92 N. E. 402, 29 L. R. A. (N. S.) 781. These principles of conflict of laws are recognized by the overwhelming and uniform weight of authority. McKay, Community Property (2d Ed.) § 623 et seq. But it cannot be overemphasized that it is comity only which leads one state to deal in a particular way with foreign acquired rights. The recognition of foreign laws cannot be claimed as a right, but only as a favor or courtesy. It is elementary that the principles of comity are overruled by positive law. Story on Conflict of Laws (8th Ed.), § 244; Bank of Augusta v. Earle, 13 Pet. (38 U. S.) 519, 589, 10 L. Ed. 274; Smith v. McAtee, 27 Md. 420, 92 Am. Dec. 641; 10 Cal. Law Rev. 154. In the absence of any constitutional prohibition, the Legislature may change the principles of comity as it sees fit, and this cannot be claimed to be a violation of any duty this state owes other states. Stated in another way, the principles of comity above discussed can have no effect when there is a positive statute in this state, such as section 164 of the Civil Code, changing these principles. When such a statute is passed, attempting to convert separate property into community property, and thus attempting to repudiate a principle of conflict of laws, the question presented does not involve any question of comity, but becomes solely and entirely a constitutional question. California, by the amendment to section 164 in 1917, has repudiated the rule of comity heretofore existing, and the question is, Can California, constitutionally, by statutory mandate, thus convert separate property into community property? Respondents argue that to uphold such a statute would be to deprive the husband of certain vested rights acquired under the laws of Montana, and it is contended that to deprive the husband of these rights would be in violation of the Fourteenth Amendment to the Federal Constitution and in violation of article 1, section 13, of the state Constitution. In other words, it is contended that section 164 is unconstitutional because it violates the due process clauses of both the Federal and state Constitutions.

It is pointed out that, under the law of Montana, this property was the separate property of Mr. Thornton, over which he had the absolute power of disposition, and that if it was converted into community property in 1919, when he brought the property here and acquired a domicile here, he was deprived of certain rights which had vested under the laws of Montana. This is undoubtedly correct. If the property was converted into community property in 1919, Mr. Thornton's power of disposition was considerably limited. Under section 172 of the Civil Code he could no longer give the property away without his wife's written consent. If he invested the personal property brought from Montana in real property here, he could no longer convey or encumber it without his wife's consent. Sec. 172a, Civ. Code. These two limitations on the husband's power of disposal clearly constitute the deprivation of a property right which had "vested" under the law of Montana. Spreckels v. Spreckels, 116 Cal. 339, 48 P. 228, 36 L. R. A. 497, 58 Am. St. Rep. 170; Clavo v. Clavo, 10 Cal. App. 447, 102 P. 556. Another result of the conversion, if upheld, would be to limit the husband's power of testamentary disposition to one-half the property. Probate Code, § 201. This does not constitute the deprivation of a vested right. Testamentary power is not an essential incident of property and depriving or limiting an owner of that power over property already acquired does not constitute a deprivation of a vested right. Magoun v. Illinois Trust & Savings Bank, 170 U. S. 283, 288, 18 S. Ct. 594, 42 L. Ed. 1037; In re Stanford's Estate, 126 Cal. 112, 54 P. 259, 58 P. 462, 45 L. R. A. 788; Eyre v. Jacob, 14 Grat. (55 Va.) 422, 73 Am. Dec. 367.

From the foregoing discussion, it necessarily follows that if the provisions of section 164 of the Civil Code, as amended in 1917, are enforced, it will necessarily result in depriving persons of certain property rights which had vested under the laws of a sister state. We are, therefore, directly presented with the question, Can California, constitutionally, impose the loss of such rights as a condition of acquiring a domicile here, if the property is brought here and the domicile is acquired after 1917?

The constitutionality of section 164, as amended, in so far as it applies to personal property brought into this state by one who becomes domiciled here after 1917, has not yet been passed upon by this court. The 1917 amendment was first noticed by this court in Estate of Arms, 186 Cal. 554, 199 P. 1053. However, the effect of the amendment was not there involved, because Arms died before the amendment took effect. The first construction of the amendment was in Estate of Frees, 187 Cal. 150, 201 P. 112. In that case a husband and wife after marriage, while domiciled in Illinois, acquired considerable personal property which, by the laws of that state, was the husband's separate property. They became domiciled in this state in 1910, and brought the property with them. Upon the husband's death the wife contended that section 164, as amended in 1917, had converted the property into community property. This court held that section 164 could not be interpreted to act retroactively so as to affect rights which had become vested under the laws of California; that when the property was brought into this state in 1910, under the law as it then existed the property remained the separate property of the husband, and that the 1917 amendment could not be interpreted to act retroactively so as to deprive the husband of the rights which had vested under the laws of this state. This case in no way involved the application of the amendment to personal property brought into this state after the amendment became effective. The same situation existed in the Estate of Drishaus, 199 Cal. 369, 249 P. 515. It will be remembered that section 164 had again been amended in 1923 (St. 1923, p. 746) to provide expressly that it was retroactive. In this case the property involved was personal property acquired after marriage by a husband and wife domiciled in Nebraska, and, by the laws of that state, it was the separate property of the husband. In 1916 the husband and wife became domiciled in California, bringing all the personal property with them. Upon the husband's death the wife contended, as had been contended in the Estate of Frees, supra, that the property was converted into community property by the 1917 and 1923 amendments to section 164. Again this court held that when the property was brought here in 1916 it remained, under the law then existing, the separate property of the husband, and that this state could not by statute take away rights which had vested under the laws of this state before the statute was passed. So far as the cases heretofore decided by this court are concerned, all that has been decided is that the 1917 and 1923 amendments can have no effect on property brought into this state before the passage of the amendments, because to convert such property from separate to community property would be to deprive the husband of rights vested under the laws of this state. The cases heretofore decided by this court have left open the constitutionality of section 164, in so far as it applies to property brought into this state after the passage of the amendment. This is the situation that is presented in the instant case.

In addition to the three Supreme Court cases above mentioned, which, as we have seen, are not in point, respondents rely on certain decisions of the District Courts of Appeal. The first of these cases is Williams v. Sutphen, 92 Cal. App. 697, 268 P. 946, a reading of which case demonstrates that the point here involved was not considered by the court. No mention is made of section 164 of the Civil Code in the opinion. In that case certain property was held in the wife's name and treated by both husband and wife as the separate property of the wife. Under either the law of Oregon, where this property was acquired, or the law of this state, such property would be, in the absence of evidence to the contrary, the wife's separate property, and the trial court so found. The case simply involves the usual situation of upholding findings when there is ample evidence to support them.

In Scott v. Remley, 119 Cal. App. 384, 6 P. (2d) 536, and Estate of Bruggemeyer, 115 Cal. App. 525, 2 P.(2d) 534, the point involved in the instant case was directly presented to and considered by the District Court of Appeal. In both cases the property was acquired after marriage in a common-law state, where it was the separate property of the husband. After 1917 the property was brought into this state and the parties became domiciled here. In both cases the District Court of Appeal, on the authority of Estate of Arms, Estate of Frees, and Estate of Drishaus, supra, held that section 164 was unconstitutional. As already pointed out, the cases relied upon merely held that the amendment to section 164 could not affect the status of property brought into this state before 1917. Those cases did not, and properly could not, consider the question as to the constitutionality of the amendment, in so far as it affects property brought into this state after its passage. For that reason, and for the further reason that no petition for hearing in this court was filed in either of these cases, they cannot be held to have established the law of this state on the proposition now before us.

[9] The only other case necessary to refer to is Melvin v. Carl, 118 Cal. App. 249, 4 P.

(2d) 954, 955, in which case this court denied a hearing. This case involved the following situation. The Melvins were domiciled in Iowa and lived and were domiciled there for thirty years after their marriage. They acquired considerable personal property which, under the laws of Iowa, was the husband's separate property. The opinion states, "In November, 1919, they came to Los Angeles for the benefit of the health of M. E. Melvin, returning to their home in Iowa in 1921." While temporarily present here, Mr. Melvin purchased two lots in this state with money acquired in Iowa. Later, after returning to Iowa, Mr. Melvin sold the lots without securing his wife's signature to the deeds. The case involved the validity of those deeds as against the wife. The court held these lots were the separate property of the husband. In arriving at this conclusion, the court indulged in a long discussion of the effect of section 164, as amended in 1917, and held, relying on the three Supreme Court cases which it has already been pointed out are not in point, that the section was unconstitutional. From a reading of the decision it is at once apparent that there was another ground upon which the same result could have been reached. The facts, as disclosed in the opinion, clearly indicate that the Melvins never were domiciled in this state. They apparently came to this state temporarily for purposes of health. Persons in this state for such a purpose, without the intent to remain here, do not, of course, acquire a domicile in this state. Section 164 of the Civil Code obviously can apply only where a domicile has been acquired in this state. It is, therefore, apparent that the constitutionality of section 164 was never properly involved in that case and the case could have been decided on another ground. For that reason, and for the further reason that the cases cited by the District Court of Appeal are not in point, we are not inclined to feel bound by that decision.

[10, 11] We are of the opinion that the question involved in the instant case has never before been properly before this court. Nor have we found any case from any other jurisdiction directly in point, although in Brookman v. Durkee, 46 Wash. 578, 90 P. 914, 12 L. R. A. (N. S.) 921, 123 Am. St. Rep. 944, 13 Ann. Cas. 839, the Supreme Court of Washington, by way of dicta, stated that in its opinion such a statute, if passed, would be unconstitutional. After careful consideration of all the arguments advanced by respondents, we are of the opinion that section 164, as amended in 1917, is constitutional in so far as it applies to personal property acquired after marriage in a state where it is the separate property of the husband and brought into this state, after the effective date of the amendment to section 164 of the Civil Code, by a husband who becomes domiciled here after 1917. In other words, we are of the opinion that California can constitutionally convert the separate property of the husband into community property, under the conditions outlined in section 164, where such property is brought here and the parties become domiciled here after 1917. We are of the opinion that such an interpretation does not constitute a violation of the due process clause of either the Federal or state Constitution. This is so for two reasons.

In the first place, we do not believe that the due process clause compels this state to recognize property rights which have been acquired in a sister state, solely because the owner of the property happened to be domiciled in that state when the property was acquired, after the owner has left that state and brought the property to this state and acquired a domicile here. The prohibition against deprivation of property without due process, in its constitutional sense, means that no state can deprive any person of a vested property right which he possesses in that jurisdiction. California, by passing such a section as 164 of the Civil Code. obviously was not intending, nor did it have the power, to affect the status of property in any other state. The legislation was aimed at property which it was contemplated would be brought into this state in the future by persons who would become domiciled here. In other words, the statute was intended to apply to property after it was taken from the state where it was acquired, and after the status imposed upon the property by the law of the place of acquisition had been lost by virtue of the fact that the property had left that state and its owner was no longer domiciled in that state. In the instant case, when Mr. Thornton acquired the property in Montana, he acquired certain rights in that property simply by virtue of the fact that he was domiciled in Montana and the property was acquired there. But the status that was impressed upon the property by the law of Montana was lost when the property was taken by Mr. Thornton from that state, and he left that state and acquired a domicile here. The status impressed upon the property by the law of Montana can have no extraterritorial effect in contravention of the positive statutes of the state to which the property is brought. When the property was brought by Mr. Thornton to California, and he acquired a domicile here, then, for the first time, he acquired certain rights under the California law. That was the first time the California law began to operate on the property. When Mr. Thornton acquired a domicile here in 1919, he acquired such domicile subject to the terms and conditions imposed by section 164 of the Civil Code. It is our view that the due process clause is not involved in such a situation. See 15 Cal. Law Rev. 399.

There are several analogous situations where, upon property being removed from the state of its acquisition, certain rights therein are affected. It is only necessary to mention one. Thus the state of Michigan, for many years, has refused to recognize the validity of chattel mortgages executed in other states, as against domestic creditors, upon property brought within the state of Michigan. Corbett v. Littlefield, 84 Mich. 30, 47 N. W. 581, 11 L. R. A. 95, 22 Am. St. Rep. 681; Boydson v. Goodrich, 49 Mich. 65, 12 N. W. 913. In this situation, by simply changing the locus of the property, the vested property right of the mortgagee was lost. The analogy would seem to be a close one.

[12] The second reason why, in our opinion, section 164 of the Civil Code is constitutional, as applied to property brought into this state after 1917 by one who becomes domiciled here after that date, is that even if the 1917 amendment to that section does constitute a deprivation of a property right in the constitutional sense, which we have already held it does not, such legislation is permissible under the power of the Legislature to control and regulate the marriage relation and its incidental property rights. Baker's Executors v. Kilgore, 145 U. S. 487, 491, 12 S. Ct. 943, 36 L. Ed. 786; Noel v. Ewing, 9 Ind. 37. It has always been part of the public policy of this state to protect the interests of the wife in marital property.

[13] Although it is true that in Estate of Frees and Estate of Drishaus, supra, it was held that this state would not be justified in converting separate property into community, where the husband's rights to the property had vested under the laws of this state, the conversion as applied to property when it is brought into this state after 1917 stands on an entirely different basis. Where the property was brought into this state before 1917 the conversion was involuntary, but as applied to property brought into this state after 1917, the conversion was dependent upon its owner's decision, with full knowledge of the existing law, to bring the property here and to take up a domicile here. When the property was brought here by Mr. Thornton in 1919 and he became domiciled in this state, he was charged with knowledge of the then existing California law and had notice that if he brought the property into this state his rights therein would be limited. Mr. Thornton must be held to have impliedly consented to the conversion by his voluntary assumption of residence here and by voluntarily bringing the property here. 20 Cal. Law Rev. 201.

For the foregoing reasons the order appealed from is reversed.

We concur: CURTIS, J.; LANGDON, J.; SHENK, J.; PRESTON, J.; SEAWELL, J.

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217 Cal. 484

KINGSBURY v. ROSS.

L. A. 13713.

Supreme Court of California.

March 1, 1933.

Rehearing Denied March 30, 1933.

1. Executors and administrators ⚷315(6).

Decree of distribution does not determine title between legatee whose right has vested and his grantee.

2. Executors and administrators ⚷315(6).

Interest of remote grantee of devisee in land and rents, issues, and profits thereof *held* not defeated by subsequent decree of distribution adjudging title in devisee.

CURTIS, SHENK, and LANGDON, JJ., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; Stephen G. Long, Judge.

Action by J. M. Kingsbury against Estelle M. Ross, substituted for Frank Bryson, administrator with the will annexed of the estate of Sadie B. Boyer, in which substituted defendant filed a cross-complaint. From an adverse judgment, plaintiff appeals.

Reversed and remanded.

For former opinion, see 10 P.(2d) 180.

W. S. Allen and Lawrence W. Allen, both of Los Angeles, for appellant.

Charles S. Darden, of Los Angeles, for respondent.

PRESTON, Justice.

Action by plaintiff for the sum of $1,224.26 in the hands of Frank Bryson, the public administrator of Los Angeles, who acted as administrator with the will annexed of the estate of Sadie B. Boyer. This sum represents rentals received by the administrator subsequent to August 13, 1921, and prior to commencement of this action, for the use and occupation of a certain tract of real property in Los Angeles county, same being the sole asset of said estate. The administrator paid the sum into court and asked that respondent Estelle M. Ross be substituted as the true defendant in the action, she being the sole legatee and devisee of said decedent. This order was made. Said Estelle M. Ross thereupon by answer denied the claims of plaintiff and at the same time filed a cross-complaint and supplemental cross-complaint setting up the fact that a final decree of distribution in said estate of said property to her was made on July 28, 1927, and that by such decree and the doctrine of relation she and not plaintiff was entitled to said land and all the accrued rents, issues, and profits thereof.

At this point a further exposition of the facts is necessary. The present action was commenced in November, 1927, and concluded on July 10, 1929. The record does not show the date of the death of Sadie B. Boyer, but it is conceded that she died prior to March 31, 1920, on which date respondent by a deed regular on its face conveyed the real property belonging to her as devisee of said estate to Lawrence W. Allen and he in turn, on August 13, 1921, conveyed it to this plaintiff, J. M. Kingsbury. Evidently Allen executed a defeasance agreement to respondent, for in a former suit between these same parties (Ross v. Allen, 82 Cal. App. 758, 256 P. 248), it appears that the conveyances above described were adjudged subject to cancellation upon the payment by Estelle M. Ross for the benefit of Allen of the sum of $1,370. The judgment in said former suit, as shown by the record before us, in this behalf states: "It is ordered * * * that the deed executed by * * * Ross to * * * Allen, and the deed executed by * * * Allen to * * * Kingsbury, are hereby adjudged and decreed cancelled provided that within ninety days * * * plaintiff pay into and deliver to the clerk * * * the sum of $1,370.00 together with interest * * * from August 13, 1921, to date of payment thereof * * * and that if said sum is not so paid by the plaintiff, then the said deeds to remain in full force and effect * * *."

[1, 2] It appears that respondent paid nothing within the ninety days or at any other time for or on account of said judgment. Notwithstanding this situation, the court below made its findings and gave its judgment in favor of respondent Ross in this action. The mind of the court evidently was that said decree of distribution naming respondent as legatee became final and thereby defeated any prior claim of plaintiff to said property or to the rents, issues, and profits thereof. In this holding the court was in error.

The deed to Allen was one by a sole legatee subsequent to the death of the testator and the deed to plaintiff carried the title Allen has acquired. These conveyances, if valid, vested in plaintiff the right to rents, issues, and profits of the property as against defendant on and after August 13, 1921. A decree of distribution does not determine the title between a legatee whose right has vested and his grantee. It is conclusive only as to the claims and rights of heirs, legatees, and devisees upon whom the estate at the time of death devolves.

The case of Chever v. Ching Hong Poy, 82 Cal. 68, 71, 22 P. 1081, 1082, contains a statement of the rule as follows: "Section 1666, Code Civil Proc., provides that a decree of distribution 'is conclusive as to the rights of heirs, legatees, or devisees;' but it is conclusive against them only as heirs, legatees, or devisees,—only so far as they claim in such capacities. The probate court has jurisdiction to determine who are the legal heirs of a deceased person who died intestate, and who are the devisees or legatees of one who died testate; but its determination of such matters does not create any new title. It merely declares the title which accrued under the law of descents, or under the provisions of the will. The decree of distribution has nothing to do with contracts or conveyances which may have been made by heirs, devisees, or legatees, of or about their shares of the estate, either among themselves or with others. Such matters are not before the probate court, and over them it has no jurisdiction. An heir may contract about or convey the title which the law has cast upon him on the death of his ancestor; and the validity or force of such contract is not affected by the fact that a probate court afterwards, by its decree of distribution, declares his asserted heirship and title to be valid."

This holding has been adhered to without exception as shown by the following cases: Archer v. Harvey, 164 Cal. 274, 128 P. 410; Parr v. Reyman, 215 Cal. 616, 12 P.(2d) 440.

The judgment is reversed, and the cause remanded for further proceedings not inconsistent with this holding.

We concur: WASTE, C. J.; SEAWELL, J.; TYLER, Justice pro tem.

We dissent: CURTIS, J.; SHENK, J.; LANGDON, J.

217 Cal. 474

LEMM v. STILLWATER LAND & CATTLE CO. et al.

STILLWATER LAND & CATTLE CO. v. LEMM et al.

Sac. 4633.

Supreme Court of California.
Feb. 28, 1933.

1. Contracts 🔑143.

Court must construe contract as a whole, and give to each clause qualification which parties intended (Civ. Code, § 1641).

2. Contracts 🔑147(1).

In interpretation of contracts, court's duty is to ascertain intent of parties.

3. Contracts 🔑143.

Although language of contract must govern its interpretation, its meaning is to be obtained from entire contract, and not from one or more isolated portions thereof (Civ. Code, §§ 1638, 1639).

4. Contracts ⚷169.

In interpreting contract, court may look to circumstances surrounding parties at time they contracted, including object, nature, and subject-matter of agreement, and preliminary negotiations between parties (Civ. Code, § 1647; Code Civ. Proc. § 1860).

5. Contracts ⚷153.

If provisions of contract as a whole are susceptible of interpretation which will give effect to mutual intention of parties as it existed at time of contracting, court must so interpret them (Civ. Code, § 1636).

6. Contracts ⚷147(3).

Court must give effect to mutual intention of parties as gathered from contract as a whole, though broader and more general terms of contract may, standing alone, include something else (Civ. Code, § 1648; Code Civ. Proc. § 1859).

7. Contracts ⚷170(1).

Court may consider events subsequent to execution of contract, particularly practical construction given to contract by parties themselves, in determining their mutual intention at time of contracting.

8. Contracts ⚷147(2).

If ascertained mutual intent of parties is not readable from language of contract, intention is to be regarded and erroneous parts of contract disregarded (Civ. Code, § 1640).

9. Compromise and settlement ⚷16(1).

Compromises settle only differences clearly comprehended in them by intention of parties and necessary consequences thereof, and do not extend to matters which parties never intended to include therein, although existing at the time.

10. Compromise and settlement ⚷16(1).

Stipulation agreement construed to settle only claims involved in chattel mortgage foreclosure action in which it was filed, and not claims in subsequent actions between mortgagor and another defendant on conditional sales contract and to cancel note and deed of trust (Civ. Code §§ 1636, 1638–1641, 1647, 1648; Code Civ. Proc. §§ 1859, 1860).

> Stipulation agreement filed in action to foreclose chattel mortgage securing four notes also secured by two trust deeds provided that, in order to settle action, mortgagor would assign to mortgagees and a party defendant who held one note all property covered by chattel mortgage and convey certain real property to them; that they were to dismiss action as to mortgagor; that property conveyed by deeds of trust was to be reconveyed and chattel mortgage satisfied; that, when conveyances were delivered and accepted, all demands of mortgagees and defendant against mortgagor were to be considered settled; that mortgagees and defendant were to reconvey to mortgagor any land theretofore conveyed to them as security.

11. Appeal and error ⚷1008(1).

Whether parties intended to contract with reference only to those matters which comprised subject of action in which stipulation agreement was filed *held* for trial court.

12. Appeal and error ⚷1050(1).

Error, if any, in permitting parties to stipulation agreement to testify respecting their beliefs as to what was included therein, *held* not prejudicial, where evidence showed that parties intended to settle only claims arising out of action in which agreement was filed, and judgment so declared.

13. Evidence ⚷460(13).

Evidence is admissible to show what claims existed in favor of promisor at time release was given.

14. Appeal and error ⚷996.

Inference to be drawn from evidence introduced in explanation of delay in prosecuting claims existing in favor of promisor at time release was given *held* for trial court.

In Bank.

Appeals from Superior Court, Shasta County; R. M. Rankin, Judge.

Actions by Charles L. Lemm, also known as Chas. L. Lemm, against the Stillwater Land & Cattle Company and others, and by the Stillwater Land & Cattle Company against Charles L. Lemm and others, wherein named defendant filed a cross-complaint. From judgments in favor of Charles L. Lemm in each case, the Stillwater Land & Cattle Company appeals.

Affirmed.

Jesse W. Carter, of Redding, for appellant.

Carr & Kennedy, of Redding, for respondents.

SHENK, Justice.

The appeals in these cases are from judgments in favor of Charles L. Lemm, the respondent in each case.

On May 11, 1928, Charles L. Lemm brought an action against Stillwater Land & Cattle Company, hereinafter referred to as the Stillwater Company, and other defendants, to recover possession of a certain hay press or the value thereof, and damages for its wrongful detention. The hay press was sold on March 3, 1924, to the Stillwater Company by the McCormick-Saeltzer Company under the terms of a contract of conditional sale for the sum of $809.91. Installments under the contract were payable $300 on February 14, 1925, and the balance on February 14, 1926, with interest. On July 13, 1925, the note and contract were assigned and transferred to Charles L. Lemm. The complaint alleged failure of the defendant to perform the terms of the contract. By way of answer and affirmative defense the Stillwater Company pleaded an instrument entitled "Stipulation and Agreement," executed on July 7, 1925, which it was alleged constituted a full and complete settlement and release of the contract relied upon, and that the obligation evidenced thereby was fully satisfied and discharged.

On August 10, 1928, the Stillwater Company brought an action against Charles L. Lemm and others to cancel a certain note and deed of trust dated December 10, 1921, executed by said company to secure the repayment of the sum of $4,000 loaned to it by Lemm. The basis of that action was the same "Stipulation and Agreement" dated July 7, 1925, pleaded in the answer filed in the action to recover the hay press. In the complaint in the action to cancel the note and deed of trust, it was alleged that the agreement of July 7, 1925, "was intended by said Charles L. Lemm and plaintiff herein, to constitute a full and complete settlement between them, and the obligation which was the subject of said deed of trust * * * was fully paid, satisfied and discharged thereby." By his answer Lemm denied the effect of the instrument as alleged in the complaint, and by way of cross-complaint sought a reformation of the instrument to accord with the true intent of the parties, on the ground of mutual mistake. The Stillwater Company demurred generally to the cross-complaint and specially on the ground that the cause of action was barred by the provisions of subdivision 4 of section 338, Code of Civil Procedure.

In each action judgment was entered for Charles L. Lemm based on the court's findings that the "Stipulation and Agreement" of July 7, 1925, did not embrace the items involved in these actions. The court also granted the relief sought by the cross-complaint. The Stillwater Company appealed from both judgments.

Both appeals are presented on a single transcript, and both are argued in one set of briefs. Several contentions are made as grounds of appeal. The principal contention involves an interpretation of the agreement of July 7, 1925. That agreement was entitled and filed in an action then pending in the Superior Court of Shasta county, brought by the Capital National Bank, the Redding National Bank, and the First Savings Bank of Shasta County, as plaintiffs, against Stillwater Land & Cattle Company and Charles L. Lemm, as defendants, for the purpose of foreclosing a certain chattel mortgage dated January 6, 1922, securing four promissory notes of the Stillwater Company aggregating a face value of $48,722.91. One of these notes was delivered to each of the plaintiffs in the action and Northern California National Bank. The four notes involved in that action were also secured by a trust deed dated January 6, 1922, and a deed of trust dated February 11, 1922. The note delivered to Northern California National Bank as the payee, together with the right, title, and interest of that bank in the chattel mortgage involved in the foreclosure action and in the two deeds of trust last above mentioned, were assigned to Charles L. Lemm.

The agreement of July 7, 1925, recites: "Whereas, the parties to the above entitled action desire to compromise and settle the above entitled action, so far as the same relates to the defendant Stillwater Land and Cattle Company * * * the parties hereto do agree as follows." Provision (1) in substance is that the Stillwater Company will assign to the plaintiffs and Charles L. Lemm all of the personal property covered by the chattel mortgage. The Stillwater Company also agreed to convey to the plaintiffs and Lemm certain real property described in the agreement comprising a tract of 420 acres, none of which was any part of the real property described in the trust deed of December 10, 1921, involved in the cancellation action herein. By paragraph (2) the plaintiff banks and the defendant Lemm agreed to file a dismissal of that action as to the defendant Stillwater Company. Paragraph (3) provided for the execution and recordation of deeds of reconveyance of the real property described in the two deeds of trust referred to in the action and a satisfaction of the chattel mortgage involved therein. The time when possession of the property, both personal and real, should be transferred was provided by paragraph (4). Paragraph (5) related to the assignment of existing insurance policies.

The agreement then reads: "(6) When defendant Stillwater Land and Cattle Company has made the aforesaid conveyances described in paragraph 1 herein, and the same shall have been accepted by the plaintiffs and defendant Charles L. Lemm, such delivery and acceptance of such conveyances shall be and constitute a settlement in full of all demands and obligations which the plaintiffs herein and defendant Charles L. Lemm have against said Stillwater Land and Cattle Company, and particularly all claims and demands whatsoever arising out of or connected with said deeds of trust and chattel mortgage and obligations connected therewith or secured thereby." Paragraph (7) makes provision for payments of costs of suit, etc. Paragraph (8) sets forth that the trial of the action shall be dropped from the calendar, and that the plaintiffs in the action and Charles L. Lemm shall forthwith agree upon the amounts due and the respective priorities of the claims of the plaintiffs and Lemm "under said chattel mortgage and deeds of trust referred to in the above entitled action," or for an accounting and trial by the court in case of disagreement, "and the court shall determine the respective amounts due each of the plaintiffs and said defendant Charles L. Lemm, and the priorities of such amounts under the terms of said chattel mortgage and said deeds of trust." The remaining specific agreements are: "(9) Plaintiffs, and each of them, and Charles L. Lemm, defendant, hereby agree to reconvey to defendant Stillwater Land and Cattle Company any lands which may have heretofore been conveyed to them, or any of them, as security or otherwise, other than the real property described in paragraph 1, which Stillwater Land and Cattle Company is to convey to plaintiffs and defendant Charles L. Lemm. * * * (10) Stillwater Land and Cattle Company hereby releases each of the plaintiffs and defendant Charles L. Lemm of and from all obligations, demands and claims whatsoever." The agreement was executed by all of the parties to the action in which the agreement was filed.

Pursuant to the terms of the agreement, the conveyances provided in paragraph (1) were made, and further negotiations were had among the parties not necessary to mention in detail.

[1-6] On these appeals the Stillwater Company contends that the provisions of paragraph (6) and (9) of the agreement of July 7, 1925, are clear and unambiguous, that no assistance outside of their terms is required to interpret them, and that the court erred in admitting over objection evidence of the surrounding circumstances and of the negotiations of the parties upon which to base its findings that the items involved in the actions herein were not embraced within, nor settled and discharged by, the agreement. In other words, the contention, on that phase of the controversy involving an interpretation of the agreement to support the findings and judgment, is that the effect of admitting evidence of the circumstances surrounding the parties and of the negotiations leading up to the execution of the agreement is to vary the terms of the agreement, which is conceded to be the exclusive memorial of the negotiations of settlement, contrary to the provisions of section 1856, Code of Civil Procedure. The appellant's argument, however, presupposes that the court may not look farther than to the language of the paragraphs relied upon by the appellant for an interpretation thereof. The law is to the contrary. A court must look at the contract as a whole and give to each particular clause thereof the modification or limitation or qualification which it is evident from the other parts of the contract the parties intended. Section 1641, Civ. Code; Ogburn v. Travelers Ins. Co., 207 Cal. 50, 53, 276 P. 1004; Stockton Sav. & L. Soc. v. Purvis, 112 Cal. 236, 238, 44 P. 561, 53 Am. St. Rep. 210; 6 R. C. L., pp. 834 et seq. In the interpretation of contracts, the duty of the court is to ascertain the intent of the parties. Although the language of the contract must govern its interpretation (Civ. Code, §§ 1638, 1639), nevertheless the meaning is to be obtained from the entire contract, and not from any one or more isolated portions thereof. Hunt v. United Bank & Trust Co., 210 Cal. 108, 115, 291 P. 184; Kennedy v. Lee, 147 Cal. 596, 601, 82 P. 257; Eastman v. Piper, 68 Cal. App. 554, 229 P. 1002; 13 C. J., p. 525. To assist it in the performance of this duty the court may look to the circumstances surrounding the parties at the time they contracted (Civ. Code, § 1647; Ogburn v. Travelers Ins. Co., 207 Cal. 50, 52, 276 P. 1004; Smith v. Carlston, 205 Cal. 541, 550, 271 P. 1091; Henika v. Lange, 55 Cal. App. 336, 339, 203 P. 798), including the object, nature, and subject-matter of the agreement (6 R. C. L., pp. 836, 837; Eastman v. Piper, 68 Cal. App. 554, 565, 229 P. 1002; Canal Co. v. Hill, 82 U. S. (15 Wall.) 94, 100–101, 21 L. Ed. 64), and the preliminary negotiations between the parties (6 R. C. L., p. 839), and thus place itself in the same situation in which the parties found themselves at the time of contracting (Code Civ. Proc. § 1860; 6 R. C. L., p. 849; Jersey Island Dredging Co. v. Whitney, 149 Cal. 269, 273, 86 P. 509, 691; Blaeholder v. Guthrie, 17 Cal. App. 297, 300, 119 P. 524). If the provisions of the contract as a whole are susceptible of an interpretation which will give effect to the mutual lawful intention of the parties as it is thus found to have existed at the time of contracting, the court is bound to give to them that interpretation. Civ. Code, § 1636; Saunders v. Clark, 29 Cal. 300, 304; Retsloff v. Smith, 79 Cal. App. 443, 452, 249 P. 886; 13 C. J. pp. 521, 523, § 482; 6 R. C. L. pp. 841–842. Whenever it may be determined as a matter of law that the actual mutual intention of the parties may be found within the scope of the language employed by them, the court must interpret the contract so as to give effect to such intention, even though the broader and more general terms of the contract may, standing alone, apparently include something as to which it nevertheless appears from the circumstances and from the contract as a whole that the parties did not intend to contract. Civ. Code, § 1648; Code Civ. Proc. § 1859; 13 C. J. p. 523.

[7] In viewing the surrounding circumstances and the situation of the parties, the court may also call to its aid the events subsequent to the execution of the contract, particularly the practical construction given to the contract by the parties themselves, as

shedding light upon the question of their mutual intention at the time of contracting. 6 R. C. L. p. 853.

[8] The proper application of these rules of construction and interpretation does not have the effect to vary the terms of a contract nor to make a different contract for the parties. But the purpose of the rules is to make the language used by the parties serve, rather than subvert, their mutual intention; and they are enacted for the assistance of the court to that end; for, if the mutual intent as so ascertained is not readable from the language of the contract viewed by its four corners, the case then becomes one of mistake for the application of section 1640 of the Civil Code. Wigmore, Evidence (2d Ed.) vol. V, § 2430; 6 R. C. L. p. 835, § 225 et seq.; United Iron Works v. Outer H., etc., Co., 168 Cal. 81, 141 P. 917; Balfour v. Fresno C. & I. Co., 109 Cal. 221, 225, 41 P. 876.

[9] Furthermore, it may be well to note some authorities which have given support to the statement that "compromises regulate and settle only such matters and differences as appear clearly to be comprehended in them by the intention of the parties and the necessary consequences thereof, and do not extend to matters which the parties never intended to include therein, although existing at the time." 8 Cyc. 520, 521. Such a statement flows as a corollary from the application of the rules hereinabove referred to; and is applicable in the case of a written memorial whenever at least the matters of difference are clearly comprehended within the terms of the instrument. See Carpenter v. Markham, 172 Cal. 112, 155 P. 644; Jersey Island Dredging Co. v. Whitney, 149 Cal. 269, 273, 86 P. 509, 691; Texas & Pac. Ry. Co. v. Dashiell, 198 U. S. 521, 527, 25 S. Ct. 737, 49 L. Ed. 1150; 22 Cal. Jur., p. 760.

[10-14] When the contract of July 7, 1925, is viewed as a whole, it is manifest that the trial court correctly applied the foregoing rules for construing its language when it determined that the parties thereby expressed an intention to settle and discharge only those claims which were involved in the action in which the agreement was filed. And this is so, even though another and different intention is also readable therefrom. Whether as a question of fact the parties had the intention to contract with reference only to those matters or things which comprised the subject of the action in which the agreement was filed was a question primarily for the trial court to decide from the evidence of the surrounding circumstances and the negotiations leading up to the embodiment of the agreement into its written form. The court, if it erred at all in this respect, committed error in permitting any of the parties to the negotiations to testify respecting his belief or conclusion as to what was included in the settlement. Swain v. Grangers' Union, 69 Cal. 186, 10 P. 404. Any such error in the present case is, however, without prejudice, inasmuch as the contract and the competent evidence in the record make it clear that the parties intended to settle only the claims arising out of the four notes involved in the foreclosure action. The evidence of the subsequent conduct of the parties also supports the trial court's findings that they did not contemplate a settlement of any obligation created in favor of Lemm by virtue of the note and trust deed of December 10, 1921. In this respect, it is in evidence that Lemm, with the knowledge of the officers of the Stillwater Company, used that note and trust deed as his own property in raising funds on his own credit subsequent to the time of the execution of the agreement of July 7, 1925. In addition, no reconveyance of the real property so incumbered was ever demanded of Lemm, although reconveyances pursuant to the agreement were delivered to the Stillwater Company. With respect to the note and conditional sales contract covering the hay press, the obligation evidenced thereby was not held by Lemm until after the execution of the agreement of July 7, 1925. The trial court's conclusion that the compromise and settlement did not embrace that obligation is clearly supported. Furthermore, evidence is admissible to show what claims in fact existed in favor of the promisor at the time the release or discharge was given. Swain v. Grangers' Union, 69 Cal. 186, 188, 10 P. 404. What inference is to be drawn from evidence introduced in explanation of any delay in prosecuting such claims is a question for the trial court.

In each case the trial court's finding that a discharge of the obligation involved was not contemplated by the agreement of July 7, 1925, is fully supported by both the law and the evidence. Also that finding supports the judgment for the respondent in each case. Since the questions determinative of the appeals turn on an interpretation, rather than a reformation, of the agreement of July 7, 1925, the issues raised by the cross-complaint and the demurrer thereto in the cancellation action become immaterial. The pleadings otherwise in both actions sufficiently presented the issues respecting the interpretation of the agreement involved.

The judgments are, and each of them is, affirmed.

We concur: WASTE, C. J.; SEAWELL, J.; CURTIS, J.; PRESTON, J.; IRA F. THOMPSON, J.; LANGDON, J.

217 Cal. 467

GINSBERG v. BUTLER et al.

Sac. 4635.

Supreme Court of California.
Feb. 28, 1933.

1. Appeal and error 🔑544(2).

Where appeal is taken on judgment roll, facts must be ascertained from findings.

2. Insurance 🔑718.

Rights of claimant in benefit certificate are determined by provisions of certificate, by-laws of fraternal benefit society, and statute under which society is organized.

3. Insurance 🔑770.

Requirements of statute as to eligibility of beneficiaries cannot be waived by fraternal benefit society organized under statute, or member receiving benefit certificate, or both.

4. Insurance 🔑797.

Death benefit certificate issued by fraternal benefit society organized under Tennessee laws prohibiting designation of creditor as beneficiary and whose by-laws made void assignment of certificate by member or beneficiary *held* not assignable to creditor by joint action of insured and beneficiaries to secure beneficiaries' debt (Shan. Ann. Code Tenn. §§ 3369a82, 3369a111).

5. Insurance 🔑718.

By-laws of fraternal benefit society are part of benefit certificate and will be enforced unless clearly against public policy or unreasonable.

In Bank.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by S. Ginsberg against James W. Butler and others. Judgment in favor of plaintiff against defendant United States Letter Carriers' Mutual Benefit Association, a corporation, which appeals.

Reversed as to that part of judgment appealed from; otherwise affirmed.

Howe, Hibbitt & Johnston, of Sacramento, for appellant United States Letter Carriers' Mutual Benefit Association.

O. F. Meldon and John Bauer, both of Sacramento, for J. W. and J. T. Butler.

A. B. Reynolds and S. H. Jones, both of Sacramento, for respondent.

SEAWELL, Justice.

Defendant United States Letter Carriers' Mutual Benefit Association, a corporation, appeals from a judgment which directed it to pay to plaintiff the sum of $2,000 due and payable as a death benefit on a benefit certificate issued by it on the life of Michael Butler, deceased. Plaintiff S. Ginsberg claims said sum as a pledgee or assignee of said benefit certificate for security purposes.

Appellant corporation is a fraternal benefit society organized under the laws of Tennessee, with branches throughout tne country. It contends that an assignment of such a certificate to a creditor for security purposes is void. In making this contention it relies on certain provisions of its by-laws and of the statutes of the state of Tennessee, under which it was organized, which expressly limit payment of death benefits due on certificates to certain classes of relatives and dependents of members of the society, not including creditors, and protect the proceeds of such certificates from attachment, garnishment, or other legal process to pay any debt or liability of a member or beneficiary, either before or after payment. More particularly appellant relies on a provision of its by-laws which expressly makes void any assignment of a benefit certificate by a member or beneficiary to a creditor. We are in accord with the contention of appellant.

[1] Since the appeal is taken on the judgment roll, the facts must be ascertained from the findings. On February 26, 1894, appellant association issued its benefit certificate No. 736 for $3,000 to Michael Butler, a member of its branch located at Sacramento in this state. Upon the direction of Butler the death benefit provided for therein was made payable to his two sons, defendants J. W. and J. T. Butler, and his daughter, Lillian Butler. On April 15, 1915, plaintiff Ginsberg loaned $2,600 to said sons, J. W. and J. T. Butler, who executed their promissory note therefor, secured by chattel mortgage. Prior to April 22, 1915, Michael Butler, the assured in benefit certificate No. 736, had requested plaintiff to make said loan to his sons and agreed to assign the benefit certificate to plaintiff as security. The court found that on the day the loan was made Michael Butler and J. W. Butler and J. T. Butler "assigned, transferred and delivered to the plaintiff said benefit certificate * * * and on the same day said defendants [J. W. and J. T. Butler] executed and delivered to the plaintiff their certain written agreement, wherein and whereby they assigned and transferred to the plaintiff for the purpose aforesaid [as security] all of their interest in said benefit certificate." Thereafter, on July 21, 1915, plaintiff loaned the additional sum of $540 to J. W. and J. T. Butler and took their promissory note therefor. The obligation of J. W. and J. T. Butler, as evidenced by said promissory notes, was kept alive by renewals and extensions until the institution of the action herein, at which time there was $5,860 due plaintiff. The court found that during the year 1920 Michael Butler, the assured, caused a new benefit certificate to be issued, payable to Lillian Butler

Metcalf, his daughter, as sole beneficiary, but that said certificate was void as to plaintiff.

The plaintiff claimed the right to recover not the full amount of the $3,000 certificate, but only $2,640, which represents the shares of the two sons named therein as beneficiaries, and $640 of the $1,000 share of the daughter, by reason of the fact that the daughter, at the date of the additional advance of $540 to J. W. and J. T. Butler, had assigned $640 of her interest to plaintiff as security. The court found that the action was barred by the statute of limitations as to Lillian Butler Metcalf, and entered judgment against appellant association for $2,000, the share of the two sons.

[2] The sole question of law presented for our decision is whether said benefit certificate was assignable by joint action of the assured and beneficiaries to secure the debt of the beneficiaries. The rights of any claimant in a benefit certificate issued by a fraternal benefit society, or the proceeds thereof, are to be determined by a consideration of the provisions of the certificate, the by-laws of the society, and the provisions of the statute under which the society is organized, which together constitute the contract between the society and the insured member. Caldwell v. Grand Lodge, 148 Cal. 195, 82 P. 781, 2 L. R. A. (N. S.) 653, 113 Am. St. Rep. 219, 7 Ann. Cas. 356; Bennett v. Modern Woodmen, 52 Cal. App. 581, 199 P. 343, 346; Bush v. Modern Woodmen, 182 Iowa, 515, 152 N. W. 31, 162 N. W. 59; Journeymen Butchers' Protective & Benevolent Ass'n v. Bristol, 17 Cal. App. 576, 120 P. 787; Thomas v. Locomotive Engineers' M. L. & A. Ins. Ass'n, 191 Iowa, 1152, 183 N. W. 628, 15 A. L. R. 1240; Modern Woodmen v. Comeaux, 79 Kan. 493, 101 P. 1, 17 Ann. Cas. 865, 25 L. R. A. (N. S.) 814, with note; 19 Cal. Jur. 480. Appellant was created by virtue of the laws of the state of Tennessee providing for the organization of fraternal benefit societies. It is under the law of Tennessee that "it lives, moves, and has its being. From this law it gets its right to do business, and by this law it is regulated and controlled." Bennett v. Modern Woodmen, supra, quoting from Bush v. Modern Woodmen, supra; see, also, Thomas v. Locomotive Engineers' Mutual L. & A. Ins. Ass'n, supra.

The statute of Tennessee providing for organization of fraternal benefit societies is of the type generally found throughout the country, and so closely resembles the Fraternal Benefit Societies Act of this state, enacted in 1911 after issuance of the certificate herein but before assignment thereof to plaintiff, that many of the provisions of the two acts are identical. Both statutes provide that the payment of death benefits shall be confined to the wife, husband, children, and certain listed relatives of the member or his dependents. 3 Shannon's Ann. Code of Tenn., p. 2723, § 3369a82; 1 Gen. Laws (1931 Ed.) Act 686, p. 339, § 6. The Tennessee act also contains this provision, in language practically identical with the California provision: "No money or other benefit, charity, or relief, or aid to be paid, provided, or rendered by any such society shall be liable to attachment, garnishment, or other process, or be seized, taken, appropriated, or applied by any legal or equitable process or operation of law to pay any debt or liability of a *member* or *beneficiary*, or any other person who may have a right thereunder, either *before* or *after* payment." 3 Shannon's Ann. Code of Tenn., § 3369a111; California: 1 Gen. Laws (1931 Ed.) Act 686, p. 339, § 21.

The by-laws of appellant society also contain the following provision: "A benefit certificate cannot be paid to a creditor, nor be held in whole or in part, nor assigned to secure any debt which may be owing by the member. *Any assignment* of a benefit certificate by a *member* or *beneficiary* shall be void." (Italics supplied throughout.)

[3] The requirements of the statute as to eligibility of beneficiaries cannot be waived by action of the society, or member, or both. The language of the Supreme Court of Iowa in Bush v. Modern Woodmen, supra, cited and followed in Bennett v. Modern Woodmen, 52 Cal. App. 581, 199 P. 343, is so apposite that we quote therefrom: "It is almost the universal holding that a society of this kind can waive the enforcement of a requirement embodied in the by-law, but it is elementary that a corporation such as this has no power to create a fund for persons other than the class specified in the law authorizing its organization and maintenance, and, as the corporation has no authority to create a fund for any other purpose, a member cannot direct that the fund be paid to a person outside of such class." Bush v. Modern Woodmen, 182 Iowa, 515, 532, 152 N. W. 31, 37, 162 N. W. 59.

And again, the court says at page 541 of 182 Iowa, 152 N. W. 31, 162 N. W. 59, 60: "It has been recognized that there lies in the Legislature the power to limit the class who may be beneficiaries of the society. We take it that those who join these societies and receive certificates therein do this in recognition of this reserved power in the Legislature from which the society gets its life."

[4] The statute of Tennessee expressly prohibits payment of the benefit fund to any person who is not within the classes designated as beneficiaries in the statute. Modern Woodmen v. Comeaux, supra. It cannot add to the rights of a creditor or other person ineligible to be named as a beneficiery that he claims under an assignment executed by a member, rather than under a void designation of himself as beneficiary in the certificate. A member cannot accomplish by indirection that which he cannot do directly. An assured member has no power to divert the benefit payable upon his death from the lawful class

of beneficiaries to a creditor. We have here to consider whether an assignment acquires validity by virtue of the fact that it is made to secure a loan to lawful beneficiaries and that said beneficiaries participate in the assignment.

[5] We are of the view that it is beyond the power of one who is or lawfully may be named as beneficiary to strip himself of anticipated benefits by an assignment in advance of the time when the certificate becomes due and payable. The statutes of Tennessee and the by-laws of appellant society protect the fund not only from creditors of the member, by invalidating assignments to creditors and prohibiting their designation as beneficiaries, but also from creditors of the beneficiary. The statute of Tennessee, above quoted, expressly exempts benefits paid from garnishment or other legal process to pay any debt or liability of a member or *beneficiary*, either before or after payment, and the by-law of appellant society, also quoted above, makes void *any* assignment of a benefit certificate by a member or *beneficiary*. We are inclined to think that even in the absence of said specific by-law the language of the statute of Tennessee is broad enough to preclude payment to a creditor of member or beneficiary by whatever right he may claim, whether by assignment of member, beneficiary, or both. The statute forbids *payment* to be made from the death benefit fund authorized to be created to any person except the classes of relatives listed and dependents of members. However this may be, there is a specific by-law in the case herein forbidding assignments by beneficiaries. If the rule declared in said by-law is not by necessary implication embraced in the statute, at least it is not contrary thereto, but in line with declared statutory policy. The validly enacted by-laws of a fraternal benefit society are part of the contract between the member and the society, and will be enforced by the courts unless they are clearly against public policy or unreasonable. Bennett v. Modern Woodmen, supra; Caldwell v. Grand Lodge, supra; Journeymen Butchers' Protective & Benevolent Ass'n v. Bristol, supra.

In sustaining the validity of a by-law practically identical in language with the by-law before us, the Court of Chancery of New Jersey in Supreme Conclave, etc., v. Dailey, 61 N. J. Eq. 145, 47 A. 277, at page 278, said: "The question, nevertheless, must be answered whether the contract itself, which, in express terms, declares any assignment by the beneficiary void, can be ignored. It is to be observed that the clause in the contract forbidding the assignment by the beneficiary is one of the most, if not the most, important feature in the scheme of this beneficial order. The purpose of the restriction against assignment is entirely clear. It is designed to provide a fund to be paid to a relative or dependent at the time when death has deprived such beneficiary of the succor and support of the living member. It is of the utmost importance, in the accomplishment of this purpose, that the beneficiary should be deprived of the power to deal with his expectancy during the life of the member. So the contract put it beyond the power of the beneficiary to defeat this purpose by mortgaging or bargaining away his right to receive the money at the particular time and for the purpose intended. The provision is intended as a guard against the imprudence or improvidence of the beneficiary."

The cases relied on by respondent are not controlling on the main question herein—the eligibility of a creditor of the member or beneficiary to receive payment of a benefit certificate. Said cases either concerned the rights of eligible persons who claimed by assignment or appointment of the member not made in the precise manner prescribed in the by-laws for a designation or change of beneficiary, or they involved the proposition that where a promise to name an eligible person as beneficiary, or not to change the designation already made, is given as part of a valid contract, equities are created in favor of such beneficiary which the member is powerless to change, at least in favor of a subsequently named beneficiary who possesses no superior equities. Conway v. Supreme Council Catholic Knights, etc., 131 Cal. 437, 63 P. 727; Jory v. Supreme Council A. L. H., 105 Cal. 20, 38 P. 524, 26 L. R. A. 733, 45 Am. St. Rep. 17; Johnston v. Kearns, 107 Cal. App. 557, 290 P. 640. The question of *eligibility* of beneficiaries or assignees is not considered in Conway v. Supreme Council, etc., supra. In that case the lower court found, according to a finding quoted in appellant's brief, that the object of the society was to maintain a benefit fund from which death benefits "shall be paid on the death of each member to his family *or be disposed of as he may direct.*" (Italics supplied.) In that case the question considered was whether the creditor-assignees were entitled to the death benefit notwithstanding the specific *mode* prescribed in the by-laws for a change of beneficiary had not been complied with. It is settled in this state that effect will be given to a statutory or by-law restriction on eligibility. Caldwell v. Grand Lodge, supra; Bennett v. Modern Woodmen, supra; Journeymen Butchers' Protective & Benevolent Ass'n v. Bristol, supra; Machado v. Ellison, 35 Cal. App. 337, 169 P. 917.

The findings and judgment under review do not determine whether as between Lillian Butler Metcalf, on the one hand, and J. W. and J. T. Butler, on the other, Lillian Butler Metcalf is entitled to the full amount of the death benefit. The pleadings did not present that issue, and it is not involved on this appeal. No showing is made that the money due on the certificate was deposited in court as in an action of interpleader.

The money judgment of $2,000 against appellant United States Letter Carriers' Mutual Benefit Association is reversed. In all other respects the judgment is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; PRESTON, J.; SHENK, J.; LANGDON, J.; IRA F. THOMPSON, J.

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217 Cal. 451

In re LAYTON'S ESTATE.

L. A. 12754.

Supreme Court of California.

Feb. 28, 1933.

1. Wills 🔑**535.**

Clause disinheriting heirs except as otherwise mentioned in will did not require that testator's brother and sisters be named to take under will.

2. Wills 🔑**506(2).**

Ordinarily, word "heirs" means persons who would be entitled to estate of one who died intestate (Civ. Code, § 1334).

[Ed. Note.—For other definitions of "Heirs," see Words and Phrases.]

3. Wills 🔑**439, 440.**

Will must be construed according to testator's intention as expressed therein, and such intention must be given effect as far as possible (Civ. Code, §§ 1317, 1318).

4. Wills 🔑**535.**

Under will giving illegal excess over bequest to church to then living heirs, clause disinheriting all heirs at law except as otherwise mentioned in will did not disinherit brother and sisters (Civ. Code, § 1386, subd. 2).

> Under the will, testator, leaving wife and child, expressly disinherited his child, and, since testator did not expressly provide that any illegal excess over bequest to church should go to wife, he did not intend that any invalid portion should go to wife alone, and in using the words "then living heirs" he did so intending to designate persons, excluding his daughter, who should be alive at termination of trust, and who at that time might come within term "heirs," and therefore brother and sisters were "mentioned" in will.
>
> [Ed. Note.—For other definitions of "Then Living," see Words and Phrases.]

5. Wills 🔑**663.**

Testator's brother and sisters not shown to have knowledge of will contest, and not cited, could not be held to have acquiesced in or failed to defend contest so as to be excluded from provisions of will (Code Civ. Proc. § 1328).

> Besides the fact that daughter contesting father's will failed to notify testator's brother and sisters of contest, the contest was dismissed, so that there was no means of knowing whether, had such dismissal not taken place, the brothers and sisters would not have successfully defeated attack on will.

6. Judgment 🔑**312.**

Court could amend order admitting will to probate by changing finding respecting testator's residence (Code Civ. Proc. § 473).

7. Judgment 🔑**323.**

Amendment of order admitting will to probate by changing finding regarding testator's residence was not invalid, because testator's brother and sisters not named in will were not personally notified (Code Civ. Proc. § 1304).

8. Executors and administrators 🔑**523.**

Where executor's act in turning property over to domiciliary was in accordance with law, court order was unnecessary.

9. Executors and administrators 🔑**519(1).**

Act of executor of nonresident's estate in taking possession of intangible property did not operate to convert property into part of California estate.

10. Wills 🔑**2.**

Charitable bequests in will of nonresident probated in state are invalid to same extent as in case of domestic will (Civ. Code, §§ 1285, 1313).

11. Courts 🔑**8.**

Legislature's rights regarding disposition of estates of deceased nonresidents can affect only property within state.

12. Wills 🔑**2.**

Rule that intangible property has situs for all purposes, including administration in decedent's domicile, applies to case involving bequest to charity violating statute (Civ. Code, §§ 946, 1313).

13. Wills 🔑**251.**

Notes secured by mortgages and executed by residents of state belonging to estate of nonresident was not property having situs in state (Civ. Code, § 946).

In Bank.

Appeal from Superior Court, Los Angeles County; Albert Lee Stephens, Judge.

In the matter of the estate of Edwin C. Layton, deceased. From an order settling the account of the executor and distributing the estate, Alice B. Layton, the widow, and the Christian Science Church, beneficiary, appeal, and Ernest H. Layton and others cross-appeal.

Affirmed.

For prior opinions, see 6 P.(2d) 305; 7 P.(2d) 199.

Earle M. Daniels and Julius V. Patrosso, both of Los Angeles, for petitioners and appellants.

Henry G. Bodkin and Leonard Husar, both of Los Angeles, amici curiæ.

Arthur W. Eckman and Melvin T. Dunlavy, both of Los Angeles (Jerry H. Powell and Morton L. Barker, both of Los Angeles, of counsel), for respondents and appellants.

Walter M. Campbell, of Los Angeles, amicus curiæ.

BY THE COURT.

After further consideration of this cause, we find ourselves in agreement with the opinion rendered by the District Court of Appeal, Second District, Division 2, when this appeal was before that court. We, therefore, adopt said opinion as the opinion of this court. Said opinion as written by Fricke, Justice pro tem., is as follows:

Edwin C. Layton died in Los Angeles, leaving him surviving his wife, Alice B. Layton, a daughter, Marguerite Layton (also known as Marguerite Nolan), and a brother and two sisters, Ernest H. Layton, Grace Layton Laughlin, and Maude Layton Clendenin, referred to in this opinion as the contestants. The deceased left a will nominating Security Trust & Savings Bank as executor. One appeal is by Alice B. Layton and First Church of Christ Scientist, both specifically made beneficiaries, and the other appeal is by the brother and sisters, who claim an interest in the estate under the will.

After provisions immaterial here, including the bequest of all clothing, jewelry, and personal belongings, the will provided that all of the remainder of the estate should go to the Security Trust & Savings Bank, in trust, to pay from the net income to Emerick Brown and Layton Brown the sum of $75 per month for a period of two years or until their prior death, and to pay the balance of the net income to the wife during her life or until her remarriage, with authority to use portions of the trust property for her necessary needs and comforts, if the trustee should so determine. The will further provided that, upon the death or remarriage of the wife, the trust should terminate, and the entire trust estate be distributed to the First Church of Christ Scientist in Boston, Mass., with the following proviso: "Fourth: If for any reason the devise and bequest to the Christian Science Church, hereinabove mentioned, or any part thereof, shall be declared or held to be invalid or in excess of my testamentary power, then and in that event I hereby give, devise and bequeath such portion or portions thereof as may be declared or held to be invalid or in excess of my testamentary power in fee, to my then living heirs-at-law, excluding my daughter Marguerite Layton, also known as Marguerite Nolan, now residing in Indianapolis, Indiana, equally, share and share alike." Another paragraph of the will of importance here provides: "Fifth: I have intentionally omitted to provide for and specifically direct and will that under no circumstances shall any part, share or interest in my estate go to, vest in or be taken by my daughter, Marguerite Layton * * * or any descendants of my said daughter, * * * and I hereby generally and specifically disinherit each and any and all persons whomsoever claiming to be or who may be lawfully determined to be my heirs-at-law, except as otherwise mentioned in this will, and if any of such persons or such heirs, or any devisees or legatees under this will, or their successors in interest, or any other person who if I died intestate would be entitled or shall lawfully become entitled to any part of my estate, shall either directly or indirectly, singly or in conjunction with other persons, seek to set aside this will, or attack, oppose or seek to set aside the probate of this will, or to impair, invalidate or set aside its provisions, * * * or shall consent to, acquiesce in or fail to contest such proceedings, * * * then and in any or all of the above mentioned cases and events I hereby give and bequeath to such person or persons the sum of One ($1.00) Dollar and no more, in lieu of any other share or interest in my estate. * * *"

The will was admitted to probate on February 1, 1926, the court finding, among other things, that the decedent was a resident of Los Angeles county, and the Security Trust & Savings Bank duly qualified as executor. On April 26, 1926, Alice B. Layton, the wife, and the First Church of Christ Scientist filed a motion under section 473 of the Code of Civil Procedure to amend the decree admitting the will to probate and the certificate of proof of will and facts found, and on the hearing on May 10, 1926, the court, with the consent of the executor, granted such motion and amended the decree and certificate to have the same contain the finding that the deceased, at the time of his death, was a resident of the District of Columbia. While personal notice of the motion was served upon the heirs and legatees specifically named in the will, no notice thereof was given to Ernest H. Layton, Grace Layton Laughlin, or Maude Layton Clendenin, the brother and sisters of deceased, other than that given by posting three notices as provided in the order fixing time for the hearing of the motion.

On January 22, 1927, Marguerite Layton filed a contest and opposition to probate of the will. The executors and specifically named beneficiaries in the will were made respondents, and answered the petition. The above-named brother and sisters of the deceased were not named or served, nor did either of them appear in this proceeding. No trial of the contest was ever had; it being dismissed October 15, 1928, by stipulation of the parties.

The executor came into possession of personalty, the separate property of the deceased, of the value of ninety-eight odd thousand dollars, of which a portion valued at $16,322 was returned in the inventory and appraisement filed herein. Of the balance, some seventy-five to eighty odd thousand dollars in intangible property was turned over by the executor to Alice B. Layton, who was appointed administratrix with the will annexed in the District of Columbia and returned this amount in the proceedings there.

The order of the trial court settling the account of the executor and distributing the estate determined: (1) That the contestants (the brother and sisters) were interested in the estate to the extent of any excess above that which the Christian Science Church could take, and that distribution of the trust estate should be deferred until the determination of the question as to whether the Christian Science Church was entitled to more than one-third of the estate; and (2) that the contestants were not disinherited by reason of any failure to oppose the contest filed by Marguerite Layton. From these portions of the order the wife and Christian Science Church have appealed. The contestants appealed from all of the order except the portions last stated, but present here only the points that decedent was a resident of Los Angeles county, and that the order amending the decree admitting the will to probate by a determination that decedent was a resident of the District of Columbia, was void, and that, even though decedent was a resident of the District of Columbia, the executor was chargeable with the value of all or at least part of the property which was delivered to the administratrix with the will annexed.

[1-4] The question first presented is whether the contestants are interested in the estate. The wife and Christian Science Church contend that the contestants are without interest by virtue of the provisions of the fifth paragraph of the will previously quoted, whereby the testator disinherited "all persons whomsoever claiming to be or who may lawfully be determined to be my heirs at law, except as otherwise mentioned in this will." Obviously, the contestants fall within the general description of this clause and are disinherited, unless "otherwise mentioned" in the will, for, even conceding that they could not be included in the class of "heirs-at-law," they were persons "claiming to be * * * heirs at law." In the reply brief of the wife and the Christian Science Church, it is argued that the word "mentioned" as used in the fifth paragraph of the will means "named," and that, since contestants were not "named," they did not come within the exception. This contention wholly overlooks the fact that in Estate of Kurtz, 190 Cal. 146, page 149, 210 P. 959, 960, the court specifically held contrary to such a contention, saying: "No reason is perceived why the wife could not be 'mentioned' by any description that would include her. Certainly it would not be necessary to mention her by name and to include her, as she was included, in the description of a class, 'mentions' her as effectually as if she had been named therein." This leaves the question, are the contestants "mentioned" in the will by any description which would include them? The fourth paragraph of the will, heretofore quoted, provides that if any part of the bequest to the Christian Science Church shall be held invalid then such portion shall go "to my then living heirs at law, excluding my daughter, Marguerite Layton. * * *" Whether the contestants are "mentioned" in the will and have an interest in the estate depends upon whether or not they are included in the term "then living heirs." Section 1386, subd. 1, of the Civil Code, provides that, where the decedent leaves a surviving wife and only one child, such wife and child will succeed to the estate in the absence of a will. It is contended that, since the decedent here left a wife and only one child, they alone would constitute and be included in the class of "then living heirs," and that, since the child is expressly disinherited by the will, the wife is the only person who could take under the conditional and contingent bequest to the "then living heirs." Ordinarily, the word "heirs" means the persons who would be entitled to the estate of one who died intestate (Civ. Code, § 1334; Ginochio v. City and County of San Francisco, 194 Cal. 159, 228 P. 428; Estate of Wilson, 184 Cal. 63, 193 P. 581, 582); however, as stated in the case last cited: "The paramount rule in the construction of wills, to which all other rules must yield, is that a will is to be construed according to the intention of the testator as expressed therein, and this intention must be given effect as far as possible. Civ. Code, §§ 1317 and 1318." Had the testator intended that any illegal excess over the bequest to the church should go to his wife, the simplest and most natural course would have

been to so provide, and the fact that he did not do so supports the theory that he did not so intend. In the fifth paragraph of the will (the disinheriting provision), the testator refers to persons "who may be lawfully determined to be my heirs-at-law, except as otherwise mentioned in this will," further evidencing that he considered that there were persons other than his wife and the daughter, specifically disinherited, who came under the description of "heirs at law," as that term was used and understood by him, a conclusion further reinforced by the exception clause, which, instead of excepting only the wife, is general in its phraseology. The use of the adjective "living" in the fourth paragraph of the will as defining the word "heirs-at-law" and its omission when using the word "heirs-at-law" in the fifth paragraph tends at least to indicate that, to the mind of the testator, there was a difference between "heirs-at-law" generally and "then living heirs-at-law." It may well be that the testator by the latter phrase intended to designate those who, when the bequest to the church should be declared invalid, were "then living." It must also be borne in mind that the estate, under the will, is to remain in trust until the "demise or remarriage" of the wife, in which event the entire estate is to be transferred to the church, and that this provision is followed by the one providing that the invalid portion shall go to the "then living heirs." This would indicate the intent of the testator that the interest of the wife should terminate upon her death or remarriage, and is opposed to the theory that the testator intended that the invalid portion of the bequest to the church should go to the wife.

The contestants base their claims upon the theory that, since the daughter is expressly excluded by the terms of the will, she is to be treated as nonexistent, and that, in accordance with the intent of the testator, the rule of intestate succession applicable to the case is that set forth in subdivision 2, section 1386, of the Civil Code, which provides that, if a husband die without issue and without a father and mother living, his estate shall go half to the wife and half to his brothers and sisters. This principle seems to be sustained by the cases of Minot v. Harris, 132 Mass. 529, and White v. Springett, L. R. Ch. App. Cas., vol. 4, p. 300. Whichever theory is adopted, it seems to us that the testator did not intend that any invalid portion should go to his wife alone, and that, in using the words "then living heirs," he did so intending to designate thereby those persons, excluding his daughter, who should be alive at the time of the termination of the trust, and who might at that time come within the term "heirs." The contestants, being the brother and sisters, were therefore interested parties in the probate of the estate, and, being "mentioned" by the provisions of the fourth paragraph of the will, are not included in the disinheriting provisions of the fifth paragraph thereof.

[5] The next point raised is that the contestants have forfeited their rights by failing to defend the contest brought by Marguerite Layton, and is based upon the fact that, while the executor and beneficiaries specifically named in the will filed an answer to the contest, the brother and sisters did not. It must be noted that the contestants here were not named as respondents in the contest, and no citation was directed to or served upon either of them, nor have we been referred to any proof tending to show that they had knowledge of the contest in time to answer. The notice of contestants to the executor requesting service upon them of copies of petition for sale of property, petition for conveyance of property, and of accounts and petition for final distribution cannot be considered as establishing that they had notice or knowledge of a contest filed thereafter. Acquiescence in a will contest or a failure to oppose the same can exist only when the party so charged has knowledge of the contest and then impliedly consents or assents thereto or willfully omits to oppose the same. Presumably Marguerite Layton, who instituted the contest, knew of the existence of her father's brother and sisters who, having been "mentioned" in the will, were entitled to notice by citation of her contest (Code Civ. Proc. § 1328), and her failure to so notify them might of itself prove fatal to the contest, since, before the court could try the issues of fact in the contest, proof would first have to be made that all known interested parties had been cited to appear. Code Civ. Proc. § 1329. Their rights and remedies arising from the fact that they were not cited would have been waived by an answer or other general appearance. The will does not say that the beneficiaries must "answer" a contest, neither does it describe how a contest shall be opposed. Contestants may, so far as we are advised, have either had no knowledge or, if they had knowledge, relied on the failure of the contestant to cite all interested parties as a means of defeating the contest. In the absence of any showing of facts to the contrary, it cannot be said that contestants did not oppose the will contest nor can it be said that they had knowledge of the contest and either acquiesced in or failed to defend the same. The finding of the trial court was fully justified. Furthermore, the contest was dismissed, and we have no means of knowing that, had such dismissal not taken place, the contestants would not have successfully defeated this attack on the will.

[6] Contestants urge that the court was without power to amend the order admitting the will to probate and the certificate of proof of will and facts found by changing the find-

ing that deceased was a resident of the county of Los Angeles, Cal., to a finding that he was a resident of the District of Columbia. The will declares that the testator is a resident of the District of Columbia, and it does not seem to be contended that in fact the deceased was not a resident of the latter jurisdiction at the time of his death. The executor's petition for probate of the will set forth, and the testimony of its agent as the applicant declared, that the deceased was a resident of Los Angeles county, but this was apparently due to a mistake of fact, and the executor later filed a written consent to the amendments in question. The proof in support of the motion clearly showed that the deceased was a resident of the District of Columbia. The only question here is whether the court was authorized by section 473 of the Code of Civil Procedure to order the amendments. Some nice distinctions are drawn in the briefs as to whether the order here attacked was one changing the finding as to the place of decedent's residence by amending the original order and certificate or by vacating the same and substituting a new order and certificate. Section 473 is not so narrow in its provisions as to lay down a specific exclusive form of order whereby a party may be relieved by reason of his mistake, inadvertence, or excusable neglect. We see no reason why the method adopted by the trial court does not fall within the procedure contemplated by the section if the section is applicable to proceedings in probate such as we have here. The precise question does not appear to have been adjudicated in this state, but it has been held that section 473 authorizes the court to relieve a party from an order or other proceeding in probate by reason of his mistake, inadvertence, or excusable neglect. Levy v. Superior Court, 139 Cal. 590, 73 P. 417; Cahill v. Superior Court, 145 Cal. 42, 78 P. 467; De Pedrorena v. Superior Court, 80 Cal. 144, 22 P. 71; Estate of Hickey, 129 Cal. 14, 61 P. 475; Estate of Seaman, 51 Cal. App. 409, 196 P. 928. The case last cited recognizes that an order admitting a will to probate may be assailed by proceedings under section 473, and the entire trend of the decisions warrants our conclusion that the trial court had the power to make the order changing the finding as to the place of residence. The case of Holabird v. Superior Court, 101 Cal. App. 49, 281 P. 108, 109, cited by contestants, was not one in which a proceeding was had under section 473, but was an application for a writ of mandate to compel the Superior Court to hear and determine a motion to set aside the order admitting the will to probate upon the ground that the court had no jurisdiction of the estate, for the reason that the deceased was not a resident of the county, and that the testimony, upon which the order was based, that she was a resident of the county, was untrue. The opinion lays down the rule that "an order granting letters of administration is an adjudication of the fact of residence of the deceased in the county over which the court has jurisdiction, and it is binding upon the whole world, unless vacated or set aside on direct attack," and that the determination as to residence "cannot be attacked collaterally." The decision in effect declares that, if the court erred in deciding the question of residence without sufficient evidence, the remedy was by appeal only. While there the motion was based upon a claim of fraud and sought a redetermination of a disputed issue of fact, here no fraud is claimed, and relief is sought by a motion under section 473. An order or judgment obtained by fraud is not an order or judgment had through mistake, inadvertence or excusable neglect. While the case of Holabird v. Superior Court, supra, holds that the order could not be attacked "collaterally" it also holds that the order "is binding upon the whole world unless vacated or set aside on direct attack." The proceeding under section 473 is a direct attack. People v. Norris, 144 Cal. 422, 77 P. 998. See, also, Sharp v. Eagle Lake Lbr. Co., 60 Cal. App. 386, 391, 212 P. 933. The cases cited wherein judicial error, which could have been reached by motion for a new trial or appeal, was sought to be corrected by motion to change findings or alter a judgment so as to overcome the error are not in point. In the case at bar, the order in question was not assailable either by motion for a new trial or by an appeal, and it seems that section 473 must have been intended to reach a situation such as we find here so that the determination of the trial court will not only be in accordance with the law, but will also be based upon the facts as they actually exist. The trial court was acting with legal authority in granting the motion and correcting the order and certificate of facts found so that they truly declared the place of residence of the deceased.

[7] Contestants raise the further point that the court had no power to make the order just referred to because they had no notice of the motion. Under and pursuant to the order of the trial court, the notice was personally served upon and a copy of the order for the hearing mailed to all persons named in the will and three copies of the notice of hearing were posted in and about the courthouse. No notice or copy of the order was served upon contestants, who here contend that the same notice should have been given as is required by law of the hearing of a petition for probate of the will. Section 1304, Code of Civil Procedure, provides that the notice of hearing a petition for probate shall be served upon the heirs and the devisees and legatees "named in the will." As the contestants were neither the heirs of the deceased nor "named in the will" (Murray v. Superior Court, 207 Cal. 381, 278 P. 1033),

they were not persons who were required by law to be notified of the hearing of a petition for probate, and, under their own contention, the same rule would apply to notice of the motion.

[8-12] Contestants next present the point that, conceding that the decedent was a resident of the District of Columbia, the executor is chargeable with the value of all of the personal property of the deceased because it took possession of the same, and that the executor had no authority to permit the removal of any of such property from the state without the order of the court. We may dispose of the latter portion of the point by stating that, if the act of the executor in turning the property in question over to the personal representative in the District of Columbia was in accordance with law, an order of court was not necessary for such a transfer (Estate of Fulmer, 203 Cal. 693, 265 P. 920, 58 A. L. R. 430), and there remains only the question as to whether the act of the executor was according to law. Contestants concede that it is the general rule that intangible property, which is the character of the property here involved, has its situs for all purposes, including administration, in the domicile of the decedent (see, also, Civ. Code, § 946), but question its applicability to cases involving bequests to charity violative of section 1313 of the Civil Code, and rely largely upon the case of Estate of Lathrop, 165 Cal. 243, 131 P. 752. That case was one in which the decedent died in the state of New York and the domiciliary executors came to California and were granted letters testamentary here. The property in California consisted of cash and shares in a local bank. The will left all of an estate valued at between two hundred and two hundred and fifty thousand dollars, except twenty-eight thousand five hundred dollars, to charity. The court held that the cash and bank stock in California was subject to the provisions as to charitable bequests of section 1313 of the Civil Code, and that appellant, one of the heirs, was entitled to her proportionate part of the estate situated in this state. The question as to whether the cash and stock was property situated in this state was not raised. The case cites and follows that of Estate of Dwyer, 159 Cal. 680, on page 683, 115 P. 242, 243, of which appears a statement with reference to the disposition of the purchase price of land in this state, due under a contract made by the deceased, which was collected by the California administrator after the close of the domiciliary administration of her estate in the state of Louisiana. The court declares that this purchase price "being personal property, the distribution of which was governed by the law of the domicile of the testator, and which would have been transmitted to the administrator in Louisiana to be distributed there had that administration not been closed, the court here in the ancillary administration properly distributed it to the heirs at law of the testatrix in accordance with the law of Louisiana."

However, as to certain real property in this state sold by the administrator here, the court held that, since the testator had bequeathed more than one-third of her property to charity, even though the will was made and probated in Louisiana, the heirs could, in the California proceeding in probate, receive a share of the proceeds of such latter sale which would make their total share equal to two-thirds of the testator's total estate. Had the money which the court held properly distributable under the Louisiana law been paid and sent to the Louisiana personal representative before the probate proceedings there were closed, the Dwyer Case would very closely resemble the case at bar, for the land purchase contract which was paid after the decedent's death was intangible property at the time of her death just as was the property sent to the personal representative in the District of Columbia in the case at bar. See, also, Estate of Gracey, 200 Cal. 482, 253 P. 921. The mere fact that the executor had the notes, mortgages, and bonds in its possession, and turned them over to the executor with the will annexed appointed in the District of Columbia, would not be a determining factor in the question before us. If the executor was not entitled to the possession thereof as such executor, its act of taking possession to which it was not entitled could not operate to convert the property into a part of the California estate of the deceased, for the situs of the property is determined by law as of the time of decedent's death and not by the act of the executor. A valid will made in another jurisdiction is valid in this state so far as it relates to personal property, "subject, however, to the provisions of section thirteen hundred and thirteen." Civ. Code, § 1285. Section 1313, limiting charitable bequests, had no application to bequests in foreign wills until the words just quoted were added to section 1285 by the amendment of 1905 (St. 1905, p. 606, § 3). See Estate of Lathrop, 165 Cal. 243, 248, 131 P. 752. The effect of this amendment was to declare it to be the law that, while generally, a will valid under the laws of a foreign jurisdiction within which it was executed is valid in this state so far as it relates to personal property, a provision in such a will, in contravention of section 1313, shall, as to such a charitable bequest or devise, be as invalid as if the will were executed in this state. The amendment, coupled with section 1313, declares no rule as to the situs of a decedent's property, but provides only that charitable bequests in the will of a nonresident probated in this state shall be invalid to the same extent as in the case of a domestic will. The matter of the disposition of the estates of deceased persons, the right of inheritance and testamentary disposition, is clearly within the legislative powers of the state (Estate of Graham, 187 Cal. 222, 201 P. 456, 18 A. L. R. 631), but "this exercise of original jurisdiction over the estates of nonresidents affects, and can affect, only the property within the state." Estate of Clark, 148 Cal. 108, 112, 82 P. 760, 761, 1 L. R. A. (N. S.) 996, 113 Am. St. Rep. 197, 7 Ann. Cas. 306. This state being without power to legislate and thus control the distribution of property located in a foreign domiciliary jurisdiction, the amendment to section 1285 cannot be construed to have that effect, even if the language of the amendment were capable of such an interpretation.

[13] Contestants urge that, in any event, the promissory notes secured by mortgages and executed by residents of this state, included among the personal property delivered by the executor to the wife of the deceased, who became the administrator with the will annexed in the District of Columbia, constituted property having its situs in this state.

In support of the contention, the case of Murphy v. Crouse, 135 Cal. 14, 19, 66 P. 971, 973, 87 Am. St. Rep. 90, is cited as holding that the situs of a chose in action is, for the purpose of founding administration, where the debtor resides. In this case, however, the court also says: "In other words, our laws provide for the administration of the estates of all nonresidents who have died leaving property here, real or personal, but as to personalty the distribution is to be made at, or at least according to the law of, the domicile," a recognition that the domiciliary law governs. In the case cited, the plaintiff purchased from the executor, appointed in the state of Minnesota where the testator resided, certain shares of the capital stock in the defendant First National Bank of San Francisco. Defendant and appellant, Crouse, was appointed administrator with the will annexed by the Superior Court of San Diego county in this state. The action was one to compel the defendant corporation to cause the shares of stock to be transferred to the plaintiff. The case is decided upon the premise that the situs of the property, the shares of stock, was in this state, even though the deceased resided and the certificates were in the state of Minnesota. The decision is reconciled when we consider the language in Chambers v. Mumford, 187 Cal. 228, 233, 201 P. 588, 591, 42 A. L. R. 342: "A concession has been made under the decisions of this court in the right to modify the application of the maxim, mobilia sequuntur personam, in the matter of certificates of stock in a domestic corporation. It has been held for purposes of the inheritance tax law the situs of stock in a corporation is in the state of the incorporation. Citing Murphy v. Crouse, and other cases. A reason for making a distinction between certificates of stock, and ordinary choses in action is in the fact that the former represent an interest in and derive their value from the tangible assets of the corporation. Beyond this the California decisions have shown no disposition to limit or modify the common-law rule that the situs of mere choses in action follows the domicile of the owner." The opinion quotes from Estate of Hodges, 170 Cal. 492, 150 P. 344, L. R. A. 1916A, 837, that "the authorities are uniform in holding that though personal property may be actually located in another state than that of the residence of the decedent at the time of his death, its situs for the purpose of imposing an inheritance tax upon it is in the state which was the domicile of the decedent, and where the primary administration of his estate is being had." In Estate of Hodges, supra, it is further said: "As a general rule, the domicile of the decedent draws to it in contemplation of law all the personal property of the decedent no matter where its actual situs may be at the time of his death, and the distribution of it is governed and controlled by the laws of succession existing at the place of the domicile of the decedent." We hold, therefore, that the trial court did not err in refusing to charge the executor with the property turned over by it to the widow of the deceased who became the administrator with the will annexed in the District of Columbia.

The orders settling the final and supplementary account and for distribution of the estate are affirmed.

We concur: WORKS, P. J.; IRA F. THOMPSON, J.

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130 Cal.App. 139

MANTYLA et al. v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 8828.

District Court of Appeal, First District, Division 2, California.

Feb. 28, 1933.

1. Master and servant 🔑416.

Industrial Accident Commission's denial of petition to reopen compensation case on ground that findings were unsupported by evidence was not abuse of discretion where no application for review of original award was made (St. 1917, p. 850, § 20 (d).

2. Master and servant 🔑416.

Industrial Accident Commission's denial of petition to reopen compensation case was not abuse of discretion where alleged newly discovered evidence was cumulative, and no diligence was shown (St. 1917, p. 850, § 20 (d).

Application by Esther Mantyla and another for annulment of order of Industrial Accident Commission denying petition of applicants to reopen a proceeding between applicants and Henry Stoneson and others, doing business under the name of Stoneson Brothers & Thorinson, and also of the order of such Commission denying rehearing of applicants' petition to reopen.

Orders affirmed.

George R. Andersen and R. H. Cormany, both of San Francisco, for petitioners.

A. I. Townsend, of San Francisco, for respondents.

SPENCE, Acting Presiding Justice.

Petitioners seek annulment of the order of the respondent commission denying their petition to reopen under section 20(d) of the Workmen's Compensation Insurance and Safety Act (St. 1917, p. 850) and also of the order of respondent commission denying rehearing of said petition to reopen.

The original award in favor of the defendants in the proceeding before the respondent commission was filed March 8, 1932, and the order denying rehearing thereon was entered April 29, 1932. No proceedings were instituted for the purpose of seeking a review thereof. Subsequently, on August 3, 1932, petitioners filed with the respondent commission their petition to reopen the cause under said section 20(d) which petition was denied on August 12, 1932, and thereafter a petition for rehearing of said petition to reopen was also denied.

[1] The petition to reopen was made upon the grounds that "the evidence does not justify the findings of facts" and that "the applicants have discovered new and further evidence which they could not with reasonable diligence have produced at the hearing herein." The deceased died of exsanguination. The first ground of the petition related to the finding of the commission that "the evidence does not establish that said employee sustained any injury arising out of or in the course of his employment; or that any injury arising out of and in the course of said employment caused or exacerbated said exsanguination or proximately caused said death." If these findings were entirely without support in the evidence, petitioners should have made timely application for review of the original award, but having failed to do so they cannot now complain of the refusal of the commission to set aside its award on a petition to reopen under said section 20(d). While said section is quite broad in its terms, we believe that ordinarily the commission should refuse to reopen the cause where the ground specified is one which might have been considered on a review by the court of the original award. We have, however, examined the record and are satisfied that the evidence supports the findings.

[2] The second ground of the petition related to alleged newly discovered evidence. This ground was not urged in the petition for rehearing following the original award, but when the petition to reopen was filed the affidavits of three medical men were attached thereto. The testimony of two of these witnesses was before the commission on the original hearing. The testimony of the third was merely cumulative. Furthermore, there was no showing whatever that such evidence could not with reasonable diligence have been discovered and produced at the original hearing. We therefore believe that the respondent commission properly denied the petition to reopen under section 20 (d), for it has been said that the power of the commission to reopen a cause under said section on the ground of newly discovered evidence "should be exercised with great caution. * * * Otherwise the process of introducing evidence before the commission would be interminable, and the commission might be held to abuse its discretion in the exercise of its power under section 20(d)." Ingram v. Department of Industrial Relations, 208 Cal. 633, 637, 284 P. 212, 214.

The orders sought to be annulled are affirmed.

We concur: STURTEVANT, J.; GOODELL, Justice pro tem.

130 Cal.App. 59

PEOPLE v. NEWTON.

Cr. 1674.

District Court of Appeal, First District, Division 1, California.

Feb. 27, 1933.

Rehearing Denied March 14, 1933.

Hearing Denied by Supreme Court March 27, 1933.

1. **Intoxicating liquors** 🔑236(9).

Finding intoxicating liquor in defendant's possession is insufficient alone to constitute crime of maintaining "common nuisance," in absence of evidence supporting inference of purpose to sell liquor (St. 1921, p. 79; Volstead Act, tit. 2, § 21 [27 USCA § 33]).

[Ed. Note.—For other definitions of "Public or Common Nuisance," see Words and Phrases.]

2. **Intoxicating liquors** 🔑239(8).

Instructions authorizing conviction for maintaining common nuisance, though jury believed no sale of liquor was made or intended, *held* prejudicially erroneous (St. 1921, p. 79; Volstead Act, tit. 2, § 21 [27 USCA § 33]).

> The instructions were to effect that if jury believed that intoxicating liquor was sold, kept, or bartered in restaurant of which defendant had charge, jury would be justified in finding that it was a common nuisance, and that, in order to convict defendant, jury must find that common nuisance was maintained at such place, and, if jury found that intoxicating liquor was sold or kept or bartered at that place, they were warranted in finding that place was common nuisance.

Appeal from Superior Court, Santa Clara County; Robert R. Syer, Judge.

C. C. Newton was convicted of maintaining a common nuisance, and he appeals.

Reversed and remanded.

J. B. Peckham, of San Jose, for appellant.

U. S. Webb, Atty. Gen., and Seibert Sefton, of San Francisco, for the People.

PER CURIAM.

Defendant appeals from a judgment of conviction of the crime of maintaining a common nuisance and from an order denying a new trial.

It was testified that defendant on March 27, 1931, was in charge of a restaurant in Gilroy, and that on that date two sheriff's deputies entered the place and purchased from him two glasses of whisky and a pint of the same unlawful beverage. The restaurant was then searched and a bottle of whisky was found under the counter, and a larger quantity of liquor in the rear room. It was testified that the defendant admitted the ownership of the restaurant and of the liquor found. He denied the sales and the admissions testified to by the prosecution's witnesses.

The information charged that "defendant did wilfully and unlawfully maintain a common nuisance, to wit, that said defendant * * * kept and maintained a place and building where intoxicating liquors, to wit, wine and whiskey, were kept, sold and stored. * * *" The charge was made pursuant to the Wright Act (St. 1921, p. 79), which was founded on the Volstead Act (27 USCA). The latter act provides that "any room, house, building, boat, vehicle, structure, or place where intoxicating liquor is manufactured, sold, kept, or bartered in violation of this chapter, and all intoxicating liquor and property kept and used in maintaining the same, is hereby declared to be a common nuisance, and any person who maintains such a common nuisance shall be guilty of a misdemeanor." Title 2, § 21 (27 USCA § 33). The court charged the jury as follows: "It is alleged in the information that the place known as 285 Monterey street, City of Gilroy, County of Santa Clara, State of California, is a place where a common nuisance was maintained. If you believe that on or about March 27, 1931, intoxicating liquor was sold, kept or bartered in that place, and that the intoxicating liquor was whiskey, then I instruct you that whiskey is an intoxicant and prohibited by law; and if you find that intoxicating liquor was so sold, kept or bartered in that place, then you are justified as a matter of law in finding it was a common nuisance." Further, that "in order to convict this defendant you must find first, that a common nuisance was maintained or conducted or kept at 285 Monterey street in the city of Gilroy, State of California; and if you find that intoxicating liquor was sold or kept or bartered in that place on or about the 27th day of March, 1931, then you are warranted as a matter of law in finding the ultimate fact that this place was a common nuisance."

[1, 2] With the exception of two drinks which, according to the evidence, were purchased, and the bottle found under the counter, it appears that the remainder of the liquor was found in another room in the building. As stated defendant denied that any sale was made or that he owned the liquor so found; and it was testified by a witness who claimed ownership of the restaurant that the liquor last mentioned belonged to him and was kept for his personal use. It has been held that the mere fact that intoxicating liquor is found in one's possession, whether upon the person or in a building, is insufficient alone to constitute the crime of maintaining a common nuisance—that there must be something in addition to the mere unlawful possession to sup-

port the inference of a purpose to sell the liquor. People v. Mehra, 73 Cal. App. 162, 238 P. 802; People v. Fuller, 73 Cal. App. 183, 238 P. 809; People v. Bettencourt, 115 Cal. App. 387, 1 P.(2d) 494. The testimony as to facts tending to show an unlawful purpose was conflicting; yet, as defendant contends, the jury following the instructions given might have found him guilty of maintaining a common nuisance although they believed that no sale was made and that the liquor found was not kept for that purpose. As the court said in People v. Mehra, supra, the instructions excluded the gist of the offense denounced by the act, namely, the maintaining of a place of common resort for the sale and distribution of intoxicating liquor. The record discloses no other instruction which states the rule laid down in the cases cited, or which tends to correct the erroneous conclusion which might have been drawn from the instructions complained of. In view of the testimony we are convinced that the instructions were prejudicial and that the defendant should have been granted a new trial.

The judgment and order are accordingly reversed and the cause remanded for further proceedings.

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130 Cal.App. 25

McGALLIARD v. J. D. HALSTEAD LUMBER CO.

COKER & TAYLOR, Inc., v. SAME.

Civ. 7304.

District Court of Appeal, Second District, Division 2, California.

Feb. 24, 1933.

1. Corporations 🔑426(7).

Where person does business as agent with knowledge and acquiescence of directors, corporation is bound by his acts and declarations within scope of business intrusted.

2. Principal and agent 🔑21.

Agency resting in parol may be established by testimony of agent himself.

3. Principal and agent 🔑99.

Where there is no express authority, it is proper to describe work performed by agent in course of employment, bringing it home to knowledge and implied acquiescence of principal.

4. Corporations 🔑432(12).

Evidence warranted trial court's finding that person signing, for lumber corporation controlling funds, acceptances of property owner's orders in favor of subcontractors had implied authority to bind corporation (Civ. Code, §§ 2316, 2319).

5. Appeal and error 🔑1008(1).

Whether subcontractors used ordinary care in believing person signing acceptances of orders drawn on lumber corporation having control of building fund had authority to bind corporation *held* for trial court trying case (Civ. Code, § 2334).

Appeal from Superior Court, Los Angeles County; Wm. S. Baird, Judge.

Actions by J. B. McGalliard and by Coker & Taylor, Inc., against the J. D. Halstead Lumber Company. From judgments for plaintiffs, defendant appeals.

Affirmed.

Culver & Nourse and Fred J. Furman, both of Los Angeles, for appellant.

G. C. DeGarmo and W. M. Crane, both of Los Angeles, for respondent McGalliard.

James F. McBryde, of Glendale, for respondent Coker & Taylor, Inc.

ARCHBALD, Justice pro tem.

In the spring of 1927 J. R. Luttrell and wife purchased a lot in Los Angeles for the purpose of improving same with an apartment house. Respondents herein were subcontractors, McGalliard having the contract for brick work and Coker & Taylor, Inc., the contract for the plumbing. Before the work on such contracts was started orders were issued to appellant lumber company by Luttrell and wife in favor of said contractors for the contract price, payable in four installments. On such orders, as stated in appellant's brief, C. C. Overpeck, "who was employed to handle sales promotion, especially in connection with construction and financing in conformity with the program of the Security Housing Corporation," imprinted a purported acceptance, using a rubber stamp bearing the name of appellant corporation and signed, "By C. C. Overpeck." Suit was brought for the unpaid balance due each respondent, and from judgments in their favor these appeals were taken.

[1-5] The sole question raised is the authority of Overpeck to bind appellant by such acceptances. Appellant is an Arizona corporation, with three directors, J. G. Halstead, the president, and two sons, one of whom, A. E. Halstead, is secretary-treasurer. No express authority was given to make such acceptances, and, unless the evidence shows that appellant either intentionally or by want of ordinary care caused an implied authority to be conferred upon Overpeck, there would be no support for the findings that

appellant accepted and agreed to pay the orders above mentioned.

The first loan of $50,000 was agreed to be advanced by the Security Housing Corporation. The owner, Luttrell, testified that he was given a list of lumber dealers by said housing corporation, "because the first loan was not sufficient and the lumber dealers would take care of the second trust deed." The name of Overpeck "was on the list that the Security Housing Corporation supplied," testified Luttrell, and "I saw Overpeck and talked with him about the deal. * * * A clerk said he was credit manager and sent me to see Overpeck. * * * I took up the matter of the loan with Overpeck of the Halstead Lumber Company." Apparently thereafter and on the 6th day of July, 1927, two trust deeds for $50,000 and $25,000 respectively were made. Appellant was the beneficiary under the first of these two. The application for the $25,000 loan is on a blank of the J. D. Halstead Lumber Company and is apparently made to it. In the commitment of the housing corporation to make the loan that company purchased the note secured by the first trust deed for the agreed sum of $50,000, to be paid as follows: 12½ per cent. when foundation was in, etc.; 12½ per cent. when building was completely framed and roofed; 25 per cent. when interior was plastered, etc.; and 25 per cent. when building was substantially ready for occupancy; the balance to be paid "after notice of completion has been filed and the improvements have been finally approved by the Corporation." By acceptance of the commitment the lumber company guaranteed the payment of any liens prior to such deed of trust. The commitment was accepted by appellant July 11, 1927. The two trust deeds and accompanying notes were escrowed with the Metropolitan Trust Company under instructions signed by the Luttrells and appellant. With regard to the "papers" and the escrow, Mr. Luttrell testified that when the instruments were made out he took them to his wife, "and then I went over to the J. D. Halstead Lumber Company and signed the papers. * * * I had no agreement except through Overpeck. Overpeck handled the escrow instructions. I had no other dealings with anybody in the Halstead Lumber Company. All of my dealings were with Overpeck. I did not come in contact with either of the Halsteads until the building was almost completed. I explained to Green, a salesman for Coker & Taylor, that the money would not be paid out except on orders at the time he gave me the bid. The work started approximately when the orders were issued." With regard to the orders made out to respondents and other subcontractors, Luttrell said: "He [Overpeck] requested me to make the orders out to the Halstead Lumber Company for the subcontractors. The money was to be paid on orders given by me to the Halstead Lumber Company and was pursuant to my conversations with Overpeck."

C. C. Overpeck testified: "I handled the deals during the first six months but the Halsteads actually signed the mortgages, trust deeds, escrow instructions and things that required the corporate seal." With regard to the Luttrell deal he said that he talked with a Mr. Allen of the Security Housing Corporation about it and that about a week later Luttrell came to see him; that he took the matter under advisement and discussed it with the Halsteads. "I handled [several] similar projects while I was with the Halstead Lumber Company * * * in the same manner and I had complete charge of the transactions." He further testified that at the time he was employed nothing was said about his official capacity; that later it was discussed; that he had then financed several contracts and was told to take over the credit department in addition. He said that Luttrell or one Armstrong presented several different set-ups of the job above referred to, and that he conferred with them and afterwards took up the project with the Halsteads, who "left everything to me." A change in the cost set-up was made to cover an increase in the cost of construction, and apparently this was arranged by Overpeck, who wrote a letter for the Halstead company to the Security Housing Corporation confirming a telephone conversation with their Mr. Tracy regarding the change in payments, using the same stamp with which the acceptances were signed. Incidentally, this stamp was furnished Overpeck by the Halsteads, the former testifying that he had used it "in other similar transactions with other people before this one, and handled in the same manner," and that the Halsteads knew of this fact. As the job progressed, according to Overpeck, he would request an inspection so that checks to make progress payments could be obtained, and when calls came in with reference to the projects the telephone girl referred them to him. With regard to the orders, the witness said that he told Mr. Luttrell how he would "have to draw these orders on this loan. It was discussed a number of times with the Halstead Lumber Company. * * * I think in all instances I had written my acceptances on behalf of the Halstead Lumber Company for the orders held by the subcontractors." Again, he said: "Except in case of the lot pay-off I did not submit any orders written by Luttrell * * * either to A. E. Halstead or J. D. Halstead, without putting my name on them or using the rubber stamp." Overpeck did not know if he submitted the Coker & Taylor orders to either of the Halsteads, but said he did not submit any of the McGalliard orders to them.

We have quoted enough of the testimony,

we think, to show that outside of the actual signing of escrow instructions and commitments the deals were all handled by Overpeck. This seems to be well corroborated by A. E. Halstead, the secretary-treasurer of the company, who testified that prior to Overpeck's coming the company did business with the housing corporation "in a similar manner." "I looked after the business before Overpeck came." It was very natural, then, that Luttrell should direct the subcontractors to take their orders to Overpeck, and the trial court might well have found that that was the usual method of handling the business. William F. Creighton, an estimator for respondent Coker & Taylor, testified that he had a conversation with Overpeck a few days before the orders in question were signed, "because I wanted assurance about the payments on the contracts"; that when he got the orders covering their contract from Luttrell he was told to see Overpeck; that Overpeck looked the orders over and signed them; that the latter said the "first payments would be rather small," and that they were fixed in the sum of $500 each; that Overpeck told him that by so doing "when it came to making the last payment there would be enough to take care of it." The two orders of $500 each were paid, and Creighton went to collect the last order, which was for $6,061. According to his testimony Overpeck told him that the money was not available and to come back later; that in the meanwhile he would talk it over with Mr. Halstead and see if it could be paid. Creighton came back and, as he testified, had considerable trouble and was delayed in seeing Mr. Halstead himself. After waiting some time, however, on the second or third day of his attempts, he asked the telephone operator if he could see Mr. Halstead, and was once more told that he could not. "So I went right into Mr. Halstead's office and laid the order down on his desk and asked him what he was going to do about it." Halstead asked him if he "would accept a lesser amount than what was due on the last order and later he would take care of the balance," but the witness replied that he wanted it all, and later was given a check for $3,983.75. "He [Halstead] did not say they were not executed by the company or anything to that effect. I delivered the orders to him. He did not deny the orders."

Respondent McGalliard received his order from Luttrell and was told to see Overpeck, who accepted it. The payments on such order were $900, three of $700 each, and the balance of $4,600 when the building was completed. He testified that he talked with Overpeck about the financial arrangement. His attorney, in getting information about how the job would be handled, called the Halstead Lumber Company on the telephone and asked for the person who had the Luttrell job. The caller was told it was Overpeck, and the call was transferred to the latter and the information obtained. Similar orders of other subcontractors on this same job, also accepted by Overpeck, were introduced in evidence. Apparently the account of the Halstead Lumber Company for material furnished on the Luttrell job was kept paid out of the progress payments, and about $3,000 out of the proceeds of the loan was used to pay for furniture for the apartment house, and the balance of the purchase price of the lot was also paid therefrom. Mr. Coker, of respondent firm, testified that he had a conversation with A. E. Halstead about "getting the balance of our payment on those orders," and that the latter said nothing about their not being authorized. C. C. Overpeck, speaking of A. E. Halstead, testified: "He just began to repudiate the orders at that time. It was after he knew the job would not be paid off in full."

There is ample evidence from which the trial court could conclude that respondents believed, and were justified in believing, that appellant had clothed Overpeck with authority to handle the details of such jobs after the original commitment and escrow papers were signed, notwithstanding the fact that he apparently had no authority to sign checks. The detail of satisfying subcontractors that their money would be paid on the orders submitted was a very necessary one. Both respondents, and apparently all subcontractors on this and prior jobs handled by Overpeck, wanted and obtained the same assurance before stating on their contracts, and the court, as well as respondents, might well have concluded that the acceptance of such orders was a part of the method of handling the business of the company, just as it was when carried on by A. E. Halstead prior to Overpeck's employment. Every one making inquiries at the Halstead company's office as to who was handling the Luttrell job was referred to Overpeck, and the court was justified in concluding that the officers must have intended that Overpeck was to take care of the matter of satisfying successful bidders on subcontracts, and must have known that such individuals could not very well be satisfied without some satisfactory writing from the company that they would be paid out of the funds to be placed in its control. The company's officers must have known that they were not executing any such assurances, and the trial court could conclude from the evidence that they either knew of the manner in which Overpeck was meeting the situation or should have known, and that he had actual authority to do as he did. Civ. Code, § 2319. Under the circumstances shown it is obvious that they permitted Overpeck to believe that he possessed such authority. Section 2316, Civ. Code. "It is not the law that the authority of an agent to act for a corporation can only be proven by the minutes of its board of directors or by a contract in writing. It may be shown by evidence that the person does business for the corporation and on its behalf, as agent, with the knowledge and acquiescence of its directors or general manager, or by their direction. The company, in such a case, is bound by his acts and declarations within the scope of the business intrusted to him." City of Venice v. Short Line Beach Land Co., 180 Cal. 447, 453, 181 P. 658, 661. Where the fact of agency rests in parol it may be established on the trial by the testimony of the agent himself. "His testimony is admissible and competent to prove the agency and the nature and scope of his authority and to bind his principal thereby." Kast v. Miller & Lux, 159 Cal. 723, 727, 115 P. 932, 933. Where there is no express authority "it is proper to describe the work performed by the agent in the course of his employment, bringing it home to the knowledge and implied acquiescence of the principal." 10 Cal. Jur. 987. We are forced to conclude that there was evidence in the instant case from which the trial court might well have determined that such knowledge was brought home to appellant, notwithstanding conflicting evidence from which a contrary conclusion might have been drawn. And on the other hand we cannot conclude, as a matter of law and under the evidence favorable to respondents, that the latter were "without want of ordinary care" (section 2334, Civ. Code) in acting as they did.

Judgments appealed from are affirmed.

We concur: WORKS, P. J.; CRAIG, J.

130 Cal.App. 141

PEOPLE v. CLAGGETT.

Cr. 2281.

District Court of Appeal, Second District, Division 1, California.

Feb. 28, 1933.

Hearing Denied by Supreme Court March 30, 1933.

1. Licenses ⚷18½.

Instrument sold by defendant representing fractional interest in mining claim *held* "security" within Corporate Securities Act (St. 1917, p. 673, § 2 (a), subd. 7, as amended).

[Ed. Note.—For other definitions of "Security," see Words and Phrases.]

2. Licenses ⚷39.

That relationship between interested persons in mining claim was partnership *held* no defense in prosecution for unauthorized sale of securities representing interests in claim (St. 1917, p. 673, as amended).

3. Criminal law ⚷982.

That court subsequent to trial was guided by unsworn and hearsay evidence of defendant's fraud in determining degree of guilt and punishment *held* not ground for reversal (Pen. Code, § 1203).

Appeal from Superior Court, Los Angeles County; Fletcher Bowron, Judge.

F. H. Claggett was convicted for violation of the Corporate Securities Act, and he appeals from the judgment and from an order denying his motion in arrest of judgment and from an order denying his motion for new trial.

Judgment and order denying motion for new trial affirmed, and appeal from order denying motion in arrest of judgment dismissed.

Hazlett & Plummer and Robert J. Sullivan, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Warner I. Praul, Deputy Atty. Gen., for the People.

HOUSER, Justice.

From a judgment of conviction of the criminal offense known as "the violation of the Corporate Securities Act" (Stats. 1917, p. 673, as variously amended), and from an order by which his motion for a new trial was denied, defendant has appealed to this court. He has also given notice of an appeal from an order "denying his motion in arrest of judgment."

As far as is here material, it appears that defendant was a lessee of certain gold placer mines, and that, in consideration of a certain sum of money by each of several different persons paid to defendant, by an instrument in writing signed by defendant, he agreed that the person who paid such sum of money was "to have one-twentieth interest in all of the gold and other values recovered from said claim after operating expenses have been paid"; also, "in connection with the other copartners," defendant agreed "to incorporate the above mentioned copartnership at any time suitable to all of the parties concerned, and at that time party of the second part shall receive $1/20$ of the stock in the company to be formed."

As set forth in the information herein, the particulars of the charge against defendant were that, without the consent of the corporation commissioner of this state, defendant sold "a security * * * evidencing and representing an interest in a gold mining enterprise, and the right to share in the profits of a mining lease. * * *"

[1] It is contended by appellant that the instrument issued by him was not a "security." But by the language of subdivision 7

⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

of section 2(a) of the act (as amended) and by the decisions in various adjudicated cases, a contrary conclusion is indicated. See State v. Gopher Tire & Rubber Co., 146 Minn. 52, 177 N. W. 937; State v. Evans, 154 Minn. 95, 191 N. W. 425, 27 A. L. R. 1165; People v. White (Cal. App.) 12 P.(2d) 1078; People v. McCalla, 63 Cal. App. 783, 220 P. 436; People v. Oliver, 102 Cal. App. 29, 282 P. 813. It follows that the contention by defendant in that regard cannot be sustained.

[2] Prejudicial error on the part of the trial court in its refusal to permit defendant to introduce evidence on the trial of the action to the effect that each of the persons to whom an interest in the mining venture was sold regarded the relationship which existed among the several interested persons as that of a partnership. However, disregarding other possible valid objections which might be interposed against the admissibility of such evidence, and even assuming (without deciding) that the relationship was such as was claimed by defendant, the result would be unavailing to him as far as it would tend to relieve him from the legal consequences of his act. It is admitted by appellant that "a partnership selling securities comes within the terms of the Corporate Securities Act"; but that fact, as well as the fact that a partnership existed among the several interested parties, is immaterial. The criminal offense was alleged to have been committed, and the evidence adduced on the trial of the action was sufficient to establish the fact that the offense was committed, not by a partnership, but by defendant as an individual in selling the security in question. Neither by virtue of the provisions of the statute here involved, nor in response to any decision by any court to which attention has been directed, may it properly be held that the relationship, if any, which existed between or among the several interested parties, either before or after the instrument in question was executed, constituted a defense for the commission of the offense.

[3] Finally, with reference to the order of the trial court by which probation was granted to defendant, appellant complains that "the trial court was guilty of misconduct, prejudice, and error in declaring the evidence to show an absence of fraud at the trial, but subsequent thereto permitted unsworn and hearsay evidence of fraud and bad faith to guide it in determining the degree of guilt and punishment of defendant."

In response to such criticism, however manifestly unfair to the defendant in some respects the operation of the prevailing probation system may appear, and however much some of the permitted practices thereunder may be deprecated, it need only be said that the provisions of section 1203 of the Penal Code authorized the course which was pursued by the trial court in the premises.

The judgment and the order by which the motion for a new trial was denied are affirmed. Since no appeal may be taken by a defendant from an order denying a motion in arrest of judgment (section 1237, Pen. Code), the attempted appeal in that regard is dismissed.

We concur: CONREY, P. J.; YORK, J.

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130 Cal.App. 182

WARREN v. ELLINWOOD.

Civ. 3937.

District Court of Appeal, Third District, California.

March 1, 1933.

1. Animals 🔑26(2).

If possession of person claiming agister's lien is wrongful, no lien arises in his favor (Civ. Code, § 3051).

2. Animals 🔑25.

In action for recovery of cattle, judgment for plaintiff *held* sustained where answer admitted plaintiff's ownership and set forth readiness to deliver property on payment of reasonable value of feed, pasturage, and care given cattle, but defendant failed to show reasonable value thereof (Civ. Code, § 3051).

Appeal from Superior Court, Tuolumne County; J. T. B. Warne, Judge.

Action by Margaret E. Warren against Charles N. Ellinwood. From a judgment in favor of plaintiff, defendant appeals.

Affirmed.

Nutter, Hancock & Rutherford and A. P. Hayne, all of Stockton, for appellant.

H. H. McPike, of San Francisco, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

The plaintiff had judgment in this action for the recovery of a certain band of cattle, or the value thereof. From this judgment the defendant appeals.

The record shows that the plaintiff in this action and Senator John B. Curtin, deceased, were brother and sister; that during the lifetime of Senator Curtin a certain band of cattle belonging to the plaintiff ranged upon lands under the care and custody of Senator Curtin, and were pastured thereon free of charge; that Senator Curtin died early in the year 1925; that after the decease of Senator Curtin the plaintiff attempted to secure possession of said band of cattle, and a controversy arose as to the ownership thereof, between the plaintiff and Mrs. Lucy Curtin, the widow of Senator Curtin, and the plaintiff was not allowed to take said cattle from the premises upon which they had theretofore been pastured. While this controversy continued between the plaintiff and Mrs. Curtin, as to the ownership of the band of cattle involved in this action, Mrs. Lucy Curtin leased certain tracts of land to the defendant in this action, upon which the band of cattle was ranging and feeding; that the defendant, with knowledge that the plaintiff claimed ownership of the cattle, nevertheless declined to deliver the cattle to the plaintiff or to her sons who had called upon him and demanded delivery. There is some testimony in the transcript to the effect that the defendant stated he would deliver the cattle upon payment of a bill of $300 claimed for the pasture and care of the cattle, to which the answer was made by one of the sons that the amount was outrageous. There is sufficient testimony in the record to show that the defendant had knowledge of the fact that the possession by Mrs. Lucy Curtin was wrongful, and knew the same at the time that he took possession thereof.

The finding of the court with reference to the ownership and possession of the property is as follows: "That said defendant unlawfully came into the possession of said personal property, under authority received from one Lucy Curtin, and against the will of plaintiff, the said Lucy Curtin at the time being wrongfully in the possession of said cattle and all thereof; that the defendant did, after the commencement of this action, offer to deliver said cows, calves, heifers, steers, and the increase thereof, to plaintiff upon payment by plaintiff to defendant of the reasonable value of the pasturage and care given by said defendant, but said plaintiff has, and at all times refused to pay, and still refuses to pay for the care, pasturage and feed of said cows, heifers, calves, steers, and the increase thereof. That plaintiff is not indebted to said defendant for any pasturage, care, feed or water, given to said cattle or any thereof, by defendant; that defendant has not a lien upon said cows, heifers, calves, steers, or any thereof, for any pasturage furnished or any care furnished for said cattle."

As we have stated, the record shows that the plaintiff refused to pay $300 as the pasturage bill for said cattle claimed by the defendant, but there is no testimony in the record showing that the plaintiff has refused to pay any bill on account of the pasturage of said cattle. The statement of the plaintiff only is that she has not paid any bill. This difference in the finding and the testimony, however, is immaterial.

[1] Section 3051 of the Civil Code gives an agister of livestock a lien thereon for the reasonable value of the feed, care, and attention given to the animals. However, the law requires that the one claiming an agister's lien must come into possession of the property lawfully. If the possession is wrongful, no lien arises in favor of such person.

As stated in 2 California Jurisprudence, page 22: "It is essential, however, that the animal be placed with the agister by its owner, or by someone having authority from him. There is no good reason why a person not an owner should be permitted to pledge property or create a lien on it, any more than he should be permitted to sell it. And it has been said that a contrary rule would be in violation of the fundamental rights of property guaranteed by the Constitution," etc.

And as said in 3 Corpus Juris, page 33: "One who wrongfully obtains or retains possession of cattle is not entitled to a lien for keeping them." To the same effect is the case of Lowe v. Woods, 100 Cal. 411, 34 P. 959, 38 Am. St. Rep. 301, and Howard v. Burns, 44 Kan. 543, 24 P. 981.

The cases cited by the appellant show that the one claiming a lien was lawfully in possession. The section of the Code under which an agister's lien may be claimed sets forth in the very first sentence the fact that the person claiming the lien must be lawfully in possession.

[2] There is another reason, however, upon which the judgment of the trial court in this case must be sustained. The answer of the defendant admits the ownership of the plaintiff, sets forth his readiness to deliver the property to the plaintiff upon being paid the reasonable value for the feed, pasture, and care given the cattle, but the record shows that the defendant failed to introduce any testimony whatever showing the reasonable value of any bill that he might have against the cattle on account of pasturage, care, etc. We have read every word of his testimony, and there is nothing therein upon which the court could make a finding as to the value of the feed, care, and attention given the cattle in question. All there is in the testimony as to the value is the fact that at one time when demand was made for the possession of the cattle, the defendant told one of the sons that possession would be delivered upon the payment of $300. There is nothing in the testimony which would warrant the court in finding a judgment in favor of the defendant for the sum of $300, or any other sum that should be awarded the defendant for the pasturage, care, and attention given the cattle. By rea-

son of this failure, the court could only find the ownership as it did find, and the right of the plaintiff to the possession of the cattle.

The judgment is affirmed.

We concur: PULLEN, P. J.; R. L. THOMPSON, J.

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130 Cal.App. 273

In re SEIPEL'S ESTATE.

GRAHAM et al. v. HAHN.

Civ. 8860.

District Court of Appeal, First District, Division 1, California.

March 8, 1933.

Hearing Denied by Supreme Court May 4, 1933.

1. Wills ⚷656.

No wider scope should be given testamentary forfeiture clause than language plainly requires, and testator's intent must be given effect.

2. Wills ⚷665.

Provision for forfeiture if legatee should commence contest proceeding or fail to abide by will *held* inapplicable to legatee who merely sued executrices for accounting and inventory of securities and deposits owned by deceased.

> The legatee brought an action against the executrices for accounting of certain shares of stock and bank deposits of deceased, which action was dismissed, and another action was brought to require stock and deposits to be inventoried as part of assets of estate. While the legatee in each of the actions alleged that deceased was weak and infirm and had little understanding of business methods, these allegations were made in support of claim that executrices wrongfully acquired possession of her property.

3. Trial ⚷390.

Findings, unless waived, must be made and filed before rendition of judgment.

Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

Petition by Emma Seipel Hahn for partial distribution of the estate of Katherina Seipel, deceased, opposed by Annie Graham and another, executrices. Judgment was entered ordering partial distribution as prayed, and the executrices appeal.

Reversed, with directions.

Alfred Fuhrman, of San Francisco (H. W. Hutton, of San Francisco, of counsel), for appellants.

Gillogley, Crofton & Payne, of San Francisco, for respondent.

JAMISON, Justice pro tem.

Katherina Seipel died on March 4, 1929. She left a will by which she bequeathed and devised her estate to her three daughters, the appellants and respondent, share and share alike, except certain jewelry which she bequeathed to each separately. The will contained the following provisions: "* * * provided, however, that if any of my said children shall commence any proceedings to contest this will, or shall fail to abide by any of its provisions, that then, and in that event all property bequeathed or devised to such contesting or objecting child, shall not pass to her, except the sum of ten dollars, payable out of my personal estate, but shall belong to and become part of the residue of my estate, to pass under this will to the non-contesting and non-objecting children, share and share alike."

On August 8, 1930, respondent filed a petition for a partial distribution to her of the sum of $1,000 and for the distribution to her of the jewelry bequeathed to her by the said will. The will was admitted to probate on March 20, 1929, and appellants duly qualified as executrices thereof. Appellants filed an answer to said petition both as executrices of said estate and as individuals. By their answer they denied that partial distribution could be made, owing to the financial condition of the estate, and also alleged that respondent had forfeited all her interests under the will; that said forfeiture was created by two actions commenced by respondent against the executrices, one of which (No. 217,468) was filed March 19, 1930, and the other (No. 52,329) on July 21, 1930. Upon the hearing had on said petition for partial distribution the trial court rendered judgment ordering partial distribution as prayed for, and from this judgment appellants have taken this appeal.

The main contention of appellants is that by the commencement of the said two actions respondent, under the foregoing provision of the will, has forfeited all of her interests in the said estate. The first of these actions appears to be one demanding an accounting by appellants of certain shares of stock and bank deposits owned by deceased at the date of her death. This action was dismissed by respondent on April 4. 1930. The other of said actions alleged fraud upon the part of appellants, by means of which they had possessed themselves of said shares of stock and money deposited in said banks, respondent asking therein that appellants be required to inventory same as part of the assets of the estate. Upon the trial of this case appellants had judgment. The will in question was executed June 11, 1922. No mention is made in the will of the shares of stock, nor of the money on deposit in the banks.

In Lobb v. Brown, 208 Cal. 476, 484, 281 P. 1010, 1013, the court said: "That a provision in a will providing for a forfeiture of a legacy in the event of a contest of the will by the legatee is valid and binding upon said legatee has been held frequently by this court." Citing authorities. In this case the court also said: "It is universally held, we think, that such a clause in a will, like all other forfeiture provisions, is to be strictly construed." Citing Estate of Hite, 155 Cal. 436, 101 P. 443, 21 L. R. A. (N. S.) 953, 17 Ann. Cas. 993; Estate of Bergland, 180 Cal. 629, 182 P. 277, 5 A. L. R. 1363, and In re Kitchen's Estate, 192 Cal. 384, 220 P. 301, 30 A. L. R. 1008.

It is true respondent alleges in each of the two said actions that deceased was an aged woman, and for a long time prior to her death was ill and had suffered a severe accident, and that by reason of illness and the infirmity of age was weak and infirm for a long time prior to her death, and was unable to properly care for and look after her business and property and had little understanding of business methods; but it is apparent that these allegations were made in aid of her claim that appellants had acquired possession of property of deceased wrongfully, and that as executrices of the will they should inventory it as a part of the assets of the estate.

It is not alleged in said actions that at the date of the execution of the will deceased was mentally incompetent to make a will or that it was procured to be made by duress, menace, fraud, or undue influence. Section 380 of the Probate Code sets forth the method by which a will may be contested. It provides that the contestant must file a petition containing the allegations against its validity, and praying that the probate be revoked. It nowhere appears in either of said actions that respondent was contesting the validity of the will, nor any of its provisions. Apparently she was endeavoring by said actions to compel the executrices to inventory as the property of the estate certain of its assets which she maintained they had failed to include in the inventory made by them. As an interested party she had a right to do this. Furthermore, the action was commenced on July 21, 1930, more than one year after the probate of the will.

[1, 2] The rule that a forfeiture clause is to be strictly construed means simply that no wider scope is to be given to the language employed than is plainly required, and it is the cardinal rule of construction that the intent of the testator as manifested by the terms of the will must be given effect. In re Kitchen, supra. In the instant case the only provisions that would result in a forfeiture under the will were the commencement of proceedings to contest the will, or failure to abide by any of its provisions. We find nothing in either of said actions commenced by respondent against appellants indicating a purpose to contest the will; on the contrary, by filing her petition for partial distribution, she indicated the reverse. The case of Estate of Hite, supra, and other cases relied upon by appellants, are all cases where there was a contest of the will or of some of its provisions.

The court found that the estate was but little indebted and that its value as shown by the inventory and appraisement was in excess of $58,000; that $3,000 of this was personal property, and that $1,000 was a reasonable sum to be allowed respondent without loss to creditors or injury to the estate or persons interested therein; and that no injury can result to the estate by said allowance and distribution.

A reappraisement of the real estate owned by the said estate was by order of the court made on April 16, 1932, in which the said real estate was valued at $26,000, making the total value of said estate as of that date, including personal property, $29,000. It also appears from the evidence that respondent was indebted to the estate in the sum of about $2,000 upon notes executed by her to deceased, but as she will receive one-third of the assets as her share on final distribution, it will be more than sufficient to take care of the said indebtedness.

[3] It appears from the record in this case that judgment on respondent's petition for partial distribution was rendered on April 20, 1932, and thereafter findings were filed on April 27, 1932. Upon trials of questions of fact, findings are required, and there can be no rendition of judgment until findings are made and filed with the clerk, unless the findings are waived. Brownell v. Superior Court, 157 Cal. 703, 109 P. 91; Crim v. Kessing, 89 Cal. 478, 26 P. 1074, 23 Am. St. Rep. 491; 14 Cal. Jur. p. 912.

We are of the opinion that the judgment in the case at bar was premature, in that it was rendered prior to the filing of the findings with the clerk. However, the findings filed being fully supported, a judgment in accordance therewith should be entered.

The judgment appealed from is therefore reversed, and the trial court is ordered to enter a judgment in accordance with the decision heretofore made by it and filed in this case.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

130 Cal.App. 119

MIDDLECOFF v. DURNAL et al.

Civ. 836.

District Court of Appeal, Fourth District. California.

Feb. 27, 1933.

1. Appeal and error 🔑**1010(1).**

Trial court's finding supported by ample evidence is conclusive.

2. Trusts 🔑**372(3).**

Evidence in action to establish trust in realty for legal services sustained finding grantee taking conveyance from owner's wife to whom owner conveyed pending litigation was not innocent purchaser.

3. Trusts 🔑**357(2).**

Grantee taking conveyance to realty with notice of attorney's claimed interest therein for services rendered and before attorney could judicially establish his interest, took property subject to attorney's interest.

4. Appeal and error 🔑**843(2).**

Where attorney seeking trust in land for legal services rendered was found to have interest therein, and grantee taking title had notice of attorney's interest, question of original grantor's insolvency was immaterial.

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Action by W. W. Middlecoff against Pearl M. Durnal and others. From an interlocutory decree for plaintiff, named defendant appeals.

Affirmed.

Aldrich & Mack, of Bakersfield, for appellant.

J. E. Greene, of Dinuba, for respondent.

BARNARD, Presiding Justice.

On November 18, 1922, the plaintiff entered into a written contract with one J. J. Kelly, providing in part as follows:

"Whereas said Kelly has heretofore purchased several pieces of land at tax sales, and desires said Middlecoff to render certain services as an attorney at law to perfect the title to said lands, now it is agreed that said Middlecoff will render the necessary legal services to determine the title to said lands, and in cases where Kelly is declared by judgment or by compromise to be the owner, then said Kelly shall have his money invested back, and the overplus of the land shall be divided equally between them. * * *"

On November 27, 1922, the plaintiff herein filed a suit for Kelly, entitled Kelly v. Smith, seeking to quiet title to a number of lots, including those here in question. Upon a second trial of this action Kelly discharged Middlecoff and secured other counsel. About the same time, and on February 11, 1924, Middlecoff filed a complaint in intervention in the case of Kelly v. Smith, asking that upon entry of judgment he be declared the owner of an undivided one-half interest in the property. The original holders of title to the property had defaulted and the suit referred to was being defended by a corporation claiming to have a lien thereon. The claim of this corporation was compromised and on April 18, 1925, a deed was executed by the corporation conveying to Kelly the three lots involved in the action now before us. On April 25, 1925, Kelly deeded these three lots to Ione Kelly, his wife. On May 4, 1925, a judgment was entered in the case of Kelly v. Smith, quieting Kelly's title to these three lots. Thereafter, a new trial as to the interest of Middlecoff, as intervener, was granted, it being later held that his attempt to establish an interest in the property through his complaint in intervention was premature. Kelly v. Smith, 204 Cal. 496, 268 P. 1057. In the meantime, on June 18, 1925, Ione Kelly deeded the three lots in question to her sister, Pearl M. Durnal, the real defendant in this action. Final judgment in Kelly v. Smith was entered on January 17, 1927, and this action was commenced on March 23, 1927, the plaintiff seeking to establish that the defendants hold the legal title to one-half of this property in trust for him and asking for a partition or sale of the property with a division of the proceeds. After a trial, findings were entered in favor of the plaintiff, and an interlocutory decree was entered providing for a sale of the property, for the repayment to the defendant Durnal of money invested and of certain amounts expended in connection with the property, and for a division of the balance between her and the plaintiff. From this interlocutory decree the defendant Durnal has appealed.

[1] The first point raised is that the respondent acquired no interest in the lots in question since he had failed to perform his part of the contract and was discharged for cause. While the appellant relies upon certain evidence as supporting this contention, there is ample evidence to the contrary, and the trial court having found in favor of the respondent, that finding is conclusive.

[2] It is further contended that the appellant is an innocent purchaser for value without notice. The court found to the contrary and the evidence sustains the findings in this regard. While the quiet title action was pending, the property was conveyed by Kelly to his wife and by her to her sister. Not only is the evidence as to consideration in each of these transfers somewhat unsatisfactory, but it fully appears that both Mrs. Kelly and Mrs. Durnal had not only constructive notice, through lis pendens recorded, but actual notice of the respondent's claims, each having

been definitely told of the same prior to their supposed purchase of the property. In any view, no more appears than a conflict in the evidence, and the findings are supported by the evidence.

[3] It is next contended that title passed to the appellant before the respondent became entitled to any interest in the property. The respondent was given a definite interest in the property by his agreement of employment. After doing a large amount of work he was discharged by Kelly. The trial court has found upon ample evidence that he was wrongfully discharged without cause, and that he did everything that he was permitted to do by his employer. The respondent at once took action to establish and protect his interest in the property and shortly thereafter the employer conveyed the property to his wife and almost immediately thereafter she conveyed it to her sister. As we have heretofore pointed out, the appellant had both constructive and actual notice of the respondent's claim, and, under the circumstances shown, it must be held not only that the appellant took the property subject to the claim of the respondent, but that this claim was an existing interest which could not be defeated by mere haste in conveying the property before the same could be judicially established. Luco v. De Toro, 91 Cal. 405, 18 P. 866, 27 P. 1082; Kelly v. Smith, supra.

[4] Some contention is made that a finding that J. J. Kelly was insolvent is not supported by the evidence. This need not be considered, for the reason that any question of such insolvency is immaterial since the respondent has been found, upon sufficient evidence, to be the owner of a certain interest in the property involved and the appellant Durnal took with both actual and constructive notice of such claim and interest.

No errors appearing, the judgment appealed from is affirmed.

We concur: MARKS, J.; JENNINGS, J.

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130 Cal.App. 255

EACRETT v. ZIMMON.

Civ. 7526.

District Court of Appeal, Second District,
Division 1, California.
March 6, 1933.

1. Appeal and error 🔑1011(1).

Appellate court must accept plaintiff's testimony supporting trial court's decision in his favor, on conflicting evidence.

2. Money received 🔑18(3).

Evidence in action for money received *held* insufficient to show that defendant personally agreed to pay money to plaintiff or that latter obtained interest in moneys paid defendant.

Appeal from Superior Court, Los Angeles County; L. T. Price, Judge.

Action by A. L. Eacrett against Max Zimmon. Judgment for plaintiff, and defendant appeals.

Reversed.

Max Schleimer, of Los Angeles, for appellant.

Robert H. Wallis and Richard Hartley, both of Los Angeles, for respondent.

CONREY, Presiding Justice.

The complaint in this action is in two counts. The first count stated a cause of action for money had and received by the defendant for the use of the plaintiff. The second count alleged the existence of a partnership between the plaintiff and the defendant; the dissolution of said partnership; and that defendant wrongfully withheld from the plaintiff a stated amount of money, being the plaintiff's share of the assets of the partnership. The court in its decision found against the existence of the alleged partnership, and adjudged that the plaintiff take nothing by the second cause of action. On the first count judgment was entered in favor of the plaintiff in the sum of $30,000 with interest, etc., and from this judgment the defendant appeals.

On July 15, 1924, letters patent were issued to the plaintiff upon an invention described as "Score Registering Devices for Golf and the like." Thereafter he assigned a one-third interest in the patent to James A. Armstrong, and another one-third interest to Howard M. O'Malley. In July, 1927, the plaintiff was introduced to the defendant and succeeded in interesting the defendant in said invention, so that defendant expressed a desire to buy the rights of Armstrong and O'Malley. This resulted in a sale of those interests, for which defendant paid to those parties the sum of $1,500. The assignments, however, were made to the plaintiff, although the defendant paid the consideration therefor. It was then agreed that a corporation would be formed, to which plaintiff would transfer the patent. Pursuant to this arrangement a written contract was executed of date September 3, 1927. In this contract after a recital that Eacrett and Zimmon were the sole owners of said invention, and that Zimmon was about to undertake the financing and organization of a corporation to be formed for the manufacture, distribution, and sale of the patented article, it was agreed as follows: "First: The sum of Thirty thousand ($30,000.00) dollars cash, shall be paid to Alfred L. Eacrett by the corporation that will be organized for the manufacture, distribution and sale of the article described in the above patent; but under no circumstance is it intended by the parties hereto that the said Max Zimmon shall be personally liable for the payment of this amount. The above payment shall be due and payable to the said Alfred L. Eacrett when the machinery is installed and ready for operation in the plant to be opened for the manufacture of the article above described." The remaining parts of the contract included a provision for the appointment of Eacrett as vice president of the corporation and manager of manufacturing operations; for the delivery to Eacrett of 5 per cent. of the total shares issued, all as part consideration of his interest in the patent, and his transfer of said patent to the corporation, and for further specified considerations to be paid to Eacrett at a later time out of the surplus profits of the enterprise, etc.

Shortly after the execution of said contract the proposed corporation was formed. The patent was assigned on November 8, 1927, by Eacrett to Zimmon, and shortly thereafter by Zimmon to the corporation.

The contract above mentioned was a personal contract between Eacrett and Zimmon. Under date March 8, 1928, another contract was entered into between Eacrett and the corporation. This contract was signed by Eacrett and by "Max Zimmon, Pres. The Golf Score Watch Co. Inc." This contract, after reciting the execution of the contract of September 3, 1927, and that Eacrett and Zimmon, the owners of the aforesaid patent, had duly transferred all their title and interest in the patent to said corporation, further recited that it was the desire of both parties to cancel and rescind the aforesaid agreement and substitute a new agreement therefor. Therefore it was now agreed that "firstly the agreement of September 3rd, 1927, by and between Alfred L. Eacrett and Max Zimmon is hereby cancelled and rescinded." It was then further provided that said corporation, in lieu of said former agreement, would pay to said Eacrett certain "royalties" and a "salary consideration" as therein stated.

Under date March 12, 1928, another contract was executed between Eacrett and the corporation. This contract recited, in substance, that whereas Eacrett had assigned said patent to the corporation "upon the terms and conditions set forth in an agreement dated September 3, 1927, and it is the desire of both parties to rescind the same and to substitute this agreement therefor. Now therefore," etc. The terms following were, in substance, that the agreement of September 3, 1927, "by and between the party of the first part and the party of the second part," be hereby rescinded, be made void and of no effect; that in lieu of the former agreement the corporation now agrees to pay to Eacrett the sum of $150,000 payable out of the proceeds to be derived from the sales of the manufactured articles, at rates and at the times specified in this agreement.

Under date December 8, 1928, an agreement in writing was entered into between Max Zimmon and one William Drusin. Eacrett was not named as a party to this contract, but immediately following the signatures of Zimmon and Drusin there appears a consent signed by Eacrett as follows: "I consent to the foregoing. A. L. Eacrett." From the recitals in the beginning of this contract it appears that Drusin, on or about January 5, 1928, had forwarded to said corporation $45,000, intending that $35,000 thereof be paid to Zimmon "for the balance due him," and the balance to be used by the corporation on account of expenses; that the corporation has paid to Zimmon the sum of $35,000 on behalf of Drusin for said balance due to Zimmon; that Zimmon and Drusin had entered into agreements, and modifications of agreements, relating to the holdings, division of dividends and advances to the said corporation, and to matters incidental thereto; that Zimmon had been requested to execute certificates causing transfers of stock certificates issued, and had refused to do so; and that other disputes had arisen between the parties thereto; and "the parties hereto are desirous of setting forth herein their respective holdings" in said corporation. Now, therefore, it was agreed between the parties thereto, as follows: The contract then proceeds in much detail to arrange for a reorganization of the corporation. This was to include some changes in the personnel of the board of directors and other officers of the corporation; and certain changes in the by-laws; and an employment of Zimmon as manager of the corporation. Also, there were provisions for further moneys to be advanced by Drusin for the use of the corporation; and providing conditions and methods of repayment by the corporation of indebtedness to Zimmon, and of indebtedness to Drusin. It was then provided that the parties to this agreement would enter into a pooling stock agreement, the details of which were set forth, covering the stocks owned respectively by Zimmon and Drusin in said corporation. It was then provided that the corporation would enter into an agreement in writing with Eacrett restating the terms of payment to be made by the corporation to Eacrett as royalties on his invention, "until the total sum of One Hundred Fifty Thousand ($150,000.00) Dollars is fully paid. The time when said royalties shall be paid, and the manner how the same shall be paid, shall be decided and determined at the said meeting. That the parties hereto shall not be liable to said Alfred L. Eacrett as stockholders, officers, individually, or otherwise." (The words "the said meeting" referred to the proposed reorganization meeting of the corporation.) There are other details of this contract of December 8, 1928, which apparently do not require attention here.

From the facts thus far stated it appears that on the 14th day of October, 1927, the patent was owned, one-third by Eacrett and two-thirds by Zimmon, the legal title being in the name of Eacrett. At about that time Zimmon sold, as he described it, "half of my interest in the patent and half of my interest in the capital stock" of the corporation, for the agreed price of $70,000, to one Jack Berman. A contract between them was executed, the terms whereof are not in evidence. At the same time, October 14, 1927, Berman paid to Zimmon $35,000, one-half the agreed price. Louis Berman, who represented Jack Berman in the negotiations, testified (Rep. Tr., p. 84), that Jack was to buy 50 per cent. of the patent rights, which Zimmon claimed to own completely, and 50 per cent. of the stock of the corporation. Soon afterwards, at the instance of Berman, the October contract was destroyed, and a new contract, dated December 29, 1927, was substituted, wherein Berman's brother-in-law, Drusin, was named as purchaser instead of Berman. In this contract of December 29, 1927, there is a recital of payment of the $35,000 (more precisely, $35,054.83), and an agreement to pay the remaining $35,000 on or before January 1, 1928. The property sold was described as one-half of Zimmon's interest in the patent and in the shares of stock, and showed on its face that Eacrett owned 25,000 shares (which last-named shares were not part of the property being sold). The contract also contained provisions covering the contemplated loan of additional funds by Drusin to the corporation. The second $35,000 was paid to Zimmon "early in January."

[1, 2] On or before the 8th day of November, 1927, under the terms of the contract then in force between Eacrett and Zimmon, Eacrett was under obligation to transfer the patent to the corporation, but only upon receiving payment of the $30,000 which Zimmon had agreed would be paid by the corporation. Nevertheless, Eacrett transferred to Zimmon the entire patent, including the one-third interest at that time belonging to Eacrett. How was Eacrett persuaded to make this transfer without at the same time receiving his $30,000? On this point, since there is a conflict in the evidence, we must accept the testimony of Eacrett, as far as it goes in support of the decision of the trial court. According to this testimony, Eacrett had no information concerning the Berman purchase, whereby Zimmon had received half of the above-mentioned $70,000. A few days after the signing of the contract of September 3, 1927, Zimmon told Eacrett that "upon the assigning of the patent over to him (Zimmon), I was to get the $30,000.00 in the latter part of November." Zimmon said, "I will have the money for you the latter part of November, sure." This is the only statement or promise said to have been made by Zimmon until after the assignment of the patent on November 8th. On that day, "after we signed up," Zimmon again said, "the latter part of November, you will get your $30,000.00." But the money was not paid. In the latter part of November Zimmon assured Eacrett that the money would be paid at Christmas. At Christmas Zimmon said, "To tell you the truth I can't make it. I will have it for you by the first of the year." In January he gave a similar assurance. It is to be remembered that the contract of September 3, 1927, contemplated payment of this money by the corporation when formed. The incorporation actually did take place in September. The contract expressly exempted Zimmon from personal obligation to make the payment. In the various promises and assurances given by Zimmon we can find nothing which amounts to an assumption of such liability. The sale to Berman or to Drusin of an interest in the patent did not include any interest of Eacrett therein. It was only a sale of a part of Zimmon's interest in the patent and of his stock in the corporation. If Zimmon concealed from Eacrett the fact that he was selling for a great price a part of the property thus owned by Zimmon, such concealment did not constitute a breach of any obligation. This evidence wholly fails to show that at any point or period in the course of the transactions Zimmon personally agreed to pay any money to Eacrett, or that Eacrett obtained any interest in the moneys paid to Zimmon by Berman or by Drusin.

It may be that, as testified by Louis Berman (brother of Jack Berman), appellant Zimmon told the Bermans that he was paying $70,000 for the patent. And it may be that, as the witness further testified, appellant told him, after receiving the first $35,000, that he had paid that money to respondent, and needed the balance for the same purpose. Such misrepresentations possibly might be a ground of complaint by Jack Berman, but they have no relation to respondent's case here. In brief, it must be concluded that Zimmon did not become indebted to the plaintiff for any money "had and received by the defendant to and for the use of the plaintiff." The finding of the court in favor of the plaintiff on that issue is not sustained by the evidence.

The judgment is reversed.

We concur: HOUSER, J.; YORK, J.

130 Cal.App. 191

PEOPLE v. MILLER.

Cr. 78.

District Court of Appeal, Fourth District, California.

March 1, 1933.

Rehearing Denied March 16, 1933.

Hearing Denied by Supreme Court March 30, 1933.

1. Infants ⚿=20.

In prosecution for contributing to delinquency of boys under 21, evidence *held* to sufficiently identify defendant as person who permitted use of house for occasion in question.

2. Time ⚿=10(6).

Where verdict of guilty was returned September 27, 1932, and October 2 was Sunday, and October 3 was fixed as date for pronouncing judgment, but defendant requested new trial and motion was denied and judgment pronounced on October 13, 1932, October 12 being holiday, judgment was pronounced within time limited (Pen. Code, § 1191; Code Civ. Proc. § 12).

Appeal from Superior Court, Riverside County; R. A. Moore, Judge.

E. D. Miller, also known as Harvey Miller, was convicted of contributing to the delinquency of boys under the age of 21 years, and he appeals.

Affirmed.

Joseph Seymour, of Riverside, for appellant.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

MARKS, Justice.

Appellant was convicted of the charge of contributing to the delinquency of four boys under the age of twenty-one years. These boys were present at a gathering held at appellant's home west of the city of Riverside, in Riverside county, given under the auspices of a Greek letter fraternity at which liquor was consumed and games of chance for money were played from which a percentage was deducted for the benefit of the fraternity. Appellant permitted the use of his house for this occasion at which minors gambled and drank intoxicating liquors. It is evident that he was directly connected with the retail sale of liquor on this occasion. We have carefully examined the record and find in it ample evidence to sustain the verdict and judgment.

Appellant demurred to the information and urges error on the part of the trial court in not sustaining the demurrer on the ground of ambiguity, uncertainty, and indefiniteness of the charge against him. A similar information was held sufficient in the case of People v. Perfetti, 88 Cal. App. 609, 264 P. 318. See, also, People v. Cohen, 62 Cal. App. 521, 217 P. 78.

[1] Appellant insists that he was not sufficiently identified as the "Miller" who permitted the use of the house for the occasion in question. The first witness identified him as "Mr. Miller, the defendant in this case." He was subsequently referred to by the same and other witnesses as "Mr. Miller," "E. D. Miller," and "Harvey Miller," which was sufficient identification. There was some testimony concerning "Le Grand Miller" and "Leroy Miller," which names were not connected with appellant. Appellant complains of small portions of instructions given by the trial court and of the refusal to give other instructions which he requested. We have examined all instructions and find that those given correctly covered the law of the case, with one exception.

The first paragraph of instruction No. 5 should not have been given in its present form. The words, "notwithstanding the base character of the witness," should have been stricken. However, we do not consider the use of these words prejudicially erroneous in the present case as there is little conflict in the evidence and no witness was directly impeached. The jury might have concluded that each witness spoke the entire truth and still have reached the same verdict.

[2] Appellant contends that judgment was not pronounced within the time limited by section 1191 of the Penal Code and that he is entitled to a new trial. Section 1202, Pen. Code. The first-cited section provides that the trial court must fix the time for pronouncement of judgment, not less than two, nor more than five days after the verdict or plea of guilty, "provided, however, that the court may extend the time not more than ten days for the purpose of hearing or determining any motion for a new trial." Section 12 of the Code of Civil Procedure provides as follows: "The time in which any act provided by law is to be done is computed by excluding the first day and including the last, unless the last day is a holiday, and then it is also excluded."

The verdict of guilty was returned on September 27, 1932. The time for pronouncing judgment was fixed for Monday, October 3, 1932. The fifth day after the verdict fell on Sunday, October 2d. On October 3, appellant filed a motion for new trial which was set for hearing on October 14, 1932, and on October 4th the trial court, on its own motion, advanced this date to October 13th when the motion was denied and judgment pronounced. October 12, 1932, was a legal holiday.

The fifth day after the verdict was returned fell on Sunday and the fifteenth fell on a holiday. We are, therefore, of the opinion that the trial court properly set the time for the pronouncement of judgment for Monday, October 3, 1932, and, a motion for new trial having been filed, properly set the same for hearing on October 13, 1932, and having denied the motion was within its right in pronouncing judgment on that day. People v. Malone, 213 Cal. 406, 2 P.(2d) 332; People v. Martino, 112 Cal. App. 548, 297 P. 965.

In People v. Zuvela, 191 Cal. 223, 215 P. 907, it is said: "The defendant was convicted in the court below of the crime of seduction under promise of marriage. He seeks to have the judgment there rendered reversed upon the ground that the sentence was not pronounced within the time prescribed by section 1191 of the Penal Code, and that he was therefore entitled to a new trial as a matter of right under the provisions of section 1202 of the Penal Code. We are satisfied that section 4½ of article 6 of the Constitution operates to prevent the granting of a new trial for the error, if any, specified." See, also, People v. Haines, 64 Cal. App. 628, 222 P. 183; People v. Ramos, 80 Cal. App. 528, 251 P. 941; People v. Wilson, 101 Cal. App. 376, 281 P. 700. Even if judgment had been pronounced in the instant case after the time limited by law, we can find no miscarriage of justice.

The judgment and orders appealed from are affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

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130 Cal.App. 66

McCOLGAN v. BOARD OF POLICE COM'RS. et al.

Civ. 8714.

District Court of Appeal, First District, Division 2, California.

Feb. 27, 1933.

Hearing Denied by Supreme Court April 27, 1933.

1. **Mandamus** 🔑154(4).

Petition for mandamus requiring pension board to grant pension to policeman's widow *held* insufficient, where not alleging clear abuse of board's discretion (St. 1917, p. 1728).

2. **Municipal corporations** 🔑187.

Finding of police commissioners, as regards whether policeman's widow was entitled to pension, upon conflicting testimony, would be res judicata, absent abuse of discretion (St. 1917, p. 1728).

3. **Mandamus** 🔑14(3).

Policeman's widow could not mandamus San Francisco police commissioners to grant her pension before commissioners rendered decision on widow's application.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Petition by Hazel McColgan for a writ of mandamus to compel the Board of Police Commissioners and others to grant her a pension, to be paid out of the police relief and pension fund, as the surviving widow of James McColgan, deceased. Writ was granted, and defendants appeal.

Reversed.

John J. O'Toole, City Atty., and Walter A. Dold, Asst. City Atty., both of San Francisco, for appellants.

James M. Hanley, of San Francisco, for respondent.

STURTEVANT, Justice.

The plaintiff applied to the trial court for a writ of mandamus to compel the defendant board to grant her a pension, to be paid out of the police relief and pension fund, as the surviving widow of James McColgan, deceased. The trial court granted the writ and from that judgment the defendant board has appealed and has brought up the judgment roll only.

In her petition for a writ of mandamus, the plaintiff alleged the official capacity of the defendants; that she is the widow of James McColgan, deceased; that the defendant board has the power to provide pensions to a surviving widow of a deceased police officer who was killed in the performance of his duty; that James McColgan became a police officer on July 5, 1927, and so continued until his death on September 2, 1928; that his salary was $2,400 per year; that on September 2, 1928, while on duty and in the performance of his duties, James McColgan was killed; that the plaintiff filed a petition with the defendant board asking for a pension; and that there are sufficient funds on hand to pay such pension. Continuing she alleged: "That at the hearing of your petitioner's said petition for a pension she submitted evidence that showed that she was entitled to a pension, and that all of the testimony taken at said hearing is attached to this petition and is made a part hereof and marked 'Exhibit A'; that said testimony submitted to the Board of Police Commissioners of the City and County of San Francisco, acting as trustees of the Police Relief and Pension Fund, entitled the petitioner herein to a pension." She then alleged that it was incumbent on the defendant board to grant the pension, but "that the said board has refused and still refuses to pay said pension; that your petitioner has no other plain, speedy or adequate remedy at law other than a writ of mandamus." No demurrer was interposed. The defendants filed an answer denying the material allegations of the petition, and alleged affirmatively that, at the time of the injury and death of said James McColgan, he was not on duty as a police officer of the city and county of San Francisco. The "Exhibit A" above mentioned comprises what purports to be the testimony by question and answer of nineteen different witnesses—two hundred and twenty-five folios or thereabouts. The defendants contend that, where evidence is conflicting but sufficient to sustain a determination of the board of police commissioners, the trial court has no right to reverse a decision of the board. It cites Mogan v. Board of Police Com'rs, 100 Cal. App. 270, 279 P. 1080. While, as we will presently show, that case is quite helpful, it is not in point on the record before us. The record before us does not show that the defendant board has ever determined the plaintiff's application. In her brief the plaintiff asserts that the question before the court is, Did the superior court have jurisdiction to entertain her petition and to reverse the decision of the board of police commissioners? She cites and relies on Buckley v. Roche, 214 Cal. 241, 4 P.(2d) 929, and Casserly v. City of Oakland, 215 Cal. 600, 12 P.(2d) 425. Neither case is in point because, as just stated, the record does not show that the defendant board rendered a decision.

[1] Assuming that the defendant board did render a decision and that its decision was against the plaintiff, the plaintiff's petition was wholly insufficient. In the case of Sevina v. Hickok, 113 Cal. App. 301, 305, 298 P. 116, 118, this court said: "To have any standing in this proceeding it was incumbent upon petitioners to plead and prove that the pension board acted artibrarily, capriciously, or fraudulently, or that in some other respect the proceedings before the pension board were conducted without due regard for the rights of the petitioners." That is, as stated in the statute, it was incumbent on the plaintiff to allege that there was "a clear abuse of discretion." St. 1917, p. 1728. But on that subject the petition is wholly silent.

[2] Still assuming that the defendant board did render a decision, that decision is under the facts res judicata. The general rule on the subject is quoted with approval in Mogan v. Board of Police Com'rs, 100 Cal. App. 270, at page 273, 279 P. 1080, 1081, as follows: "As a general rule, whenever any person or persons have authority to hear and determine any question, their determination is, in effect, a judgment having all the incidents and properties attached to a similar judgment pronounced in any regularly created court of limited jurisdiction acting within the bounds of its authority. Hence, whenever any board, tribunal or person is by law vested with authority to decide a question, such decision, when made, is res judicata, and as conclusive of issues involved in the decision as though the adjudication had been made by a court of general jurisdiction."

In this connection it is proper to state that we have read the testimony given before the defendant board and that the testimony is distinctly conflicting. Nevertheless there was an abundance of testimony which, if the defendant board believed it, fully justified a ruling denying the petition. That testimony was to the effect that at the time of the automobile accident the deceased had gone off duty and was on his way home, and, from the time he left the police station until his death, he did nothing whatever in the line of his duty as a policeman, and therefore his injury and death resulted from a cause not within the contemplation of the statute providing for pensions.

[3] If, on the other hand, the defendant board had never rendered a decision on the application made to it by the plaintiff, then the plaintiff was before the wrong tribunal. The power to hear and determine such application is by section 4, chapter 10, of article 8, of the charter, clearly vested in the defendant board (Mogan v. Board of Police Com'rs, supra), and not the courts.

If the defendant board determined the plaintiff's application against her, or if it was not asked to determine it at all, under the facts contained in the record, a writ should not have been granted.

The judgment is reversed.

We concur: SPENCE, Acting P. J.; GOODELL, Justice pro tem.

130 Cal.App. 294

GRINNELL CO. OF THE PACIFIC v. SCOBLE.

Civ. 8380.

District Court of Appeal, First District, Division 2, California.

March 9, 1933.

Bills and notes ⚷92(1).

Property owner's note given to contractor's creditor in mistaken belief that owner owed contractor *held* without consideration, where creditor did not expressly or impliedly agree to forbear suing contractor.

Appeal from Superior Court, City and County of San Francisco; Michael J. Roche, Judge.

Action by the Grinnell Company of the Pacific against Thomas Scoble. From a judgment for plaintiff, defendant appeals.

Reversed.

Alfred J. Harwood, of San Francisco, for appellant.

Ira J. Darling, of San Francisco, for respondent.

NOURSE, Presiding Justice.

Plaintiff sued on a promissory note. The cause was tried without a jury, and plaintiff had judgment. The appeal is on typewritten transcripts.

The defendant owned properties in San Francisco and Oakland upon which he was erecting buildings. One Wara was a contractor engaged by defendant in connection with the construction who purchased materials from plaintiff. The defendant believed he owed Wara the amount of the note, but in fact owed him nothing. Wara was indebted to plaintiff in excess of the amount of the note, and, at his request, defendant gave the note in suit to plaintiff upon the express understanding that the amount would be credited to Wara's account when paid. A few days after the delivery of the note, the defendant discovered his mistake, and so notified plaintiff. Thereafter plaintiff extended further credit to Wara far in excess of the amount of the note. This indebtedness had been paid in full by Wara, but the latter refused to pay plaintiff the amount of the note, and appeared as a witness for plaintiff in an endeavor to hold defendant upon the note notwithstanding the mistake which is conceded by all parties. The defendant had previously guaranteed in writing a separate account held by plaintiff against Wara, but this was not canceled when the note was executed, and it was conceded in the trial that it had no part in this transaction.

The want of consideration passing to the defendant was proved by evidence which was undisputed, and that fact is here conceded. But the plaintiff now argues in support of the judgment that there was some forbearance to sue Wara, which, if true, would be a sufficient detriment to plaintiff to constitute a good consideration for the note. The difficulty is that there is not a shred of evidence to support the theory. No suit had been threatened, no agreement to forbear, either express or implied, was made, and, in fact, the plaintiff did sue Wara for the exact amount of the note. The appellant states confidently that no such evidence was offered. We have carefully read the transcript and have found none. The respondent apparently agrees that the evidence was not produced because it rests its theory on an implied agreement to forbear. In support of its theory cases are cited where the promisor had requested a forbearance or where a note or mortgage has been renewed. The evidence here is that no forbearance was requested, none was granted, and none was suggested or contemplated by the parties. In those cases where the obligation has been renewed a forbearance is implied because the mere renewal forces a forbearance. But here, with no evidence of an express agreement to forbear, and no evidence upon which an inference could be drawn that there was an implied agreement to do so, there is nothing whatever to support the conclusion that there was a consideration for the note.

Judgment reversed.

We concur: STURTEVANT, J.; SPENCE, J.

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130 Cal.App. 186

GOLDEN WEST CREDIT & ADJUSTMENT CO., Limited, v. PEARDON et al.

Civ. 4758.

District Court of Appeal, Third District, California.

March 1, 1933.

Rehearing Denied March 31, 1933.

Hearing Denied by Supreme Court April 28, 1933.

Attachment ⚷333.

Sureties on bond to release attachment *held* not released when plaintiff recovered judgment against only one defendant and failed on appeal to give bond to continue attachment against codefendant (Code Civ. Proc. §§ 17, 540, 553, 946).

Appeal from Superior Court, Yuba County; Eugene P. McDaniel, Judge.

Action by the Golden West Credit & Adjustment Company, Limited, against Fred

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⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

Peardon and another. Judgment for defendants, and plaintiff appeals.

Reversed, and cause remanded, with directions.

Jesse A. Mueller, of San Francisco, for appellant.

Rich, Weis & Carlin and Ray Manwell, all of Marysville, for respondents.

Mr. Justice PLUMMER delivered the opinion of the court.

The plaintiff brought this action to recover on a certain bond given to secure the release of an attachment previously issued. The bond sued upon, excluding the verification, is in the words and figures following, to wit:

"Whereas, the above named plaintiff has sued out an attachment in the above entitled action in the City and County of San Francisco, State of California, against the above named defendants, by virtue of writ of attachment in the amount of $2,231.17, the following described property, to-wit: furniture and all personal property located in that certain building known as Wilson's Furniture Store at 340 3rd Street, Marysville, Yuba County, California, has been seized and is being held by the sheriff of the County of Yuba, State of California; and whereas, the said defendant is desirous of releasing said property from said attachment before the return thereof is made thereon and according to the form of the statute in said cases made and provided.

"Now, therefore, we the undersigned, residents and freeholders of the County of Yuba, State of California, in consideration of the premises and of the releasing of said property, do jointly and severally undertake in the sum of $4,500.00 and promise to the effect that in case the plaintiff recovers judgment in said action and said attachment is dissolved, that the said defendant will on demand, redeliver to the proper officer, said attached property and in default of such delivery that the defendant and we his sureties will pay or cause to be paid to the plaintiff, the full value of the property so released.

"Dated this 27th day of September, 1929.

"Harvey Whitten
"Fred Peardon."

The bond was duly verified and approved by the judgment of the Superior Court of Yuba county. The defendants demurred to the plaintiff's complaint, and particularly stressed the point that the complaint does not state a cause of action. The court sustained the defendants' demurrer, and, from the judgment entered thereon, the plaintiff appeals.

The complaint sets forth that on the 10th day of September, 1929, the plaintiff began a certain action against the defendants, Verne S. Wilson and George D. Karsch, individually and as copartners, doing business as such under the firm name and style of Wilson & Karsch, for the purpose of recovering the sum of $2,231.17; that a writ of attachment was issued following the filing of said complaint, in due form, placed in the hands of the sheriff of Yuba county for service, and that in pursuance of the writ of attachment the sheriff of Yuba county proceeded to levy upon all of the personal property in that certain store known as "Wilson's Furniture Store," in the city of Marysville, whereupon the bond which we have set forth was given to release said property, and the sheriff thereupon released the same. Thereafter, on the 8th day of October, 1931, upon the trial of said action, judgment was entered in favor of the plaintiff as against the defendant George D. Karsch, and in favor of the defendant Verne S. Wilson. An appeal being taken by the plaintiff from the judgment so far as it went in favor of the defendant Wilson, the judgment in favor of the defendant Wilson was, by the District Court of Appeal of the Third District, on the 14th day of January, 1932, reversed, and an order made directing that judgment should be entered in favor of the plaintiff against the defendant Wilson, as well as against the defendant Karsch. 119 Cal. App. 627, 7 P.(2d) 345. Thereafter, on the 23d day of March, 1932, a judgment was entered by the Superior Court of the county of Yuba, in favor of the plaintiff, against the said Verne S. Wilson, and the judgment in the case runs against George D. Karsch and Verne S. Wilson individually and as copartners doing business under the name and style of Wilson & Karsch. Demand having been made for the payment of the amount of the judgment, as required by law, and said judgment not having been paid, and an execution having been issued against the defendants Wilson & Karsch and having been returned unsatisfied, this action was begun to recover from the sureties.

Upon this appeal it is contended that the bond is given pursuant to section 540 of the Code of Civil Procedure; that at the time the plaintiff appealed from the judgment, in so far as it went in favor of the defendant Wilson, no bond was given to continue the attachment in force under the provisions of section 946, Code of Civil Procedure, and that by virtue of section 553, Code of Civil Procedure, the bond should have been delivered by the sheriff to the defendants in this action.

The court, in its ruling upon the demurrer as appears from the transcript, concluded that the bond was a statutory bond given under the provisions of section 540, Code of Civil Procedure, and that, as the complaint did not allege that a bond had been given according to the provisions of section 946, Code of Civil Procedure, the complaint failed to state a cause of action. In this conclusion we think the court was in error. There is no section of the Code which requires that the plaintiff shall obtain judgment against all of the defendants in order to keep an attachment in force or to keep alive a surety bond given to the sheriff to release attached property. Section 553, Code of Civil Procedure, uses only the word "defendant." This word, however, is a word which means "defendants" as well as "defendant," being so expressly provided for in section 17, Code of Civil Procedure. It is not necessary, in order to keep alive an attachment and also a surety bond, that the plaintiff recover a judgment against all of the defendants named in the action. If the property attached belongs to a particular defendant, and the bond given for the release of the property provides specifically that, if judgment goes in favor of the plaintiff as against that particular defendant, then and in that case the sureties will not be bound, and the bond will be released if judgment goes in favor of the particular defendant, and, if an appeal is prosecuted therefrom, then an undertaking must be given by the plaintiff in order to continue the attachment in force and hold the sureties on the bond as specified in section 946, Code of Civil Procedure.

In the bond given for the release of the attachment in this case there is no provision contained therein limiting its scope and effect to any particular defendant. It promises to the effect that, in case the plaintiff recovers judgment, and default is made in redelivering the property or paying the same, the sureties will cause to be paid to the plaintiffs the full value of the property released. The bond does read: "And in default of such delivery, that the defendant and we, his sureties, will pay." But, as stated herein, the word "defendant" must include both defendants as well as any particular one; there being no limitation as to any one of the defendants.

In McCormick v. National Surety Co., 134 Cal. 510, 66 P. 741, 742, the court, having before it a similar question, used the following language: "It is a statutory undertaking, and its direct and express covenants are that the things promised shall be done if the plaintiff in the action shall 'recover judgment in said action.' There is no condition in it that plaintiff shall recover judgment against all of those who are made defendants. A judgment against any one or more of the defendants is sufficient. Heynemann v. Elder, 17 Cal. 433; McCutcheon v. Weston, 65 Cal. 37, 2 P. 727. In the latter case the court say: 'The point that judgment was recovered against one of the defendants only, in the attachment suit, is not well taken. The action was against two, and the undertaking was to pay "if the plaintiff shall recover judgment in said action." Why judgment was recovered against one only, we are not informed, but the court had power to render such judgment, and it was rendered in that action.' In Poole v. Dyer, 123 Mass. 363, the court said: 'The result, so far as the sureties are concerned, is the same whether the plaintiff discontinues against one of the defendants, or fails to recover against him upon trial.'" This case goes on to hold that the ownership of the property attached and released is wholly immaterial so far as the obligation of the sureties is concerned.

Under the decisions which we have cited and the section of the Code holding that, where the singular is used and there are no other words limiting the application to any particular defendant, it must be held that the undertaking of the sureties was to respond in the event of judgment going in favor of the plaintiff as against any one of them.

The judgment of the court sustaining the defendants' demurrer is reversed, and the cause remanded to the trial court, with directions to overrule the defendants' demurrer, and allowing the defendants a reasonable time within which to file an answer to plaintiff's complaint, if so advised.

We concur: PULLEN, P. J.; R. L. THOMPSON, J.

130 Cal.App. 262

KERSCHNER v. FISK TIRE & RUBBER CO., Inc., et al.*

Civ. 7565.

District Court of Appeal, Second District, Division 1, California.

March 6, 1933.

Rehearing Denied April 4, 1933.

1. Malicious prosecution 🔑64(2).

In action for malicious prosecution in attaching plaintiff's automobile to satisfy judgment against plaintiff's husband, evidence sustained finding of want of probable cause and malice.

2. Malicious prosecution 🔑32.

Malice does not necessarily follow from finding of want of probable cause for alleged malicious prosecution, but jury may infer malice therefrom.

Appeal from Superior Court, Los Angeles County; Samuel R. Blake, Judge.

Action by Evelyn Kerschner against the Fisk Tire & Rubber Company and others. From a judgment for plaintiff, defendants appeal.

Affirmed.

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*Rehearing denied 20 P.(2d) 957.

Hubert F. Laugharn and Francis B. Cobb, both of Los Angeles, for appellants.

Clarence Hansen, of Los Angeles, for respondent.

YORK, Justice.

This is an appeal from a judgment in favor of respondent in an action for malicious prosecution.

The facts out of which the action arose are as follows: On September 17, 1928, an action was filed in the municipal court of Los Angeles county by appellants Bruhnke & Silver against P. E. Kerschner, the husband of respondent Evelyn Kerschner. A writ of attachment was issued directed to Charles R. Thomas, marshal of said court, with instructions to attach a Studebaker automobile which was owned by, and in the possession of, said respondent Evelyn Kerschner. Immediately thereafter respondent filed with said Marshal Thomas her verified third-party claim setting up her title, ownership, and right of possession to said automobile and demanding its release from attachment. Thereupon appellants Bruhnke & Silver filed an amended complaint making said respondent a defendant therein, and caused an alias writ of attachment to issue, pursuant to which Marshal Thomas reattached and took possession of the automobile. Respondent filed answer to complaint, and on or about November 7, 1928, the matter came to trial in the municipal court, and judgment was rendered against appellants Bruhnke & Silver and in favor of respondent for her costs, which judgment was later satisfied, and at the same time a judgment was rendered in favor of appellants Bruhnke & Silver against P. E. Kerschner, respondent's husband. On November 12, 1928, respondent demanded release of her automobile from Marshal Thomas and from appellants Bruhnke & Silver. The latter, on the 21st day of November, 1928, deposited with Marshal Thomas a surety bond, and, by instructions in writing and an execution issued on their judgment against P. E. Kerschner, did instruct Marshal Thomas to levy on and sell the said automobile. In reliance upon these instructions and said execution, Marshal Thomas on December 12, 1928, sold respondent's automobile to appellants Bruhnke & Silver, who in turn sold the same to the Fisk Tire Company, applying the proceeds of said sale under execution to the credit of the judgment held by them against P. E. Kerschner.

On December 12, 1928, respondent, Evelyn Kerschner filed an action in municipal court against Marshal Charles R. Thomas for conversion and trespass ab initio for the value of said automobile, in which case judgment was rendered in respondent's favor for the sum of $500, the value of said automobile. On June 17, 1929, an execution issued on said judgment, and was placed in the hands of the sheriff, with instructions to levy and collect the same. On the 27th day of June, 1929, appellants Bruhnke & Silver caused an execution to issue in their action against P. E. Kerschner, and placed the same in the hands of the sheriff, with instructions to levy on the judgment of $500 entered in the action of respondent Evelyn Kerschner against Charles R. Thomas, and on the 27th day of June, 1929, the said sheriff levied upon said judgment against said Charles R. Thomas for the purpose of satisfying the balance of the judgment held by said Bruhnke & Silver against P. E. Kerschner. On July 19, 1929, said Thomas filed a complaint in interpleader in the Superior Court of Los Angeles county, and on the 30th day of July, 1929, a notice of motion for an order to interplead came on for hearing and was denied. On the same day the said Charles R. Thomas satisfied said judgment entered against him in the action by respondent against him.

On the 5th day of August, 1929, an action was commenced in the Superior Court of Los Angeles county by respondent herein against appellants for malicious prosecution, wrongful attachment, and damages, and judgment was thereafter rendered in her favor. It is from this last-named judgment that this appeal is taken.

[1, 2] Appellants now contend that the court erred in denying their motion for nonsuit; that the evidence is insufficient to support certain of the findings of fact; that certain of the findings of fact are contrary to the evidence; that the judgment is not supported by the evidence, and is contrary thereto. In support of appellants' position as to their first assignment of error, they claim that there was a failure to show lack of probable cause and a failure to prove malice.

The evidence is sufficient to show, not only that the manager for the plaintiffs in the first action knew within a week or ten days following the first attachment that the car was registered in the name of Mrs. Kerschner, and that when it was again attached and sold under execution he knew it was so registered, but also to prove that he was without knowledge of facts warranting a belief that the automobile was not her property. With this knowledge in mind, it cannot be said, as against findings to the contrary, that the appellants were warranted in believing that they had the right to attach the automobile after respondent had filed her third-party claim and demanded possession of her car, nor that they had the right to levy upon said automobile under a writ of execution and sell it to satisfy a judgment they held against respondent's husband. We believe this clearly shows want of probable cause, and that malice may be inferred therefrom. "The want of probable cause does not raise a legal presumption of malice; the law presumes nothing on that issue any more than it does on any other issue of fact in a civil action. The jury may, however, if they find that there was no probable cause for the prosecution infer malice therefrom, although malice is not a necessary inference to be deduced therefrom." Burke v. Watts, 188 Cal. 118, 126, 204 P. 578, 581.

With this showing of lack of probable cause, and the inference of malice therefrom, there was no error by the court in its denial of appellants' motion for nonsuit.

A careful examination of the evidence convinces us that each of the findings made by the trial court is amply supported, and that the judgment is in consonance with, and supported by, the evidence.

The judgment appealed from is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

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130 Cal.App. 267

PEOPLE v. FUHRMAN.

Cr. 1702.

District Court of Appeal, First District, Division 1, California.

March 7, 1933.

1. Indictment and information 🔑176.

In prosecution for rape, precise time of offense *held* not required to be fixed by prosecution, under facts.

The information alleged the offense was committed on or about October 15. The district attorney in opening the case stated, in substance, he would prove the crime was committed on or about June, the exact date being uncertain. While the evidence failed to show directly the exact date, it sufficiently appeared that the offense occurred in the summer about the month of June.

2. Criminal law 🔑565.

Where evidence showed with fair degree of certainty time when offense of rape was committed, defendant suffered no prejudice by state's failure to prove exact date.

3. Criminal law 🔑565.

In rape case, instruction that exact time of offense need not be proved, provided it occurred within three years before filing of information, though erroneous, *held* not prejudicial.

There was no prejudice because the jury was also instructed that the act relied on must be established beyond a reasonable doubt, and that evidence of other acts was admissible only to determine whether defendant committed the very act selected.

4. Criminal law 🔑369(8).

In rape case, evidence of other acts of intercourse before and after one charged is admissible to show defendant's disposition and probability of his committing act charged.

5. Rape 🔑51(1).

Evidence *held* to support conviction for rape.

Appeal from Superior Court, Alameda County; Frank M. Ogden, Judge.

August C. Fuhrman was convicted of rape, and he appeals.

Affirmed.

George Gelder, of Oakland, for appellant.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, of San Francisco, for the People.

PER CURIAM.

Defendant was charged with the crime of rape and also with the violation of section 288 of the Penal Code. He was convicted on the first charge, and appeals from the judgment and an order denying a motion for a new trial.

[1-5] As grounds for the appeal, it is contended that the evidence fails to show the commission of any offense at the time alleged by the prosecution, and that the court erred in its instructions to the jury.

The information alleged that the offense first charged was committed on or about October 15, 1930. The district attorney in opening the case stated in substance that he would rely for conviction upon said offense, and would prove that the same was committed on or about June, 1930, the exact date being uncertain. The child was aged eight years, and the evidence shows definitely two acts of intercourse by the defendant, who admitted their commission. While the evidence fails to show directly the exact dates when these occurred, it appears sufficiently from the testimony of the girl and another child about the same age, together with defendant's own admissions, that the offense which the prosecution elected to prove occurred in the summer of 1930 about the month of June. It has been held that under such circumstances the precise time of the offense need not be fixed by the prosecution (People v. Wademan, 38 Cal. App. 116, 175 P. 791); and, as the evidence shows with a fair degree of certainty the time when the offense was committed, defendant suffered no prejudice by the failure to prove its exact date. He contends, however, that the court erroneously instructed that the exact time of the offense charged need not be proved, provided it occurred within a period of three years preceding the date of the filing of the information. This instruction has been held to be erroneous. People v. Williams, 133 Cal. 165, 65 P. 323; People v. Elgar, 36 Cal. App. 114, 171 P. 697. But where, notwithstanding such an instruction, the jury (as was the case here) is also instructed "that the act relied upon by the prosecution must be established beyond a reasonable doubt or they must acquit the defendant, and that evidence of other acts was admissible only for the purpose of determining whether or not the defendant committed the very act of sexual intercourse selected," it has been held that the jury must have understood that a conviction must rest entirely upon evidence directed to the particular act selected by the prosecution. People v. Wademan, supra. Evidence of other acts of intercourse before and after the date of the one charged is admissible for the purpose of showing the disposition of the defendant and the probability of his committing the act charged [People v. Castro, 133 Cal. 11, 65 P. 13; People v. Koller, 142 Cal. 621, 76 P. 500; People v. Christian, 48 Cal. App. 646, 192 P. 182; People v. Martinez, 59 Cal. App. 121, 210 P. 61; People v. Foster, 117 Cal. App. 439, 4 P.(2d) 173]; and we are satisfied that the jury was in no way misled by the instructions of the court.

The evidence clearly supports the verdict, and no error appears which would warrant the conclusion that the same resulted in a miscarriage of justice. The judgment and order appealed from are affirmed.

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130 Cal.App. 194

PEOPLE v. KLOSS et al.

Cr. 239.

District Court of Appeal, Fourth District, California.

March 1, 1933.

1. **Criminal law 🔑77.**

Offense of concealing crime or fact of its commission from magistrate is entirely separate from that of harboring and protecting persons charged with or convicted thereof, although person committing either is accessory (Pen. Code, § 32).

2. **Indictment and information 🔑85.**

Information charging that accused, with full knowledge that felony had been committed, concealed and harbored person committing such felony from magistrate, *held* not to state public offense (Pen. Code, § 32).

Information did not charge a public offense, because it confusedly stated some element or elements of two different offenses without stating all the elements of either. Pen. Code, § 32, provides that all persons who, after full knowledge that a felony has been committed, conceal it from the magistrate, or harbor and protect the person charged with or convicted thereof, are accessories.

3. **Criminal law 🔑1186(4).**

Court cannot say that there has been no "miscarriage of justice," where accused were convicted on information that charged no public offense but was so confused that no one could say what jury would have decided if single definite offense had been clearly charged (Const. art. 6, § 4½).

[Ed. Note.—For other definitions of "Miscarriage of Justice," see Words and Phrases.]

Appeal from Superior Court, Imperial County; A. C. Finney, Judge.

Robert Kloss and Jack Williams were convicted of being accessories to commission of a felony, and they appeal.

Reversed.

Lyman P. Robertson and Don C. Bitler, both of El Centro, for appellants.

U. S. Webb, Atty. Gen., John D. Richer, Deputy Atty. Gen., and Elmer W. Heald, Dist. Atty., and D. H. Wolford, Deputy Dist. Atty., both of El Centro, for the People.

BARNARD, Presiding Justice.

The facts in this case are practically identical with a part of the facts in the case of People v. Hatfield (Cal. App.) 18 P.(2d) 366. The evidence indicates that these defendants either disposed of the body referred to in the case just mentioned or assisted in the disposal of the same. In the present case the defendants were charged with being accessories after the fact, under section 32 of the Penal Code. They were tried by a jury, and, from a judgment of conviction following a verdict and from an order denying a motion for a new trial, this appeal is taken.

The main ground urged for reversal, which we think must be sustained, is that the information does not state facts sufficient to constitute a public offense. The charging part of the information reads as follows: "The District Attorney of the County of Imperial hereby accuses Robert Kloss and John Williams of a felony, to-wit: Violation of Section 32 of the Penal Code of California, to-wit: Accessories after the fact, in that on or about the 10th day of May, 1932, in the County of Imperial, State of California, the said defendants, Robert Kloss and John Williams, who, after having full knowledge that a felony had been committed, the said defendants, Robert Kloss and John Williams, did then and there conceal and harbor the person committing said felony from the magistrate."

Section 32 of the Penal Code, upon which this charge is based, reads as follows: "Who are accessories. All persons who, after full knowledge that a felony has been committed, conceal it from the magistrate, or harbor and protect the person charged with or convicted thereof, are accessories."

[1] Section 32 of the Penal Code sets forth two ways in which the offense there involved may be committed: First, where, with full knowledge that a felony has been committed, the crime or the fact of its commission is concealed from the magistrate; second, where, with full knowledge that a felony has been committed, the person charged with or convicted thereof is harbored and protected. Without question, a defendant could be charged with committing either one or both of these offenses. Neither of these offenses necessarily involves the other, and each of them naturally rests upon acts and circumstances at variance with those upon which the other is based.

[2] In the instant case, some of the elements of each offense are charged, but the charge does not include all of the elements of either. The elements of the two offenses are here so mixed that the resulting charge, to wit, that the defendants concealed and harbored the person committing the felony in question from the magistrate, is in fact a charge of the commission of acts which are not made an offense by the statute. The first offense above mentioned is not charged, since there is not even an attempt to allege that the fact of the commission of a felony had been concealed from the magistrate. The allegations are equally insufficient to show the commission of the second offense referred to. It is alleged that the defendants concealed and harbored the person committing the felony from the magistrate. The matter of concealment has nothing to do with the second named offense, and there is no attempt to charge any harboring of the "person charged with or convicted" of the crime. While the elements of the two offenses are combined and confused, the second offense named in the statute is neither charged clearly nor at all. Such harboring as is charged refers to the person committing the crime rather than the person charged or convicted, and is limited by the words "from the magistrate," which is obviously not the intention or meaning of that portion of the statute. In addition, it is not alleged that the person supposed to have been concealed and harbored had been charged with the crime or convicted thereof. See People v. Garnett, 129 Cal. 364, 61 P. 1114.

While the offense described in section 32 of the Penal Code may be committed in either of these two ways, it is impossible to say in which of these ways these defendants are charged to have committed the offense. In fact we think they are not charged with any offense at all, and that the purported information is void and of no effect. Section 952 of the Penal Code provides that the statement charging an offense may be in the language of the statute "or in any words sufficient to give the accused notice of the offense of which he is accused." In the case before us, there is not merely a slight deviation or trivial omission, but there is an absolute failure to either follow the language of the statute or to give any notice to the accused sufficient to enable him to tell with which offense he is charged.

[3] Nor do we think we can say there has been no miscarriage of justice within the meaning of section 4½ of article 6 of the Constitution. In People v. O'Bryan, 165 Cal. 55, 130 P. 1042, 1046, in discussing this provision of the Constitution, the court said: "On the other hand, we do not understand that the amendment in question was designed to repeal or abrogate the guaranties accorded persons accused of crime by other parts of the same Constitution or to overthrow all statutory rules of procedure and evidence in criminal cases. When we speak of administering 'justice' in criminal cases, under the English or American system of procedure, we mean something more than merely ascertaining whether an accused is or is not guilty. It is an essential part of justice that the question of guilt or innocence shall be determined by an orderly legal procedure, in which the substantial rights belonging to defendants shall be respected."

While the enactment of this provision has led to a great liberality, and rightly so in many cases, it can hardly be said that there has been no miscarriage of justice when a defendant is forced to trial upon an information where neither he nor the court can tell with which of two offenses he is charged, and where the language of the statute is not followed, especially where the requirements of the statute, in defining the elements necessary to be charged, are plain, simple, and easily complied with.

It has frequently been held that it cannot be said that there is no miscarriage of justice where the reviewing court cannot determine from the record whether or not the defendant would have been convicted, had not the error sought to be excused by this provision of the Constitution been committed. People v. Van Cleave, 208 Cal. 295, 280 P. 983; People v. O'Bryan, supra; People v. Sheffield, 108 Cal. App. 721, 293 P. 72, 77; People v. MacPhee, 26 Cal. App. 218, 146 P. 522. We are unable to say what the jury might have done in this case had the charge been clear and definite. This depends upon which offense was actually charged. Obviously it was not intended to charge both offenses. If the first was charged, the evidence would justify a conviction, and, if the second, the reverse is true. The jury may have found the defendants guilty of the second offense, this being the one the information seems to be attempting to allege, in which case the evidence does not sustain the verdict. On the other hand, the jury may have considered the defendants guilty of the first offense named in the statute, although such an offense is plainly not charged. Under such circumstances, we are unable to say that there has been no miscarriage of justice within the meaning of the constitutional provision. In our opinion, the information in question fails to state facts sufficient to constitute a public offense, and is void.

The judgment and order appealed from are reversed.

We concur: MARKS, J.; JENNINGS, J.

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130 Cal.App. 168

PEOPLE v. HOPWOOD.

Cr. 240.

District Court of Appeal, Fourth District, California.

Feb. 28, 1933.

1. Sodomy ⚷1.

"Infamous crime against nature" consists in unnatural sexual relations (Pen. Code, § 286).

[Ed. Note.—For other definitions of "Crime Against Nature," see Words and Phrases.]

2. Sodomy ⚷5.

Allegation in information that accused had "carnal knowledge" of body of named person meant that he had a sexual connection with such person.

[Ed. Note.—For other definitions of "Carnal Knowledge," see Words and Phrases.]

3. Sodomy ⚷5.

Information charging that accused at specified time and place committed infamous crime against nature by having carnal knowledge of body of a person described by feminine name *held* not to state public offense (Pen. Code, §§ 286, 952).

4. Indictment and Information ⚷119.

In information charging that accused committed infamous crime against nature, allegation concerning with whom the act was committed is essential and cannot be disregarded as surplusage (Pen. Code, §§ 286, 952).

5. Indictment and Information ⚷110(3).

Although information in substantial language of statute is sufficient, if facts alleged may or may not constitute a crime, information must be held insufficient because of presumption of innocence (Pen. Code, § 952).

Appeal from Superior Court, San Diego County; Arthur L. Mundo, Judge.

Proceeding by the People against Hal Hopwood. From order granting defendant's motion in arrest of judgment, the People appeal.

Affirmed.

U. S. Webb, Atty. Gen., John L. Flynn, Deputy Atty. Gen., and Thomas Whelan, Dist. Atty., and Frank Pomeranz, Deputy Dist. Atty., both of San Diego, for the People.

Edgar B. Hervey, of San Diego, for respondent.

JENNINGS, Justice.

This is an appeal by the people from an order of the Superior Court arresting judgment.

The information filed by the district attorney contained two counts. In the first count the defendant was charged with having committed the infamous crime against nature. In the second count he was charged with having committed certain lewd and lascivious acts upon the body of a child. The trial of the case resulted in his being convicted of both offenses charged. He thereupon moved for a new trial. This motion was granted as to the offense charged in the second count and denied as to the offense charged in the first count. He then presented to the court a motion in arrest of judgment, which was granted.

The motion in arrest of judgment was made on the ground that the facts stated in the first count of the information do not constitute a public offense. The first count of the information is in the following language: "Hal Hopwood is accused by the district attorney of the county of San Diego, state of California, by this information of the crime of infamous crime against nature committed as follows: The said Hal Hopwood on or about the 8th day of September, A. D. nineteen hundred and thirty-two at said county of San Diego, state of California, and before the filing of this information did then and there wilfully, unlawfully and feloniously commit the infamous crime against nature, by then and there wilfully, unlawfully and feloniously having carnal knowledge of the body of one Virginia Hayhurst."

[1] The infamous crime against nature is denounced by section 286 of the Penal Code. This section does not define the offense. However, as was said by the court in People v. Green, 65 Cal. App. 234, 223 P. 1004, 1005, "every person of ordinary intelligence under-

stands what that crime is." Broadly speaking it consists of unnatural sexual relations. 8 R. C. L., p. 333.

[2] Appellant contends that, if the first count of the information be measured by the standard declared in section 952 of the Penal Code, it is apparent that it is sufficient. It is urged that the acts constituting the offense are therein stated in ordinary and concise language and in such fashion as to enable a person of common understanding to know what is intended. For the purposes of this opinion we may assume that, if the first count had simply charged the commission of the offense upon the body of a named individual and had gone no further, it would not have been vulnerable to the attack presented by the motion in arrest of judgment. People v. Green, supra. The first count does, however, go further and specifies that the crime was committed by respondent willfully, unlawfully, and feloniously having carnal knowledge of a named individual. This latter statement, which purports to describe the manner in which the offense was committed, introduces an element entirely foreign to the offense designated as "the infamous crime against nature." The words "carnal knowledge" mean sexual connection. People v. Carroll, 1 Cal. App. 2, 4, 81 P. 680; People v. Allison, 25 Cal. App. 746, 748, 145 P. 539.

[3] The first count of the information therefore charges that respondent committed the infamous crime against nature by having sexual connection with a named person. If this person whose name is stated to be Virginia Hayhurst is a female, the effect of the language was to charge respondent with having committed sexual intercourse with a female, which is not itself a crime. People v. Carroll, supra.

[4] Appellant urges that the portion of the first count which specifies that the crime was committed by respondent having carnal knowledge of the body of the individual named therein is superfluous and may be disregarded as surplusage. This contention may not be sustained. The crime denounced by section 286 of the Penal Code must be committed "with mankind or with any animal." A charge that the crime was committed must therefore specify that it was committed with another human being or with an animal. The only part of the first count which contains this necessary specification is the portion which appellant contends is superfluous and may be disregarded. It is, however, obvious that it cannot be disregarded if we are to discover that the count correctly charges the commission of the offense.

[5] Furthermore, although an information will be held sufficient where the crime is substantially alleged in the words of the statute, or their equivalent, nevertheless if the facts stated are capable of two constructions upon one of which the facts might be true and not constitute a crime, the pleading is insufficient in charging the offense. The information cannot be aided by presumption since every presumption is in favor of innocence, and, if the facts stated may or may not constitute a crime, the presumption is that no crime was charged. People v. Allison, supra.

It is contended that the case is covered by the provisions of article 6, § 4½, of the Constitution and that it is apparent that no miscarriage of justice has resulted from respondent's conviction. The section relied upon provides that no judgment shall be set aside or new trial granted for any error as to any matter of pleading or for any error as to any matter of procedure, "unless after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." The record herein contains no reporter's transcript of the trial. It is therefore impossible for us to make an examination of the evidence and obviously impossible to arrive at an opinion as to whether or not there was a miscarriage of justice. The trial judge who heard the evidence was evidently of the opinion that such miscarriage had resulted, and since the opportunity has not been afforded to us of examining the evidence submitted, it is manifestly impossible for us to declare that he was in error.

The order arresting judgment is therefore affirmed.

We concur: BARNARD, P. J.; MARKS, J.

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130 Cal.App. 98

LARIMER et al. v. SMITH et al.

Civ. 4245.

District Court of Appeal, Third District, California.

Feb. 27, 1933.

1. **Attorney and client** ⚷32.

It is dereliction of duty for attorney to abandon cause on appeal, and if attorney loses faith in his cause, he should either retire or dismiss action.

2. **Brokers** ⚷85(7).

In brokers' action for commission for procuring contract for sinking oil wells, contract between defendants respecting distribution of profits *held* properly admitted in evidence, as against objection of lack of proof that it was signed.

⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

3. Evidence 🔑373(1).

Conflict regarding matter of identifying contract and tracing copy thereof to defendants' possession merely affected weight of evidence, not admissibility of contract.

4. Trial 🔑412.

Objection to admissibility of contract on ground of extraneous matter written thereon, with statement that there was no objection to introduction of remainder of document, waived objection to document on ground it was not executed and identified.

5. Appeal and error 🔑931(6).

Appellate court will presume in support of judgment that extraneous matter written on contract and having no connection with matter in litigation was not considered by court, and that admission of contract without specifically excluding memorandum was not prejudicial.

6. Evidence 🔑186(6).

Purported copy of deceased's assignment of interest in oil contract *held* sufficiently identified as being true copy of original assignment.

7. Evidence 🔑353(2).

In brokers' action for commission for procuring oil well drilling contract, exclusion of another contract for sinking oil wells between certain defendants and drilling company not party to action *held* not error.

> The exclusion of such contract was not error because brokers suing for commission claimed no interest in well mentioned in that contract, and there was no showing that plaintiffs knew of such contract or had or claimed any interest therein.

8. Appeal and error 🔑1057(1).

Excluding testimony, if error, was harmless where fact sought to be elicited was otherwise fully established.

9. Brokers 🔑88(14).

In brokers' action for commission for securing oil well drilling contract, finding that defendants were partners engaged in drilling business *held* not objectionable as not within pleadings.

> The amended complaint referred to and adopted recitations of contract between defendants, which contract could reasonably be construed as constituting partnership or joint adventure between defendants in oil-prospecting enterprise, and it was immaterial whether business relationship of defendants constituted partnership or joint adventure, since obligations of interested parties would be the same in either case.

10. Appeal and error 🔑1053(6).

Admitting in evidence letter with limitation that it should not be binding on defendant, but only on codefendant who wrote it, *held* harmless as to defendant.

Appeal from Superior Court, Los Angeles County; Hugh Crawford, Judge.

Action by C. H. Larimer and another against Everett O. Smith, as administrator of the estate of Vernon E. Sack, deceased, Howard Zellers, and others. Judgment for plaintiffs, and defendant last named appeals.

Affirmed.

Hibbard & Kleindienst, of Los Angeles, for appellant.

Allard & Mitchell, of Pomona, and M. I. Church, of Los Angeles, for respondents.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

The plaintiffs recovered judgment for services performed in securing a contract for the sinking of oil wells. From this judgment the defendant Zellers has appealed.

The amended complaint alleges that the plaintiffs are real estate brokers who reside in Los Angeles; that in 1923 they entered into an agreement with the defendant Sack to procure a contract with the Pomona Oil Company to sink oil wells on lots 15–18, block H, tract 1901, in Los Angeles county, in consideration of the payment of $14,400 as commissions for their services; that this contract for sinking oil wells was duly executed by the Pomona Oil Company according to the agreed terms and conditions, on July 14, 1923; that the several defendants subsequently entered into an agreement by the terms of which they were associated in the joint enterprise of prospecting for oil upon the said lots pursuant to the terms of the above-mentioned contract with the Pomona Oil Company; that for a valuable consideration the defendants executed a written agreement concerning the operation of their said oil-prospecting enterprise, specifying the proportions in which each should participate in the profits and losses of the business, and specifically agreeing to pay all expenses of operation, including the compensation of plaintiffs for procuring the contract first above mentioned; that no part of plaintiffs' commissions has been paid; that the defendant Sack died after the commencement of this action, and upon proceedings duly had, the defendant Smith was appointed and qualified as administrator of his estate. Separate answers of the defendants deny the material allegations of the complaint. Upon trial of the cause, the court adopted findings supporting the foregoing allegations of facts. A joint and several judgment for the agreed value of plaintiffs' services in procuring the oil-developing contract was rendered against the defendants. From this judgment the defendant Zellers has appealed. The judgment is final against the other defendants.

The appellant contends that the findings and judgment are not supported by the evidence; that the finding of court regarding the existence of a partnership or joint enterprise is not within the issues presented by the pleadings; and that the court erred in receiving and rejecting testimony.

[1] The respondents have filed no brief in support of their judgment of $16,568 which was secured in the trial court. The issues involve an alleged partnership or joint enterprise and the construction of numerous documents incident thereto. The pleadings and findings are complicated. The record consists of 530 pages. A reversal of the judgment is sought for alleged errors in receiving and rejecting testimony and because it is claimed the findings and judgment are not supported by the evidence. The recitation of facts and evidence which appears in the appellant's brief must be accepted as conclusive unless we personally examine the voluminous record. It is a dereliction of duty on the part of an attorney for him to abandon a cause on appeal. Accepting employment as an attorney, with or without pay, is accompanied with serious responsibilities and entitles the client and the courts to faithful performance of services. Ethics and common justice to client and to the courts should prompt diligent service of an attorney of record. When an attorney loses faith in his cause, he should either retire from the case or dismiss the action. Lest an injustice should result from the negligence of respondents' counsel, we have undertaken to make an independent examination of the record.

[2-5] The appellant asserts that the court erred in admitting in evidence the contract for distribution of profits from an operation of the oil wells, executed June 26, 1923, between the four defendants, which agreement is referred to in paragraph VI of the amended complaint, and is found on page 270 of the transcript, for lack of proof that it was signed and because the copy which was offered in evidence contains some extraneous matter which was written thereon with a pencil. The objection to this contract is in the following language:

"I want to object to the introduction in evidence of that agreement so far as the handwriting contained thereon at the conclusion thereof. It is clearly a declaration by Mr. Sack, not made while on the stand, and not competent evidence. The remainder of the contract. I have no objection to introducing it as it is."

In the deposition of Mr. Sack, which was read in evidence, he testified:

"Q. Did you have a written contract? A. We had. * * *

"Q. Do you know to whom it was delivered after it had been signed by all the parties? A. Mr. Campbell had one and Mr. Zellers had one."

At the trial a carbon copy of this document was identified by Mr. Larimer. Regarding the written matter to which the appellant objects, the following colloquy occurred: "Q. (By Mr. Mitchell) Now, I direct your attention to the handwriting on the bottom of this instrument, and will ask you to state to the court whose handwriting that is, if you know? A. That is Mr. Sack's handwriting, signed in my presence. * * * That was done in the lobby of the Hayward Hotel * * * that was June 13, 1925."

The contract was properly admitted in evidence. It was identified and a copy traced to the possession of the appellant. To be sure there is a conflict regarding this matter, but that merely affects the weight of the evidence. Moreover, the appellant's attorney specifically waived objection to the document on the ground that it was not executed and identified. The extraneous matter written at the bottom of the instrument, to which he does object, was clearly explained. It does not appear what this written matter consists of. It was endorsed on the document by Mr. Sack two years after the original contract was executed and delivered. It is not contended that it has any bearing on the issues involved in this case. In admitting the document the court might have been a little more explicit in excluding that particular matter. Since the case was tried by the court without a jury, it may not be assumed the judge wrongfully considered this pencil memorandum on the copy of the contract in deciding the case. It is evident from the record the court intended to reject the pencil memorandum. In accordance with the rule in support of a judgment on appeal it will be presumed the objectionable matter was not material to the case, that it was not considered by the court, and that the admission of the document without specifically excluding this memorandum was not prejudicial.

[6] Over the objection of appellant a purported copy of an assignment of interest in an oil contract with the Pomona Oil Company was received in evidence. This assignment appears to have been made December 11, 1923, by the defendant Sack to the appellant, Zellers. The reception of this document is now designated as erroneous on the ground that it was not sufficiently identified as a true copy of the original instrument. We think the instrument was sufficiently identified as a true copy of the original assignment. There is ample evidence that this assignment was made. On account of the death of Mr. Sack prior to the trial of the case, his deposition was read in evidence. Regarding this assignment he testified as follows:

"Q. As a matter of fact, did you not assign that contract to Mr. Zellers? A. * * * I gave Mr. Zellers a little writing at that time in longhand, that is of the assignment that I gave him of the contract. * * *

"Q. Which you wrote out yourself in longhand? A. Yes sir.

"Q. And as far as you know, Mr. Zellers has that agreement now? A. Yes, as far as I know."

Mr. Leaman, former president of the Pomona Oil Company, testified regarding this assignment as follows:

"I then asked Mr. Sack to make an assignment to Mr. Zellers so we could go ahead and deepen the well. * * * He agreed to do it and did do it on or about the 11th of December of that year. * * *

"Q. Did you ever see that assignment that was made by Mr. Sack to Mr. Zellers? A. Yes sir; I did. * * *

"Q. Are you familiar with the contents of that assignment? A. Yes sir, I am.

"Q. Did you examine the contents of it? A. Yes sir, I did.

"Q. I want to show you an instrument here that purports to be a copy of an assignment. * * * I will ask you if you can identify that instrument (handing paper to witness)? A. I can.

"Q. I will ask you to state what that instrument is? * * * A. The assignment (that) was made to him. * * * The original was written in longhand in Mr. Sack's own writing on a piece of yellow paper, with Mr. Sack's name on it. This is a copy of the original."

In spite of the appellant's denial that he signed or received this document, there is sufficient evidence to identify it as a copy of the original assignment. The loss of the original was sufficiently established. There is evidence that it was delivered to the appellant, who denies that he ever had possession of the instrument. The document was properly admitted in evidence.

[7] The exclusion of a contract for sinking an oil well on a "per lineal foot basis" on one of the lots affected by this suit, dated July 21, 1923, between the defendants Campbell and Zellers and the Western Drilling Company, is assigned as erroneous. The Western Drilling Company is not a party to this action. It does not appear this company ever had any participation in the oil-prospecting enterprise between the defendants and the plaintiffs in this suit. Appellant contends this agreement is competent "to show the relationship which existed between the various defendants, and was a step in showing that the defendant Howard Zellers was not a partner with Sack, Campbell and Pettijohn." It is not suggested how an independent contract with a stranger to this action, in which the plaintiffs are in no way connected, will throw any light upon the obligations or relationship of the parties to this suit. The fact that the excluded contract provides for the drilling of a well by a stranger to the transaction on one of the lots included in the contract involved in this suit might furnish some evidence that the defendants Campbell and Zellers were violating their contract with the plaintiffs. But the plaintiffs claim no interest in the oil well mentioned in the Western Drilling Company contract. There is no showing that plaintiffs knew of this contract, or had or claimed any interest therein. The instrument was therefore properly excluded.

[8] The appellant assigns as erroneous several rulings of court sustaining respondents' objections to questions propounded to the defendant Campbell with the object of proving the signing and execution of the alleged partnership agreement referred to in the complaint, designated at the trial as "Plaintiffs' Exhibit 7," and marked "Exhibit D." This evidence was competent and material. The court did sustain objections to several similar questions. These rulings are harmless for the reason that the fact thus sought to be elicited was otherwise fully established. The excluded answers would have been merely cumulative. On cross-examination the same witness, Campbell, flatly denied that the agreement was signed. The appellant also denied that he signed the document. Respecting this subject, the transcript, at page 268, discloses the following testimony: "Q. (By Mr. Mauk) Mr. Campbell, was that agreement marked exhibit D ever signed by any of you people? A. No sir." The objection to this question was not ruled upon. The answer stands as a flat contradiction that any of them signed the instrument. Erroneous rulings excluding testimony are harmless, when the evidence is otherwise fully developed by the same or other witnesses. 2 Cal. Jur. 1022, § 608; Silvey v. Harm, 120 Cal. App. 561, 573, 8 P.(2d) 570.

[9] It is contended that a finding which was adopted by the court to the effect that the defendants were "partners engaged in the business of drilling oil wells, developing oil leases and buying, selling and otherwise dealing in oil leases and oil well drilling contracts," is not within the issues tendered by the pleadings and therefore inadequate to support the judgment. This claim is without merit. It is immaterial whether the business relationship of the defendants constituted a partnership or a joint adventure in an oil-producing industry. Ford & McNamara, Inc., v. Wilson, 119 Cal. App. 475, 6 P.(2d) 996. For the purposes of this suit the obligations of the interested parties would be the same. This challenged finding is, however, in accordance with the allegations of paragraph VI of the amended complaint, which refers to and adopts the recitations of the

contract between the defendants marked "Exhibit D." This contract may be reasonably construed to constitute a partnership or joint adventure between the defendants in the oil-prospecting enterprise. This challenged finding of the court is therefore adequately supported by the pleadings.

[10] The appellant complains of the admission in evidence of a letter, dated May 14, 1925, from the defendant Sack to the plaintiff Larimer, acknowledging the execution of a contract with the Pomona Oil Company to sink a well, in the profits from which the plaintiffs were to participate. In the admission of this letter the evidence was specifically limited in its application to the liability of Sack, the author thereof. It does not affect the liability of the appellant. At the time of the offer, the attorney for plaintiffs said: "We do not contend it is binding on Mr. Zellers, but it is on Sack." Upon that express limitation the court admitted the letter in evidence. The judge said: "I will overrule the objection *if that is the case.*" Since this evidence was specifically limited in its application to the defendant Sack, and it was thoroughly understood that it was not binding on the appellant, the appellant may not complain of the ruling. It is harmless so far as he is concerned.

We are of the opinion there is no prejudicial error disclosed by the record in the admission or rejection of evidence. The findings and judgment are adequately supported by substantial evidence.

The judgment is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

130 Cal.App. 200

Application of BEHYMER et al.

BEHYMER et al. v. SCHRADER et al.

Civ. 1002.

District Court of Appeal, Fourth District, California.

March 1, 1933.

1. Judgment 🔑**518.**

Chief distinction between "collateral" and "direct" attack upon judgment is that in collateral attack evidence to show excess of jurisdiction is restricted to judgment roll as defined by law at time of rendition of judgment.

[Ed. Note.—For other definitions of "Collateral Attack" and "Direct Attack," see Words and Phrases.]

2. Judgment 🔑**386(3).**

Judgment or order void on its face may be vacated on motion at any time, or court may of its own motion set it aside, or disregard it regardless of how its validity is brought to court's attention.

3. Judgment 🔑**386(3).**

A judgment or order is "void on its face" when its invalidity is apparent upon inspection of judgment roll.

[Ed. Note.—For other definitions of "Judgment Void on its Face," see Words and Phrases.]

4. Process 🔑**96(2).**

Test of sufficiency of affidavit for publication of summons is whether it is so clear and certain that indictment for perjury may be sustained on it if false.

5. Process 🔑**96(4).**

Affidavit for publication of summons was insufficient where averments with reference to diligence were based on information obtained from another and all statements showing diligence were hearsay.

6. Taxation 🔑**627.**

Omission of word "penalties" from notice appended to delinquent tax list rendered notice fatally defective and tax deed based thereon void.

7. Adverse possession 🔑**13.**

Payment of taxes on unoccupied and unimproved city lot, filing for record various legal papers, and quieting title against former owner after it had parted with title, did not constitute "adverse possession" as against true owner (Code Civ. Proc. § 323).

[Ed. Note.—For other definitions of "Adverse Possession," see Words and Phrases.]

8. Appeal and error 🔑**110.**

No appeal lies from order denying motion for new trial.

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Petition for initial registration of title to land by Lynden E. Behymer and others, opposed by Hermann H. Schrader and another contestants. From judgment for petitioners, contestants appeal.

Affirmed.

Elijah M. Smuckler and Crocker & Steelman, all of Los Angeles, for appellants.

Chauncey E. Snow, of Los Angeles, and Harmel L. Pratt, of Hollywood, for respondents.

VAN ZANTE, Justice pro tem.

On July 28, 1927, under the Land Title Law, petitioners filed a petition with the clerk of the superior court of Los Angeles county for initial registration of title to a city lot in the city of Long Beach. The contestants filed an answer wherein they alleged "that they are the owners in fee simple, as joint tenants, and are in possession and entitled to the possession of said property." The matter was heard before a referee whose findings were adopted by the court and judgment was rendered in favor of petitioners.

Respondents claim title through a deed from the Long Beach & Alamitos Improvement Company, dated March 7, 1912, which was recorded August 17, 1926. Appellants claim title through a judgment against the Long Beach & Alamitos Improvement Company quieting title, a tax deed, and by adverse possession. The judgment quieting title, and the tax deed, were obtained by appellants between the above-named dates. Appellants also claim that the title vested in them between these dates by adverse possession. It is through these several sources of title, and because of them, that appellants contend the judgment of the trial court should be reversed. These will be discussed in the order in which appellants have stated them.

[1] It is conceded that the attack made on the judgment quieting title is collateral and not direct. "The chief distinction between a collateral and a direct attack upon such a judgment is that in a collateral attack the evidence which may be received to show excess of jurisdiction is restricted to the judgment roll as defined by law at the time of the rendition of the judgment. But where by a resort to such evidence the want of vitality in the judgment is demonstrated, the duty to declare it void is as imperative on collateral as on direct attack." Gray v. Hall, 203 Cal. 306, 321, 265 P. 246, 254.

[2, 3] "However, a judgment or order void on its face may be vacated on motion made at any time, or the court may, of its own motion, set it aside or disregard it, regardless of how the invalidity is brought to its attention. People v. Davis [143 Cal. 673, 77 P. 651], supra; Reher v. Reed, 166 Cal. 525, 528, Ann. Cas. 1915C, 737, 137 P. 263. A judgment or order is said to be void on its face when the invalidity is apparent upon an inspection of the judgment roll. People v. Davis, supra. It follows, therefore, that if the affidavit upon which the order directing publication of summons was had in this action fails, as urged by the appellant, to comply with the provisions of section 412 of the Code of Civil Procedure, the default judgment thereafter entered on such defective service would be void on its face, and the trial court at any time could have properly set it aside." Morgan v. Clapp, 207 Cal. 221, 224, 277 P. 490, 491.

One of the papers constituting the judgment roll in the proceeding quieting title is the affidavit for publication of summons. It is contended by respondents that this affidavit is insufficient and that the judgment quieting title based thereon is void. The affidavit, omitting the formal requisites, reads as follows: "Hermann H. Schrader, being sworn, says: The complaint in the above entitled action was filed in the office of the County Clerk of the County of Los Angeles, on the 17th day of March, 1924, and summons was duly issued thereon. The action herein is brought for the purpose of quieting title to real estate in this state as will appear by the verified complaint. Defendant (1) resides out of the State of California; (2) has departed from the State of California; (3) can not, after due diligence, be found within the State of California; (4) conceals himself to avoid the service of Summons; as will appear from the following facts and circumstances: (Here insert or attach statement of Specific Facts. See footnote. The requirements of the footnote must be complied with, or no order will be granted.) That it appears by said complaint, on file that this is an action which relates to real estate, in this state, in which such persons and said Corporation defendant claims a lien of interest actual or contingent to the property described therein, and that the relief demanded consists wholly in excluding the said defendants, and Corporation, from any interest therein. That affiant employed one William D. McClaflin of 5336 Aldama Street, Los Angeles to ascertain the whereabouts of any of the defendants, and is informed by him that he could not find any of the officers of said defendant Corporation, and was informed that said Corporation had defaulted its Charter, and was not now in existence, that he had interviewed the City assessor, Tax Collector and City Clerk of Long Beach, California, where said Corporation had its principal office, and at the Alamitos Land Company who own property near said lot, and could not learn from any of them the whereabouts of any of the said defendants. That there has not been filed by or on behalf of defendant in the office of the County Recorder of said County of Los Angeles, any certificate of residence as provided in Section 1163 of the Civil Code of California."

[4] "A test of the sufficiency of an affidavit is whether it is so clear and certain that an indictment for perjury may be sustained on it if false." Gee Chong Pong v. Harris, 38 Cal. App. 214, 217, 175 P. 806, 807, citing 2 C. J. 348.

[5] Evidently the affidavit in question does not meet this test. Every averment with reference to showing diligence is based on information obtained from another, and, even if false, affiant would not be criminally liable for perjury.

The affidavit is also insufficient in that all the statements showing diligence are hearsay. "The affidavit is full and explicit as to the cause of action, its nature, the parties, etc., but is fatally defective in failing to show with accuracy the efforts made to serve defendant with summons. It states, in substance, that plaintiff's attorney placed the summons and complaint in the hands of five different persons (naming them) for service, and that they returned them with the information that they could not find defendant or see her, and that she cannot be found in the city and county. This statement is but hearsay, and may be wholly untrue, in fact, without any impeachment of the truthfulness of the affiant. Where service of process upon a defendant within the county is attempted to be made by a person other than the sheriff, his affidavit should, as a rule, be required, showing the nature of the effort made to serve the party, and, where practicable, the reasons why such service cannot be had." Kahn v. Matthai, 115 Cal. 689, 692, 47 P. 698, 699. See, also, Wilson v. Leo, 19 Cal. App. 793, 127 P. 1043; Columbia Screw Company v. Warner Lock Company, 138 Cal. 445, 71 P. 498.

[6] Appellants obtained a tax deed to this property in 1921. The trial court held this deed to be void by reason of defective notices contained in the publication of the delinquent list for the years 1915 and 1920. The following is an extract from the report of the referee: "That in the published delinquent assessment list for the year 1915–1916, the first part of said publication stated that the land thereinafter described (which included the land in this petition), would be sold unless taxes, penalties and costs were paid. The notice at the end of the list gave the amount set out opposite each assessment as taxes and costs, but omitted therefrom the word 'penalties.' * * * Assessment No. 265703 shows amount sold for but not amount of penalties." There is no contention that the evidence is not sufficient to support this finding. We think the omission of the word "penalties" from the notice appended to the delinquent tax list for the year 1915 rendered this notice fatally defective and consequently the tax deed void. The following is a paragraph from the syllabus in the case of Knoke v. Knight, 206 Cal. 225, 273 P. 786: "In this action to quiet title to real property, in which plaintiff relied upon a tax deed, the trial court properly held that said deed was invalid by reason of the fact that proceedings leading up to the execution of said deed were defective, in that the delinquent tax list, together with the notice appended thereto, failed to state the amount of the penalties." In this case the authorities bearing on this question are compared, and the case of Stuart v. Chapman, 87 Cal. App. 552, 262 P. 348, relied on by appellant, distinguished. See, also, Myran v. Smith, 117 Cal. App. 355, 4 P. (2d) 219.

[7] Finally, appellants claim title to this property by adverse possession. They contend that by reason of this property being a city lot in uncultivated, unoccupied, and barren territory, the requirement of actual and visible occupation should be less imperative, and therefore they claim the following acts constitute adverse possession (quoting from appellants' opening brief): "Summarized, those acts were: Receiving quit-claim deed to said property on August 18, 1921; duly recording same on said date; having the property assessed in their name on the state, county and city assessment rolls for the year 1922 and onward; paying all assessments and taxes from the year 1921 for more than five years; obtaining a decree quieting title to the property against the Long Beach and Alamitos Improvement Company, dated July 17, 1924; executing an oil and gas lease on the property, dated February 28, 1927; and duly filing for record a notice of non-responsibility for labor or materials on the property, dated March 7, 1927." But these acts as above enumerated do not meet the requirements of section 323 of the Code of Civil Procedure.

" 'Both parties are claiming under a record title from a common source, and the only question is superiority. Limitation or lapse of time does not perfect a defective record title in the absence of possession. If the situation of these parties had continued 10, 15, or 20 years longer, and the question should then arise, as now, as to which title of record is superior, a plea of limitation would not avail for either party against the other. Appellants show that they have regularly paid the taxes on the land. * * * One cannot acquire title to the land of another by paying the taxes on it, nor will a claim of title under a void deed, although recorded, ripen into a fee by lapse of time, nor will limitations run against the owner of record in favor of a claimant not in possession, nor is it incumbent upon the owner to sue for cancellation of a void deed, or to take steps to remove a cloud upon his title. * * * If he desires to have the cloud removed the law affords a remedy, but he is not compelled to go to that expense, and his failure to do so cannot be considered laches, nor will it operate as an estoppel against him. A mere claim of title, even of record, unaccompanied by adverse holding, will not start the statute.' " Secret Valley Land Co. v. Perry, 187 Cal. 420, 425, 426, 202 P. 449, 451. See, also, 1 Cal. Jur. 527.

[8] Appellants have attempted to appeal from an order denying motion for a new trial. No appeal lies from such order and the appeal therefrom is dismissed. Burk v. Extrafine Bread Bakery, 208 Cal. 105, 280 P. 522; In re Guardianship of Hann, 100 Cal. App. 743, 281 P. 74.

The judgment appealed from is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

130 Cal.App. 231

DEPARTMENT OF WATER AND POWER OF CITY OF LOS ANGELES v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al.

Civ. 8820.

District Court of Appeal, Second District, Division 2, California.

March 2, 1933.

Hearing Denied by Supreme Court May 1, 1933.

Master and servant ⊙385(1).

$28 *held* reasonable average weekly earning capacity, for purposes of compensation, of city employee engaged for 30 days at $4 per day, who received injuries on 20th day of employment and had elsewhere preceding injury received $4.83 per day (St. 1917, p. 842, § 12 (a), subds. 1–4, as amended by St. 1929, p. 553).

Certiorari to Industrial Accident Commission.

Proceeding under the Workmen's Compensation Act by George Campbell, claimant for injuries, opposed by the Department of Water and Power of the City of Los Angeles, employer. To review an award of the Industrial Accident Commission granting compensation, the employer brings certiorari.

Affirmed.

Erwin P. Werner, City Atty., Mark L. Herron, Asst. City Atty., William E. Balter, Deputy City Atty., and Loren A. Butts, Asst. City Atty., all of Los Angeles, for petitioner.

A. I. Townsend, of San Francisco, for respondents.

CRAIG, Justice.

The respondent, an employee of a municipal subdivision of the city of Los Angeles, was injured in the course of his employment. Pursuant to application and hearing before the respondent commission which resulted in an award based upon wages of $28 per week, a petition for rehearing was denied. The employer thereupon petitioned for a writ of certiorari to review the same.

It is conceded that the employee was engaged for a stated period of thirty days at the rate of $4 per day, and that he received injuries on or about the 20th day of his employment by falling backward from loose boards provided as steps which he was required to ascend in carrying packages. Said injury was found to have caused temporary total disability continuing more than thirty days thereafter. It is contended by the petitioner that compensation should not be allowed on the basis of $28 per week, under the evidence and section 12 of the Workmen's Compensation Act.

Subdivisions 1, 2, and 3 of section 12(a) of said statute (as amended by St. 1929, p. 553), provide that if earnings be irregular or specified to be by the week, month, or *other period*, as a basis the average weekly earnings of the employee who has worked at least 260 days of the year preceding his injury, or of one of the same class working for the same period, shall be 95 per cent. of the average earnings during such period, not exceeding one year, as may conveniently be taken to determine the weekly rate of pay. Subdivision 4 provides that where the foregoing methods of arriving at the average weekly earnings cannot reasonably and fairly be applied, the average weekly earnings shall be taken at 95 per cent. of such sum as shall reasonably represent the average weekly earning capacity of the injured at the time; due consideration being given to his actual earnings from all sources and employment during the year preceding his injury, not exceeding the rate actually paid him. Since the respondent employee was employed upon an agreed daily rate of compensation, and it is not denied that he was one of a class of numerous employees working at the same wage, none of whom had been employed for a period of 260 days, it is insisted that the method first mentioned is unavailing. It appeared that the respondent had earned approximately $150 elsewhere during the year preceding the injury, for services at intervals within something less than one month, at a rate in excess of $4.83 per day, or about $37.84 per week if employed every day. From the foregoing we are unable to say as a matter of law that the respondent commission erred in adopting $4 per day as reasonably representing the average weekly earning capacity of the injured at the time, taking into consideration for such purpose prior actual earnings. Had he been employed for the full 260 days, the rate of compensation to be applied, though mandatory, would not appear to have been less. Hence, under none of the methods prescribed by the statutes does an amount less than that adopted seem to be legally required nor does a different method of computation so plainly appear as to require annulment of the award.

The award is affirmed.

We concur: WORKS, P. J.; ARCHBALD, Justice pro tem.

⊙For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

130 Cal.App. 133

YUSUKE TAKEHATA v. SUPERIOR COURT IN AND FOR ORANGE COUNTY et al.

Civ. 1242.

District Court of Appeal, Fourth District, California.

Feb. 27, 1933.

1. Marriage ⚷62.

Trial court should not refuse to proceed with action for annulment of marriage because of petitioner's failure to pay temporary alimony, absent determination that petitioner was able to pay.

2. Marriage ⚷62.

Petitioner cannot demand that action for annulment of marriage proceed where he has not paid, as ordered, court costs incurred by defendant wife.

Application by Yusuke Takehata for writ of mandate to be addressed to the Superior Court in and for the County of Orange, and the Hon. James L. Allen as Judge thereof, to compel the respondents to proceed with the trial of an action for annulment of marriage.

Petition denied, and proceeding dismissed.

Ray L. Smith, of Los Angeles, for petitioner.

Head, Wellington & Jacobs, of Santa Ana, for respondents.

BARNARD, Presiding Justice.

This is an application for a writ of mandate to compel the respondent court and judge to proceed with the trial of an action for annulment of marriage, in which the petitioner is the plaintiff. When the action came on for trial, the court refused to proceed with the same until such time as petitioner complied with an order previously made requiring him to pay to the defendant the sum of $30 per month as alimony pendente lite, with the further sum of $15 for court costs incurred by the defendant. In this previous order the question of attorney's fees had been reserved until the hearing of the case on its merits. It appears from the petition that the respondent court refused to hear any testimony with reference to the petitioner's ability to meet the payments required by the prior order, and that the petitioner has not been found to be in contempt by reason of his failure to make the payments referred to.

The only case cited by respondents is Farrar v. Farrar, 45 Cal. App. 584, 188 P. 289. While the question now before us was not involved in that case, in passing upon an appeal from an order requiring a husband to pay a certain monthly sum for the support of his wife pending an appeal, together with a further sum for printing her brief on appeal, the statement is made that where an action is brought by a husband, a court will refuse to proceed therewith until compliance is made with an order to pay temporary alimony and the expense of defending the suit. In support thereof the court cited the case of Winter v. Superior Court, 70 Cal. 295, 11 P. 633. In the last-named case there was involved only an order for the payment of counsel fees to enable a wife to make her defense, and it was held that the trial court did not abuse its discretion in refusing to set the case for trial until such order was complied with or set aside. The facts in the case of Allen v. Superior Court, 133 Cal. 504, 65 P. 977, 978, are very similar to those in the case now before us with the one exception that, in the instant case, the question of the ability of the petitioner to pay has apparently not been examined into or passed upon. In the Allen Case the court said: "We think the court is in error in refusing the petitioner a hearing until he pays the alimony. It is conceded that he is unable to pay anything, and, such being the case, he should not be debarred from a trial until he has provided for his wife's support. It is enough to stay the proceeding until he provides the defendant with the money actually necessary for her defense, independent of support,—suit money as distinguished from alimony. As to suit money, the right of the wife cannot be denied. Until her alleged fraud is established, she remains the lawful wife of the petitioner, and has the same right to defend the action to annul the marriage that he has to prosecute it; and, until she is provided with the means actually necessary to make her defense, she ought not to be forced into a trial."

The language just quoted is cited with approval in Dunphy v. Dunphy, 161 Cal. 87, 118 P. 445. In Pugliese v. Pugliese, 200 Cal. 652, 254 P. 266, the rule above stated seems to be somewhat modified with respect to the payment of counsel fees, at least in so far as proceedings on appeal are concerned, in the absence of any showing as to necessity and ability to pay, respectively.

[1, 2] We think, therefore, that the court was in error in refusing to proceed with this trial until the order to pay $30 a month for the support of the wife was complied with, in the absence of any showing that the petitioner was able to comply with the order. A somewhat different situation exists with reference to the order to pay $15 for court costs. With respect to that, so far as we are informed, the rule set forth in Allen v. Superior Court, supra, is still controlling. While the petitioner states in his authorities that he offered to pay this $15, the only proof in the record before us is to the contrary. Apparently, however, he is willing to pay the same. The question as to his ability to pay the amount ordered for the support of his wife

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⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

can and should be disposed of. Under the circumstances, the petitioner not having brought himself clearly within the rule, we think this petition should be denied.

For the reasons given the petition is denied and this proceeding dismissed.

We concur: MARKS, J.; JENNINGS, J.

130 Cal.App. 163

BROUWER et al. v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

Civ. 8874.

District Court of Appeal, Second District, Division 2, California.

Feb. 28, 1933.

Hearing Denied by Supreme Court April 28, 1933.

1. Prohibition 🔑19.

In proceeding for writ of prohibition, only tribunal whose exercise of jurisdiction is sought to be stayed is proper party respondent, and not any of individuals who aid in discharge of its functions, or who are suitors before it.

2. Bankruptcy 🔑148.

Bankruptcy court has no jurisdiction over property of one who has filed bankruptcy petition, except that which was his at time petition was filed.

3. Bankruptcy 🔑391(3⅛).

To protect property acquired after adjudication in bankruptcy in federal court, bankrupts could resort to state courts.

4. Bankruptcy 🔑418(1).

State courts must give full faith and credit to discharge in bankruptcy obtained in federal court.

5. Bankruptcy 🔑421(1).

Superior court could not issue writ of execution against wife's interest in community property acquired after her adjudication in bankruptcy to enforce judgment obtained on provable claim pending bankruptcy proceedings.

6. Bankruptcy 🔑391(3⅜).

Pending determination of debtor's application for discharge in bankruptcy, superior court would be enjoined from attempting to enforce judgment obtained on provable claim against husband's interest in community property acquired after adjudication in bankruptcy.

Application for writ of prohibition by John C. Brouwer and another, to enjoin the Superior Court in and for Los Angeles County, Lucius P. Green, Judge, and others from issuing or maintaining writs of execution.

Peremptory writ of mandate issued.

George Acret, of Los Angeles, for petitioners.

Everett W. Mattoon, Co. Counsel, and S. V. O. Prichard, Deputy Co. Counsel, both of Los Angeles, for respondents.

Doyle, Clark, Thomas & Johnson, of Long Beach, for respondent Sally Williams.

WORKS, Presiding Justice.

The petition in the proceeding alleges that petitioners are husband and wife; that R. L. Butcher, incorrectly named as a respondent, was plaintiff in respondent court in an action in which petitioners were defendants; that Sally Williams, also incorrectly named as a respondent, was the assignee from Butcher of a judgment rendered in the action; that E. W. Biscailuz, also improperly named as a respondent, is sheriff, as stated in the title of the proceeding; that Butcher, under three counts on contract, commenced an action against petitioner in respondent court; that on a certain date petitioners filed a petition in bankruptcy in the United States court and were at once, according to law, adjudicated bankrupts; that Butcher filed claims against petitioners in the bankruptcy matter upon the choses in action involved in the action in which he was plaintiff, they being claims provable against the bankrupts under the law, and received pro rata payments thereon arising from a disposition of property of the bankrupts through the bankruptcy proceeding; that thereafter, unbeknown to petitioners, Butcher procured judgment by default against them in the action; that thereafter petitioners made application for discharge in the bankruptcy proceeding; that petitioner Evelyn Brouwer was granted discharge but that the application of petitioner John C. Brouwer was contested by Butcher, and that his discharge has not yet been granted; that a hearing on Butcher's contest was set for January 5, 1933, before a referee in bankrûptcy, and that the contest is still pending; that, after the discharge in bankruptcy of Evelyn Brouwer and pending the bankruptcy proceeding of John C. Brouwer, Butcher procured writ of execution to issue for the enforcement of his default judgment aforesaid; that thereafter petitioners filed in respondent court notice of motion to quash the writ of execution; that, while said notices of motion were pending Butcher assigned his judgment to Sally Williams; that thereafter, and prior to the hearing of the notice of motion to quash, Sally Williams procured, in the name of Butcher, issuance of a writ of execution for the enforcement of her judgment and procured an order of sale requiring the sheriff to sell, under the writ, certain live stock, dairy cows, and other dairy equipment and supplies; that all of the described property is community property of petitioners and has been acquired by them, and from money earned by them, since they were adjudicated bankrupt; that the sheriff has served garnishment under the writ of execution procured by Sally Williams and thereby has realized more than the sum of $600 belonging to petitioners; that the sheriff has given notice that on a certain date he will sell the dairy property levied upon by him as aforesaid; that petitioners gave notice of motion to quash the writ of execution procured by Sally Williams and to stay permanently execution against them; that at the time set therefor the motions of petitioners to quash and for stay of proceedings came on for hearing before respondent court; that at the hearing petitioners presented affidavits showing the various material facts above stated; and that respondent court ordered a stay of proceedings under the execution of Sally Williams only until the date set for the hearing by the referee in bankruptcy of the objections to the discharge as a bankrupt of John C. Brouwer, "but that the execution shall not be quashed, nor the property levied upon released therefrom."

Petitioners ask for the writ of prohibition to the end that respondent court may be enjoined from issuing or maintaining writs of execution for the enforcement of the Butcher judgment. Upon presentation of the petition an alternative writ of prohibition issued.

[1] The only return made to the writ is by general demurrers to the petition. One of these is presented by Sally Williams; another by counsel who demur on behalf of "the respondents." We shall construe this latter demurrer as applying to all the named respondents except Sally Williams, and we except her because of her separate appearance by other counsel. It is obvious that the demurrers must be sustained as to all the named respondents except respondent court. It has been too often necessary for the courts to say that in such a proceeding as this only the board or tribunal whose exercise of jurisdiction is sought to be stayed is a proper party respondent, and not any of the individuals who aid in the discharge of its functions or who are suitors before it.

[2, 3] That as against respondent court petitioners are entitled to relief is almost too plain for argument or discussion. It is contended that the writ will not issue for the reason that respondent court, a state tribunal, may proceed to enforce the judgment mentioned in the petition, by means of execution, unless its activities in that behalf are indirectly halted by injunctive process emanating from the bankruptcy court and directly operating against the parties litigant. Various cases are cited upon this proposition by respondent. Among these are Williams v. Lane, 158 Cal. 39, 109 P. 873; Brazil v. Azevedo, 32 Cal. App. 364, 162 P. 1049; Woods v. Berry, 111 Cal. App. 675, 296 P. 332; In re William E. De Lany & Co. (D. C.) 124 F. 280. We need not pause to expound our views as to the effect of these cases under circumstances which might arise from the exercise of the imaginative processes. They have no application here for reasons which are both apparent and real. A bankruptcy court has no interest in nor jurisdiction over any fund or property of one who has filed a bankruptcy petition except that which was his at the time when the petition was filed. In other words, such a court is interested only in the assets listed by a bankrupt in his schedules, or which he should have listed in them but has omitted. It is those assets, and those only, which the court is charged with the duty of assembling, protecting, and subjecting to the payment of the provable debts of the bankrupt. These remarks become most pertinent when it is remembered that in the petition before us it is alleged that the property seized under the execution in question was acquired by petitioners after their adjudication in bankruptcy and by means of money earned after the adjudication. Under these circumstances a citizen situated as are petitioners has the right to look to the courts of his state for the protection of his rights of property; there being no other forum to which he may appeal for relief.

[4-6] The effect of an adjudication in bankruptcy upon one having provable claims against the bankrupt, when he attempts to enforce his claims, pending the bankruptcy proceedings, against property honestly acquired after the adjudication by the bankrupt, is too well known to require exposition here. The effect of a discharge in bankruptcy, as to the same matters, is more potent and permanent. Evelyn Brouwer has been discharged as a bankrupt. Her discharge is in effect a judgment to which the courts of this state must give full faith and credit. She is therefore entitled to be relieved of harassment, so far as her interest in the property here in question is concernd, under the judgment mentioned in the petition. As to John C. Brouwer a different order must be made. He has not yet received his discharge, and he may never receive it. His adjudication in bankruptcy, however, affords him temporarily, at least, the same protection as that to which his wife is entitled permanently. Whether his relief, indeed, shall in the end be temporary or permanent depends upon the final issue of the contest now pending before the referee in bankruptcy. If his discharge shall be granted, he will be in the same position as that now occupied by Mrs. Brouwer. If it shall be denied, the owner of the Butcher judgment may enforce execution against his interest in the property now wrongfully in the possession of the sheriff.

Respondent contends that the remedy by prohibition is not proper under the facts shown by the petition. It may not be. Certainly, as it seems to us, the situation may be dealt with more handily by means of the writ of mandate, and under the law we have jurisdiction to order either the one or the other.

The demurrer is sustained as to all respondents other than respondent court, and as to the latter it is overruled. A peremptory writ of mandate will issue requiring respondent court to quash the executions mentioned in the petition, to order the sheriff to deliver to petitioners the property held by him pursuant to the executions, to desist permanently from all attempt to enforce the Butcher judgment against petitioner Evelyn Brouwer, and to desist from all attempt to enforce the same against petitioner John C. Brouwer until he is finally either granted or denied a discharge as a bankrupt in the bankruptcy proceeding now pending, and until the proper presentation of proof of such final grant or denial to respondent court.

We concur: CRAIG, J.; STEPHENS, J.

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130 Cal.App. 290

FRICK v. PRESTON.

Civ. 8718.

District Court of Appeal, First District, Division 2, California.

March 9, 1933.

1. Appeal and error ⚷1078(1).

Point not referred to in brief cannot be considered by appellate court.

2. Arbitration and award ⚷82(1).

On general arbitration, findings of arbitrators on questions of law and fact may not be reviewed by courts, except for fraud or similar misconduct, or unless error appears on face of award (Code Civ. Proc. § 1288).

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

In the matter of the agreement to arbitrate and submission to arbitration of a certain controversy between W. P. Frick and H. P. Preston. From a judgment confirming the award of the arbitrators, W. P. Frick appeals, and H. P. Preston files a motion to affirm.

Motion to affirm granted.

Gregory, Hunt & Melvin, Melvin & Sullivan, and Sullivan, Roche, Johnson & Barry, all of San Francisco, for appellant.

Hatch & Mahl, of San Francisco, and H. L. Preston, of Ukiah, for respondent.

NOURSE, Presiding Justice.

Motion to affirm under rule 5, section 3, Rules of Supreme Court and District Courts of Appeal.

The appeal is from a judgment confirming an award of arbitrators. The appellant had moved in the superior court to vacate the award on the ground that the arbitrators "were guilty of misconduct and committed gross error and otherwise acted improperly." He offered in evidence a transcript of the entire evidence taken before the arbitrators for the purpose of showing that the evidence did not support certain findings of facts and conclusions based thereon. The trial court refused to receive the transcript in evidence and, no other showing having been made, entered its judgment confirming the award.

[1] Appellant's brief on the appeal from the judgment is confined to a discussion of the evidence taken before the arbitrators and to the argument that the arbitrators should have drawn a different conclusion as to the relation of the parties. There is no assignment of error and no suggestion that the trial court erred in its judgment. The single point involved on the appeal is whether the articles of arbitration made it a general or a special arbitration and, as such, whether the award is reviewable. The point is not even referred to in the brief and hence could not be considered if the appeal were to be heard on the merits.

[2] Arbitrations are governed by sections 1280–1293, Code of Civil Procedure. Vacation of an award is permitted by section 1288 when it was procured by corruption, fraud or undue means, or when the arbitrators were guilty of misconduct in refusing to hear pertinent evidence, or of any other misbehavior. The appellants made no effort to prove any of the grounds thus specified. The offer of the entire transcript of the proceedings before the arbitrators was simply an offer to retry before the superior court all the issues tried and determined by the arbitrators. The grounds stated in the motion to vacate the award were that the arbitrators were "guilty of misconduct and committed gross error and otherwise acted improperly" in that their award was contrary to the evidence, that the evidence was insufficient to support the award, and that it was "against law, equity and good conscience." Now it is conceded that, if the arbitration was a "general" one, the findings of the arbitrators on questions of law as well as on questions of fact are final and

conclusive and may not be reviewed by the courts (except for fraud or similar misconduct or unless the error appears on the face of the award). 2 R. C. L. p. 392; 5 C. J. p. 161; 3 Cal. Jur. p. 77; Peachy v. Ritchie, 4 Cal. 205, 207; Carsley v. Lindsay, 14 Cal. 390, 395; Utah Const. Co. v. Western Pacific Ry., 174 Cal. 156, 160. It was not claimed by the appellant that the arbitrators were guilty of fraud or that they were guilty of any misconduct other than that they drew an erroneous conclusion from the evidence as to respondent's legal liability. Hence when the transcript of evidence was offered to the trial court and objection to its admission was made the single question presented to the trial court was whether this was an unqualified submission in which the error of law appeared on the face of the award.

Having determined this question in the negative, the trial court rejected the evidence and, no other attack having been made, the award was confirmed. On the appeal from this judgment the propriety of this ruling is the only issue before us; but this is the one point upon which appellant's brief is silent. Sixty-two pages of the brief are devoted to comments on the facts of the controversy. These are followed by arguments tending to show that a confidential or fiduciary relation existed between the parties and that an award should have been made favorable to appellant. But these are questions which we cannot determine if the ruling of the trial court was correct. It would seem therefore to follow necessarily that, in so far as appellant's brief is concerned, "the questions on which the decision of the cause depends are so unsubstantial as not to need further argument" within the meaning of the rule.

For these reasons the motion to affirm should be granted. We may, however, add what may be said to be mere obiter dicta that we have been led to this result after having reached the conclusion that the ruling of the trial court was sound because (1) the arbitration was a general and unqualified one; (2) the reference to the three arbitrators as men each of whom "is by virtue of his learning in the law, ability and integrity, fully qualified to arbitrate the controversy between the parties" was designed to foreclose the parties from thereafter attacking the qualifications of the arbitrators and was not intended to limit or qualify the submission; (3) that the tenor of the entire arbitration agreement shows that the parties intended that the arbitration should be unqualified; (4) that, assuming that the opinion of the majority of the arbitrators was a part of the award, nevertheless it does not appear on the face of the award—including the opinion—that the award was "contrary to the law or the evidence"; (5) that all that does appear herein from the award as well as from appellant's brief is that a majority of the arbitrators may have placed too much credit in the testimony of certain witnesses from which they made the findings of fact upon which their conclusion of law was based. Putting it in another way, all that appears here is that there was a decided controversy between the parties as to certain material facts; that the evidence of these facts was in wide conflict; that two of the arbitrators believed the evidence of respondent and found accordingly. If their finding on these facts was sound the conclusion drawn therefrom was sound. Hence the issue is really one of fact upon which there is evidence supporting the finding made.

The motion to affirm is granted.

We concur: **STURTEVANT, J.**; **SPENCE, J.**

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130 Cal.App. 22

STAFFORD v. GEARY et al.

Civ. 8570.

District Court of Appeal, First District, Division 1, California.

Feb. 24, 1933.

Execution ⚷414.

Where finding made after judgment was entered showed debt was paid, court properly held in subsequent supplementary proceeding that creditor was not entitled to lien on automobile for work and labor (Code Civ. Proc. § 689).

Appeal from Superior Court, City and County of San Francisco; James G. Conlan, Judge.

Action by Chris Stafford against M. E. Geary and others. From an order rendered, after final judgment, in a supplementary proceeding for the purpose of determining a third party claim to an automobile seized by the sheriff pursuant to a writ of execution, plaintiff appeals, and defendants move to dismiss the appeal.

Order affirmed, and motion to dismiss appeal dismissed.

See, also, 213 Cal. 650, 3 P.(2d) 10.

Joe Mannix and Rudolph Scholz, both of San Francisco, for appellant.

Samuel D. Hamburg, of San Francisco, for respondents.

KNIGHT, Justice.

This appeal was taken from an order rendered after final judgment in a supplementary

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⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

proceeding instituted under the provisions of section 689 of the Code of Civil Procedure for the purpose of determining a third-party claim to an automobile theretofore seized by the sheriff pursuant to a writ of execution.

The following are the circumstances leading up to the rendition of said order: Early in the year 1926 or thereabouts the respondent Geary brought an action in claim and delivery against appellant to recover possession of the automobile which appellant was then holding under a claim of lien for work and labor performed thereon; and by virtue of the writ issued in said action the sheriff took the automobile in his possession. Besides answering, appellant filed a cross-complaint for the purpose of obtaining a judgment for the debt due him and to establish his lien on said automobile. As cross-defendants he named the respondents Geary, Skinner, Arnold, and Ringole. The action was tried in February, 1926, and in September of that year judgment was entered on the cross-complaint in favor of appellant and against the cross-defendants for the sum of $849.51, and declaring a lien on said automobile in appellant's favor until the debt was paid. From said judgment Ringole took an appeal and the judgment was affirmed (Geary v. Stafford, 98 Cal. App. 84, 275 P. 865), but for some reason not explained in the record before us the automobile was never redelivered to appellant. However, in February, 1930, approximately three and a half years after the entry of the original judgment, appellant, claiming to have discovered the automobile in the possession of the respondent Hammond, caused a writ of execution to be levied thereon; whereupon Hammond filed a third-party claim pursuant to said section 689 of the Code of Civil Procedure asserting ownership of the automobile and that he was entitled to the possession thereof. In response to such claim the supplementary proceeding above mentioned was had to determine the title to the automobile; and as a result thereof and on March 20, 1930, the court entered its order, in the form of a judgment containing findings, adjudging and decreeing that ever since August, 1923, Hammond had been and was then the owner and entitled to the possession of said automobile, that the same was free and clear of all liens and incumbrances in favor of appellant created by the original judgment in the action, and that appellant had no right, title, or interest therein; furthermore, it was adjudged and decreed that the sheriff redeliver the automobile to Hammond, and that appellant be "perpetually restrained and enjoined from in any wise interfering with the possession" thereof.

The appeal from said order was taken to the Supreme Court, and while pending there respondents suggested by way of motion a diminution of the record, seeking thereby to have incorporated in the record on appeal an order made subsequent to the entry of the original judgment and prior to the entry of the order in the supplementary proceeding; and the motion was granted. The order thus made part of the record on appeal was entered November 27, 1929, as a result of a hearing on an order of examination of respondent Ringole, which took place before the same judge who several months later heard and determined said supplementary proceeding; and said order (of November 27, 1929) contained a finding to the effect that the debt upon which appellant based his claim of lien had been fully paid and discharged. In view of such finding respondents moved for a dismissal of the appeal upon the ground that the question presented thereby, as to whether appellant was entitled to a lien on said automobile and the possession thereof, had become moot. In that state of the record the appeal was transferred to this court for hearing and determination.

It is evident that said finding of payment must be accepted as the controlling factor in the determination of the appeal. As stated, it was made November 27, 1929, and the supplementary proceeding wherein the court found that appellant was not entitled to a lien, was heard and determined in March, 1930; and both proceedings having been heard by the same judge, it may be fairly assumed that the so-called judgment or order rendered in the supplementary proceeding, declaring that appellant was not entitled to a lien, was based largely upon the finding previously made by the same judge that appellant's debt had been paid. In any event, so far as the transcript on the present appeal discloses, no evidence was introduced at the hearing of the supplementary proceeding in contradiction of said finding of payment. The evidence adduced thereat, as shown by the transcript, consisted merely of certain letters written by appellant's counsel to one of the respondents, and the certificates of registration of the automobile for the years 1922 and 1923. It is true that the substance of said letters indicates that at the time they were written the full amount of appellant's debt had not been paid; but the last of said letters, according to its date, was written October 18, 1929, which was more than two weeks prior to the hearing of the proceeding which resulted in the making of said finding, and more than a month prior to the date of the entry of the order containing said finding, during which time, for aught the record shows, full payment may have been made. The letters so introduced were consequently of little value as evidence contradicting said finding.

Since it affirmatively appears, therefore, from the uncontradicted finding made on November 27, 1929, that appellant's debt had been theretofore paid, it cannot be successfully maintained that the trial court was not warranted in holding in the supplementary proceeding had in March, 1930, that appellant was not entitled to a lien on said automobile.

The order or judgment appealed from is accordingly affirmed, and respondents' motion to dismiss the appeal is dismissed.

We concur: TYLER, P. J.; CASHIN, J.

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130 Cal.App. 116

Ex parte SAMAHA.

Cr. 81.

District Court of Appeal, Fourth District, California.

Feb. 27, 1933.

1. Constitutional law 🔑83(3).

Act penalizing failure to pay discharged employees' wages *held* not unconstitutional as permitting imprisonment for debt (St. 1919, p. 294, as amended).

2. Master and servant 🔑84.

Prosecution for failure to pay discharged employees' wages may be maintained without civil judgment having been obtained against employer (St. 1919, p. 294, as amended).

3. Criminal law 🔑108(1).

Justice court of township wherein farm, on which employees were discharged by one charged with failure to pay their wages, was located, had jurisdiction of prosecution (St. 1919, p. 294, § 1, and § 4, as amended by St. 1927, p. 391).

4. Master and servant 🔑84.

Testimony of employer, charged with failure to pay discharged employees' wages, *held* sufficient, with that of his foreman, to sustain justice's implied finding that they were discharged (St. 1919, p. 294, § 1, and § 4, as amended by St. 1927, p. 391).

> Defendant testified that complaining witnesses, who were Mexicans, had worked for him, but that he instructed foreman before their last employment to hire no more Mexicans.

5. Criminal law 🔑304(6).

Justice of peace is charged with judicial notice of boundaries of his township and location of farm therein.

6. Evidence 🔑1.

"Judicial notice" is form of evidence.

[Ed. Note.—For other definitions of "Judicial Notice," see Words and Phrases.]

7. Habeas corpus 🔑92(1).

Evidence warranting inference of defendant's ability to pay wages of employees discharged by him presented fact question for justice's court in trial for failure to pay their wages, and question is not reviewable in habeas corpus proceeding (St. 1919, p. 294, as amended).

Application by R. Samaha for a writ of habeas corpus to the Sheriff of Imperial County.

Writ discharged, and petitioner remanded to the sheriff's custody.

Fred H. Thompson, of Brawley, for petitioner.

Elmer W. Heald, Dist. Atty., and R. I. French, Deputy Dist. Atty., both of El Centro, for respondent.

MARKS, Justice.

During the year 1932 petitioner resided in the city of Brawley, in Imperial county, and was engaged in farming about one hundred thirty acres of land near Calipatria, in the same county. On July 26, 1932, a complaint was filed with the justice of the peace of Calipatria township charging petitioner and his foreman with failing to pay Claudio Lares, a discharged employee, his wages, under the provisions of the wage law, Statutes of 1919, page 294, as amended. A similar complaint was filed on the same day, charging violation of the same act in failing to pay F. Galindo, a discharged employee, his wages. The two cases were consolidated and tried together, resulting in the conviction of petitioner, who appealed to the Superior Court of Imperial county, where both judgments were affirmed.

[1, 2] The first contention of petitioner is that the wage law is unconstitutional, in that it permits imprisonment for debt. This has been resolved against him in the case of In re Oswald, 76 Cal. App. 347, 244 P. 940. He also advances the argument that a prosecution for violation of the act under consideration cannot be maintained until a civil judgment is obtained against the employer. This has no merit. The debt can be established by competent evidence during the prosecution for the offense.

[3] Petitioner urges that the justice court of Calipatria township had no jurisdiction of the offense because, first, petitioner resided without Calipatria township, and, second, because venue was not proven at the trial.

Section 1 of the Wage Act provides that, when an employer discharges an employee, the wage shall become immediately due and payable, and section 4 of the same act (as amended by St. 1927, p. 391) provides that the account shall be paid at the place of discharge.

[4] Petitioner maintains that the employees were not discharged, but voluntarily left his employment. The record does not sustain this

contention. Samaha's defense was based on the contention that he did not employ either of the complaining witnesses. He testified they had previously worked for him, but that prior to their last employment he instructed his foreman to hire no more Mexican labor. His testimony, and that of his foreman, was amply sufficient to sustain the implied finding that the two complaining witnesses were discharged. This would make their compensation immediately due at the place of their discharge, which was on the farm near Calipatria.

[5, 6] There is no direct evidence in the statement on the appeal to the Superior Court of Imperial county, that this farm was within the boundaries of Calipatria township. However, a justice of the peace is charged with judicial notice of the boundaries of his township. Witnesses located this farm, and undoubtedly the justice of the peace took judicial notice that it was within Calipatria township. Rogers v. Cady, 104 Cal. 288, 38 P. 81, 43 Am. St. Rep. 100; Varcoe v. Lee, 180 Cal. 338, 181 P. 223; Fitzpatrick v. Sonoma County, 97 Cal. App. 588, 276 P. 113. Judicial notice is a form of evidence. Gayton v. Pacific Fruit Express (Cal. App.) 15 P.(2d) 217.

[7] Petitioner contends there is no evidence in the record showing his ability to pay his discharged employees. While there is nothing directly on the question, there is evidence from which may be drawn the inference of ability to pay. This presents a question of fact for the decision of the justice's court, and is not one properly reviewable in this proceeding. It is said in 13 California Jurisprudence, 218: "Thus, if the lower court had jurisdiction of the person and the subject-matter, mere error in the proceedings therein may not be inquired into in proceedings on habeas corpus, for it is not the purpose of the writ to subserve the functions of an appeal, or to pass upon the weight and sufficiency of the evidence introduced in the lower court, or the credibility of the witnesses who testified therein."

Respondent has filed in this court an amended statement of facts on appeal, certified to as correct by the justice of the peace of Calipatria township, in which it is stated that evidence was received at the trial that petitioner stated that he was able to pay his employees, and that another witness located the place of employment in Calipatria township. Petitioner strenuously objects to the consideration of this amended statement on appeal. However, we have been able to determine the questions presented to us without reference to the facts set forth in this document. We are not, therefore, called upon to decide whether it is properly before this court.

The writ of habeas corpus is discharged, and petitioner is remanded to the custody of the sheriff of Imperial county.

We concur: BARNARD, P. J.; JENNINGS, J.

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130 Cal.App. 180

ISAKSON v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al.

Civ. 8789.

District Court of Appeal, First District, Division 2, California.

March 1, 1933.

1. Divorce ⚿262.

Denial of final divorce decree to plaintiff for failure to pay in full amount awarded to wife was error where plaintiff was not in contempt and was making monthly payments within his means.

2. Mandamus ⚿51.

Mandamus *held* proper to compel trial court to grant plaintiff final decree of divorce where plaintiff was not in contempt for failure to make payments required by interlocutory decree.

Application by Gregory J. Isakson for a writ of mandate to be directed to the Superior Court, in and for the City and County of San Francisco and Honorable Thomas F. Graham, Judge of Department 10 thereof, to compel the granting to petitioner of a final decree of divorce.

Peremptory writ granted.

Samuel B. Russell, of San Francisco, for petitioner.

Brewster F. Ames, of San Francisco, for respondents.

SPENCE, Acting Presiding Justice.

Petitioner seeks a writ of mandate to compel the respondent court to grant a final decree of divorce in that certain action entitled Gregory J. Isakson v. Mary S. Isakson, being action numbered 219460 in the files of said court. An alternative writ was issued herein, but no demurrer or answer to the petition has been filed. On the return day a request was made on behalf of respondents for time to file a brief, which request was granted and the cause continued to the next calendar. At the hearing had on the day to which the cause had been continued no appearance was made on behalf of respondents and no brief has been filed.

It appears from the uncontradicted allegations of the petition that the interlocutory decree of divorce was signed, filed and entered on December 16, 1930. It was thereby adjudged that the petitioner was entitled to an interlocutory decree of divorce from defendant on the ground of defendant's extreme cruelty. Provision was made therein for the division of certain personal property of the community and it was further ordered that the petitioner herein pay to defendant the sum of $1,500 "in full of all alimony, maintenance and support of every kind" and the further sum of $150 "in full of counsel fees herein. Said several sums to be paid on or before January 15, 1931." Although petitioner on August 25, 1932, and several subsequent occasions duly submitted his "affidavit for final judgment of divorce" as required by the rules, the respondent court has at all times refused petitioner's applications for the granting of the final decree because of petitioner's failure to fully comply with the provisions for payment of alimony. Said affidavit above mentioned was in all respects in the usual form except that it did not show full compliance with the order for the payment of the above-mentioned sums. In lieu thereof it showed that petitioner had paid the sum of $675 on account and it set forth in full the reasons for his failure to pay the balance. We need not set forth all of the facts therein alleged regarding petitioner's financial condition except to state that it appeared that petitioner had been compelled to borrow money and clearly showed his inability to pay the required sums in full. In addition thereto the affidavit showed that petitioner had never been adjudged in contempt for failure to pay said sums and that although petitioner was willing and anxious to pay the same he could not comply with the order further than to pay the sum of $25 per month on account thereof, which sum he was paying. Neither in the trial court nor on this proceeding have petitioner's allegations relating to his inability to make further payments been controverted. It therefore appears that petitioner has not been in contempt by reason of his failure to fully comply with the order.

[1, 2] Under the circumstances the respondent court should have granted petitioner's application for a final decree of divorce and we are of the opinion that mandamus is a proper remedy. Claudius v. Melvin, 146 Cal. 257, 79 P. 897; Olson v. Superior Court, 175 Cal. 250, 165 P. 706, 1 A. L. R. 1589; McGuinness v. Superior Court, 196 Cal. 222, 237 P. 42, 40 A. L. R. 1110; Newell v. Superior Court, 27 Cal. App. 343, 149 P. 998.

Let a peremptory writ of mandate issue as prayed.

We concur: STURTEVANT, J.; GOODELL, Justice pro tem.

WINTHROP v. INDUSTRIAL ACCIDENT COMMISSION et al.*

Civ. 8806.

District Court of Appeal, Second District, Division 2, California.

Feb. 24, 1933.

Rehearing Granted March 24, 1933.

1. Witnesses 🔑208(2).

Law of privileged communications *held* inapplicable to surgeon performing operation on compensation claimant to remove disability.

2. Master and servant 🔑417(9).

Statute relating to Industrial Commission's continuing jurisdiction over awards did not authorize commission to hold second hearing and deny compensation, where on former review Supreme Court held claimant was entitled to compensation, and surgeon's testimony on second hearing was not newly discovered (St. 1917, p. 850, § 20 (d).

3. Master and servant 🔑417(9).

Where commission held second hearing on employer's request after Supreme Court on former review held claimant entitled to compensation, and evidence on first hearing on issues on which further hearing was sought was not shown, commission could, subject to review by courts, take evidence upon issues involved, necessary to render just compensation (St. 1917, p. 850, § 20 (d).

Proceeding under the Workmen's Compensation Act by Fannette Winthrop, claimant for injuries, opposed by the Wetherby-Kayser Shoe Company, employer, and the Associated Indemnity Corporation, insurer. To review an order of the Industrial Accident Commission denying compensation, claimant brings certiorari.

Order annulled, with directions.

Goldman & Lieberman, of Los Angeles, for petitioner.

A. I. Townsend, of San Francisco, for respondents.

WORKS, Presiding Justice.

Original application for the writ of review. Petitioner in this proceeding, claiming that a physical disability under which she labored had arisen out of and in the course of her employment with respondent Wetherby-Kayser Shoe Company, applied to respondent Industrial Accident Commission for an adjustment of compensation for her alleged injury. The commission assumed jurisdiction of the application, heard evidence produced by petitioner in support thereof, and by her employer in opposition thereto, and finally determined that her disability

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🔑For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 29 P.2d 850.

was not caused by injury suffered in the course of her employment. Accordingly, the commission made its order denying her an adjustment of compensation. Thereafter she made application to the Supreme Court for the writ of review for the purpose of procuring an annulment of the order. The writ issued, the court, in finally disposing of the matter, rendered an opinion in which the evidence produced before the commission was reviewed, and in which the court declared, at the close of its discussion, "we are of the view that petitioner is entitled to industrial compensation." Winthrop v. Industrial Accident Commission, 213 Cal. 351, 2 P.(2d) 142, 144. The court issued no directions to the Industrial Accident Commission, and merely concluded its opinion with the order: "The order denying compensation to petitioner is annulled."

Thereafter, despite the opinion and order of the Supreme Court, the commission held a further hearing upon the application of petitioner for an adjustment of compensation, at which testimony was taken. This testimony consisted partially of a lengthy examination of a surgeon who, soon after the occurrence by which petitioner claimed she was injured, performed upon her person a surgical operation for the purpose of removing the disability from which she suffered. The surgeon gave it as his opinion that petitioner's disability was not occasioned by the occurrence in her employer's establishment, but that it arose from a pre-existing cause. The commission thereupon made a second order denying petitioner compensation. This order is now before us pursuant to writ of review issued upon application of petitioner.

[1] The evidence given by the surgeon was in no sense newly discovered, as was the case in Western Pipe & Steel Company v. Industrial Accident Commission (Cal. App.) 14 P.(2d) 530, 531, relied upon by respondent commission, among other cases, nor is it contended by respondents that any evidence taken was newly discovered. As to the surgeon, he simply was not called at the original hearing. The following is shown near the beginning of his examination, by the referee, at the second hearing:

"Q. Dr. Toland, in an earlier hearing in this case before another referee apparently, Mr. Goldman, attorney for the applicant, stated that you refused to give any report in this matter; is that true? A. Yes.

"Q. What was the reason for your refusal? A. For the reason I didn't want to get mixed up in it, that's all."

It is useless to quote further from the record. It is just to observe, however, that there is matter in the return to the writ which tends to show that the surgeon's "refusal" to make a report arose from his mistaken belief that the law as to privileged communications applied to him under the circumstances. But he was subject to call at the original hearing, as he was at the second, and, as we have observed, he simply was not called.

[2] The commission contends that it was empowered to hold its second hearing, after the decision of the Supreme Court, by virtue of the provisions of the well-known section 20 (d) of the Workmen's Compensation Act (St. 1917, p. 850), which is quoted in full in the opinion in the case above cited. We think this contention is ill-founded under circumstances such as those which appear here. It will be observed that in the Western Pipe & Steel Company Case it was said that "regardless of our preconceived notions" we must rule that the unearthing of newly discovered evidence was "good cause" for the holding of a second hearing by the commission under circumstances otherwise much like those present here. It will also be noted that in a concurring opinion in the case it was remarked that "any break in the rule of finality of decision is regrettable." We can see no just reason for allowing a sanction of the hearing in this instance which was held by the commission after the decision of the Supreme Court. We think section 20 (d) is not susceptible of so far-reaching a construction. If the hearing referred to was proper, the commission undoubtedly, after the order of annulment which we intend as a close to this proceeding, would have the power to hold a third hearing within the two hundred forty-five weeks prescribed by the statute, at that hearing take the testimony of some other person whose existence as a prospective witness was known at the time of the second hearing, and upon his testimony render a third award denying compensation to petitioner, and might similarly hold as many other hearings as the limit of the two hundred forty-five week period would permit. It will be understood, as a matter of course, that in what we have said we intend no reflections upon the good intentions of the Industrial Accident Commission. The excellent labors of that body for the general good we highly appreciate and indorse. In the present instance the commission has earnestly endeavored to exercise a jurisdiction it believes to exist under the terms of section 20 (d). We think, however, that the section was allowed the limit of its force, in the direction in which the commission now seeks to go, when it was held that newly discovered evidence is "good cause" for a continued exercise of jurisdiction under circumstances similar to those existing here. All litigation must end somewhere.

[3] The commission will make an award allowing compensation to petitioner under the evidence reviewed and declared to be sufficient by the Supreme Court. Something yet remains, however, to be said in order that a conclusion just to all parties may be

attained. The second hearing held by the commission was convened pursuant to written request, made by petitioner's employer, in which it was stated that a "further hearing is essential to determine three important issues involved, namely: 1. The reasonableness of appellant's medical bills. 2. The proportionment of the disability due to aggravation and pre-existing disease. 3. Nature, extent and duration of disability." The return in this proceeding, very properly, shows only the activities of the commission since the decision of the Supreme Court, and we are therefore not informed what, if any, evidence was taken at the first hearing upon the three points stated in the petition for further hearing. Under these circumstances, and subject to review by the courts, the commission may take such evidence upon the three points, or any of them, as may be necessary and proper, in order to render just compensation to petitioner.

The award denying compensation to petitioner is annulled. The Industrial Accident Commission will proceed further under petitioner's application for adjustment of compensation in accordance with the views expressed in the opinion of the Supreme Court and in this opinion.

We concur: STEPHENS, J.; ARCHBALD, Justice pro tem.

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130 Cal.App. 199

PEOPLE v. MONKS.

Cr. 244.

District Court of Appeal, Fourth District, California.

March 1, 1933.

Appeal and error ⚷800.

Motion to dismiss appeal will be denied where appellee suffered no prejudice and appellant's brief, with explanation of delay, was filed before day noticed for motion to dismiss (Rules of the Supreme Court and District Courts of Appeal, rule 5, § 1).

Appeal from Superior Court, San Diego County; Arthur L. Mundo, Judge.

Proceeding by the People against Mrs. Allan B. Monks. From judgment for plaintiff, defendant appeals. On respondent's motion to dismiss appeal.

Motion denied.

Edgar G. Langford, of Hollywood, for appellant.

U. S. Webb, Atty. Gen., and Thomas Whelan, Dist. Atty., and John F. Holt, Deputy Dist. Atty., both of San Diego, for the People.

MARKS, Justice.

This is a motion to dismiss an appeal, under the provisions of section 1 of rule 5 of the rules of the Supreme Court and District Courts of Appeal, for the reason that appellant's opening brief was not filed within the time specified in section 15 of rule 2 of the same rules.

Respondent's notice of motion was filed on January 27, 1933, noticing the motion for February 14, 1933. Appellant's opening brief was filed on January 30, 1933. On February 7, 1933, counsel for appellant filed an affidavit giving reasons for the delay in filing the brief.

It has been repeatedly held that where the brief has been filed before the making of the motion to dismiss in open court on the day noticed, an appellate court may deny the motion. Toth v. Metropolitan Life Ins. Co., 113 Cal. App. 55, 297 P. 564. Appellant should have applied for an order extending the time within which to file her opening brief. However, respondent has suffered no particular injury from the delay and, under the facts presented, we think the motion should be denied.

Motion denied.

We concur: BARNARD, P. J.; JENNINGS, J.

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130 Cal.App. 95

PEOPLE v. CARTER.

Cr. 1240.

District Court of Appeal, Third District, California.

Feb. 27, 1933.

1. **Burglary** ⚷2.

"Burglary" is entry of building with intent to commit grand or petit larceny or any felony (Pen. Code, § 459).

[Ed. Note.—For other definitions of "Burglary," see Words and Phrases.]

2. **Burglary** ⚷41(3).

In burglary prosecution, jury, in determining whether defendant's acts were committed with criminal intent, could consider direct or circumstantial testimony (Pen. Code, § 459).

3. **Burglary** ⚷41(2).

In burglary prosecution, facts and circumstances in evidence *held* sufficient to prove corpus delicti and support second degree burglary verdict (Pen. Code, § 459).

4. Criminal law 🔑680(1).

Order of proof is within court's discretion, and receipt of evidence out of usual order is not ground for reversal, unless grave injury resulted (Const. art. 6, § 4½).

5. Criminal law 🔑680(1).

In burglary prosecution, receiving defendant's admissions in evidence allegedly out of usual order of proof *held* harmless.

6. Criminal law 🔑1186(4).

Failure to impose sentence within time prescribed by law is not error requiring new trial, unless examination of entire record discloses error resulted in miscarriage of justice (Pen. Code, § 1191; Const. art. 6, § 4½).

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

James Carter was convicted of burglary in the second degree, and he appeals.

Affirmed.

Ray T. Coughlin, of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

Mr. Justice PULLEN delivered the opinion of the court.

Defendant was charged with the offense of burglary, and was thereon tried and convicted of burglary in the second degree. He moved for a new trial, which motion was denied, and he was sentenced to imprisonment in the state prison. He now prosecutes this appeal from the judgment and the order denying a new trial.

At about 11 o'clock in the evening, a police officer apprehended defendant in a building occupied by an automobile agency, and, upon being questioned by the officer, defendant stated he was in need of money and "thought he could get some out of the cash register." At the time of his arrest, he was wearing gloves, had a flash-light, numerous keys, and a lock pick in his possession.

This appeal is based upon two assignments of error, first, that the evidence is insufficient to prove the corpus delicti, and therefore the admissions of the defendant were not admissible; and, secondly, the judgment was not pronounced within the time provided by law.

[1-3] Burglary is the entry of a building with intent to commit grand or petit larceny or any felony. Appellant contends there was no proof of any intent to commit any of the offenses mentioned in the section (Penal Code § 459) save and except that shown by the statement of defendant to the effect he intended to commit larceny.

That defendant was inside of an inclosed building, without permission and without right, is apparent from the testimony. He had the tools and habiliments of a burglar. The jury were instructed that before they could convict there must exist a criminal intent, and such intent was a question of fact manifested by the circumstances connected with the offense, and, in determining whether the acts of defendant were committed with a criminal intent, they could consider testimony either direct or circumstantial.

We believe the facts and circumstances here in evidence were ample and sufficient to support the verdict of the jury.

In the case of People v. Montgomery, 15 Cal. App. 316, 114 P. 792, whether the gun was loaded was one of fact for the jury. They had the right to determine from the facts and circumstances connected with the conduct of the defendant that the gun was loaded, regardless of his statement to the contrary.

In the case of People v. Spencer, 16 Cal. App. 759, 117 P. 1039, it became necessary to prove that defendant had no money or credit in a certain bank in the state of Washington. The fact that there was no money or credit in such bank was proved by circumstantial evidence.

In the case of People v. Jones, 123 Cal. 65, 55 P. 698, 700, commenting on the degree of proof necessary to establish the corpus delicti before permitting proof of the defendant's extrajudicial statements, it was said: "A distinction must be taken between the evidence which upon the whole case would justify a conviction, and that degree of proof of criminal agency * * * for the purpose of letting in evidence of the confessions or admissions of the defendant. To justify a conviction, the jury must be satisfied beyond a reasonable doubt of the existence of every fact necessary to constitute the offense, and to identify the defendant as the perpetrator; but it is not necessary that the evidence of the criminal act should be of that conclusive character in order to justify the admission of the defendant's confessions."

[4, 5] The order of proof on the hearing is a matter within the discretion of the court. The receipt of evidence out of its usual order is not a ground for reversal unless it appears grave injury had resulted therefrom. Such injury is not here apparent.

[6] As to the second point raised by defendant, it appears that some twenty-two days lapsed between the date of conviction and the date of the sentence. Section 1191, Pen. Code, provides in effect that, after a plea or verdict of guilty, the court must appoint a time for pronouncing judgment which must not be less than two nor more than five days after the verdict, provided, however, that the court may extend the time not more

than ten days for the purpose of hearing or determining any motion for a new trial or in arrest of judgment. Failure to impose sentence within the time thus specified was in the case of People v. Zuvela, 191 Cal. 223, 215 P. 907, held to be an error of procedure within the meaning of section 4½ of article 6 of the Constitution. A new trial will not be granted because of such error unless an examination of the entire record discloses that the error complained of resulted in a miscarriage of justice.

From examination of the record, we are entirely convinced of the guilt of defendant, and no injury has been sustained by the delay of the court in pronouncing judgment and sentence.

For the foregoing reasons, the judgment and the order of the court are affirmed.

We concur: R. L. THOMPSON, J.; PLUMMER, J.

130 Cal.App. 152

BRUST et al. v. C. J. KUBACH CO. (BAKER IRON WORKS, Intervener).

Civ. 7327.

District Court of Appeal, Second District, Division 2, California.

Feb. 28, 1933.

1. Negligence ⚷33(2).

Subcontractor's employee who, after completion of work in which subcontractor's employees authorizedly used contractor's hoisting tower, cable, and other equipment in connection with subcontractor's blocks, returned to premises to obtain blocks, and, finding contractor's employees engaged in lowering cable and blocks by rope, was standing on tower platform when rope broke, *held* mere trespasser, precluding recovery in death action.

> It appeared that hoisting tower, wire cable, and all instrumentalities used by subcontractor's employees with contractor's permission in performing certain work under subcontract were owned by contractor with exception of hoisting blocks which were owned by subcontractor; that, on morning of day following that on which such work had been completed, thereby terminating contractor's specific permission for use of tower and equipment, subcontractor's employee returned to premises to obtain blocks and found contractor's employees who had been instructed to demolish tower engaged in lowering cable and blocks by means of rope from about top level of building, which was 28 floors in height; that employee proceeded to platform of tower at level of twenty-fifth floor and was standing on platform when rope broke, allowing cable to fall and encircle employee's neck, causing death by strangulation.

2. Negligence ⚷33(1).

Without wantonness or heinousness of behavior, recovery cannot be had for trespasser's death.

3. Negligence ⚷32(1).

Without overt act of negligence, recovery cannot be had for licensee's injury or death.

4. Negligence ⚷121(2).

Res ipsa loquitur doctrine *held* inapplicable where injured person was mere trespasser.

5. Appeal and error ⚷110.

In civil cases, order denying motion for new trial is nonappealable.

Appeals from Superior Court, Los Angeles County; F. C. Valentine, Judge.

Action by Lela A. Brust and Lester Isbon Brust and another, minors, by their guardian ad litem, Lela A. Brust, against the C. J. Kubach Company, in which the Baker Iron Works, a corporation, intervened. From a judgment for defendant and an order denying their motion for a new trial, plaintiffs and the intervener appeal.

Appeal from the order denying a new trial dismissed, and judgment affirmed.

Samuel A. Rosenthal, Gibson, Dunn & Crutcher, and Theodore Stensland, all of Los Angeles, for appellants.

George P. Kinkle, John S. Hunt, and Richard J. O. Culver, all of Los Angeles, for respondent.

WORKS, Presiding Justice.

Plaintiffs bring suit for the recovery of damages for the death of Edward J. Brust, husband and father to them respectively. The decedent was an employee of Baker Iron Works at the time of his death. Upon due application therefor, that corporation, under award by the Industrial Accident Commission, was required to render compensation for the death of Brust. It becomes an intervener in this action for the purpose, if plaintiffs shall be successful in the suit, of recovering what it has paid under the award. Defendant had judgment, and plaintiff and the intervener appeal from the judgment and from an order of the trial court denying their motion for a new trial. Throughout this opinion defendant will be referred to as Kubach Company and intervener will be referred to as Baker Company.

The death of Brust occurred during the construction of the Los Angeles city hall. Kubach Company was the general contrac-

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⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

tor for the construction of the building. Baker Company was an independent contractor whose duty it was to install the elevators in the structure. For the purpose of raising to appropriate place the materials to be used by it in constructing the building, Kubach Company had erected a temporary tower or shaft. It was a part of the work of Baker Company, in connection with its work of installing the elevators, to place in the building a motor which was to furnish the power for the purpose of operating them. Kubach Company allowed Baker Company the use of the tower and of its equipment therein for the purpose of lowering this motor to place. The work was done by means of a seven-eighths inch wire cable which was reeved through two blocks. One of these blocks was appropriately fastened near the top of the tower, while the other, with hook attached, traveled up or down the shaft, as the case might have been, with loads which were being raised or lowered. The blocks used at the time which is of interest here were the property of Baker Company, but the tower, the wire cable, and all instrumentalities employed in the lowering of the motor, with the sole exception of the blocks, were the property and under the general control of Kubach Company. Brust, the unfortunate decedent, was engaged about the lowering of the motor for his employer, Baker Company, and that work was completely done at about 4:30 of a certain afternoon. Thus was terminated the specific permission for the use of the tower and equipment which had been extended by Kubach Company to Baker Company. On the next morning Brust and other employees of Baker Company went to the city hall for the purpose of securing the two blocks which belonged to that corporation. Meanwhile employees of Kubach Company had been instructed to "tear down" the tower, the work on the building having neared completion, and when Brust arrived at the structure they, as preparatory to their main work, were actually engaged in lowering the steel cable and the blocks through which it was reeved. This lowering was in progress by means of a three-quarters inch Manila rope. The building is twenty-eight floors in height, and the men were lowering the cable and blocks from about the top level. When Brust came upon the scene, he went to the twenty-fifth floor and proceeded to the platform even with that floor and upon which materials to be used in that vicinity had theretofore been unloaded by Kubach Company. As Brust stood on the platform, the Manila rope parted, the heavy wire cable fell, a loop formed in it which encircled Brust's neck, and he was strangled to death.

The action was tried by a jury. In addition to a general verdict for Kubach Company, the trial body found several special verdicts:

(1) Brust was upon the platform of the hoisting tower at the time of the accident.

(2) He was on the platform solely in pursuance of the business of Baker Company.

(3) "Q. Was the cable which was being lowered * * * caused to fall solely by reason of some defect in the equipment or appliances used by defendant? A. No."

(4) "Q. * * * [S]tate what you find to have been the proximate cause of the fall of said cable, and if you are unable to determine the cause, so state. A. Parting of the rope, cause unknown."

The first and practically the only point to be determined is: What was the status of Brust as he stood at what turned out to be a place of imminent danger—at his place on the platform of the tower? Appellants contend that he was an invitee of Kubach Company. That corporation insists that he was a mere trespasser, or, at most, but a licensee. Appellants retort that, if he was not an invitee, he was not a trespasser, but was "at least a licensee." The striking parts of the views of appellants upon these questions are contained in the reply brief. Perhaps the questions may best be solved by means of a traverse of some of the statements there made, and we shall pursue that labor at some length. The case is a most important one to all concerned. It is argued with vigor on both sides. For these reasons, although the solution of the appeal seems simple to us, we are perhaps required to exhaust much space in determining it. At least, we are justified in taking that course.

Appellants make the following significant statement: "It is not our contention that the Baker Iron Works, under the facts of this case, was doing any work under any contract therefor, with the respondent. When we mention an agreement between said Baker Iron Works and respondent, we refer, or, at least intend to refer, specifically to that agreement whereby respondent gave said Baker Iron Works permission to use respondent's hoist in the City Hall Building, for the purpose of performing some of the work to be done by said Baker Iron Works under its contract with reference to the construction of said building, said respondent's said hoist being that particular instrumentality which, while under the exclusive control, management and operation of respondent, suffered a break in a part thereof, resulting in the accident in question."

It is said again, by appellants, "that the Baker Iron Works had the permission of the respondent's foreman to use the respondent's said hoisting-tower and hoisting instrumentalities on the day before the accident in question, for the purpose of lowering machinery, or something that had to do with an elevator, * * * and to use said hoisting instrumentalities and tower in that connection; that everything in use at the time of this accident, and every appliance, with the exception of the blocks which were not [sic] actually used in this operation, were under the control of the defendant."

A little further on appellants also say that, on the day of the accident to Brust, "the said physical work of actually lowering said elevator machinery having been completed on the preceding day, said decedent, Brust, as foreman in charge of employees of said Baker Iron Works, returned to said City Hall Building for the purpose of removing, from respondent's said hoisting instrumentalities, the said hoisting-blocks belonging to said Baker Iron Works, as aforesaid, but found that he and his men could not have immediate access to said blocks or immediately engage in the physical work of removing them because of the fact that respondent's employees were then operating respondent's hoisting instrumentalities in work of respondent; that, while awaiting an opportunity to reach and remove said hoisting blocks, the said Brust had walked out on to the platform adjacent to said hoisting-tower, at the 25th floor of said City Hall Building, when a part of respondent's said hoisting instrumentalities, then being lowered by respondent's servants, broke or parted, permitting a steel cable, attached to said hoisting instrumentalities, to fasten itself about the shoulders and neck of said decedent, Brust, thereby causing his death by strangulation."

Again, it is remarked that "it conclusively appears that the Baker Iron Works had the express permission of the respondent's foreman to use respondent's said hoisting-tower and respondent's hoisting instrumentalities, connected therewith, * * * for the purpose of lowering certain elevator machinery, then being installed by said Baker Iron Works in pursuance of its contract relative to the construction of said City Hall; that * * * when the employees of said Baker Iron Works (i. e., decedent, Brust, foreman, and his crew), quit work for that day, at 4:30 p. m., the respondent's hoisting instrumentality and the blocks of the Baker Iron Works, thereto attached, were left hanging in said hoisting-tower, said hoisting instrumentality being respondent's only equipment therein; that the upper one of said blocks, with said cable fastened through the same, was then fastened at the top of said hoisting-tower, and that it would take some 15 or 20 minutes to remove said cable from said block, it being necessary to lower said cable for that purpose; that on the following morning * * * at about 9:30 o'clock, when the decedent, Brust, foreman, as aforesaid, for said Baker Iron Works, and his crew of men returned to said hoisting-tower for the purpose of getting their said blocks, the respondent's foreman, Elliott, and other of respondent's employees, were there engaged in lowering said cable (then attached to a concrete bucket) down through said hoisting-tower; that thereupon the employees of said Baker Iron Works, pursuant to instructions from their said foreman, the decedent, Brust, went to the top of said tower to get the Baker Iron Works' block there hanging, as aforesaid, while the decedent, Brust, remained on a staging, adjacent to said tower, at the 25th floor of said building, at which place the respondent's foreman, Elliott, and his men were engaged, lowering said cable; that at the time of the accident in question, resulting from the falling of said cable, pursuant to the breaking of a rope, thereto attached and used by respondent's employees in lowering said cable, the decedent, Brust, continued to be on said 25th floor-staging, whereon said cable fell, said Brust having been there then for a period from two to three minutes, during which time respondent's said foreman, Elliott, and his crew of men were there engaged in lowering said cable, as aforesaid; that at the time of said accident and for a few minutes prior thereto, the workmen about said tower were, at all times, in position to see and did actually see the decedent, Brust, on said 25th floor-staging."

Appellants attempt to make much of a stipulation entered into at the trial. Upon this subject they say: "Respondent, however, appears to forget or designedly disregards its express admission that, at the time of the accident, 'said decedent was merely waiting for respondent's employees to finish using the hoist in order that he and the coemployees of the Baker Iron Works might go upon the hoist and remove the blocks and tackle of the Baker Iron Works'; and, likewise, respondent's express admission that on the morning prior to the time when the accident occurred, to wit, at about 9:30 or 10:00 o'clock, the decedent, Brust, and other employees of the Baker Iron Works arrived at the City Hall and went to the 25th floor, but found that they could not have access to the blocks, the removal of which was the only work to be done by them, due to the fact that the respondent's employees were doing some work and were using their own (respondent's equipment)." It is to be observed specially as to this particular matter that, even if Brust was "waiting," there is absolutely nothing in the evidence, or by stipulation, to the effect that he was privileged so to wait upon the platform adjacent to the twenty-fifth floor of the building.

Another quotation from the reply brief of appellants: "As admitted by the respondent, the decedent, Brust, on the day of the accident and at and immediately prior to the occurrence thereof, was on the premises in question exclusively for the purpose and business of removing said pulley-blocks for his employer, the Baker Iron Works. In other words, he was there with the knowledge and consent of the respondent in pursuance of his employment by said Baker Iron Works and for the exclusive purpose of doing necessary work for said employer under the latter's contract in the construction of said City Hall building; but, for a minute or two prior to the accident and at the time thereof, he was being deterred from physical action in that behalf by respondent's servants. Under no stretch of imagination can it then reasonably be said that, at and immediately preceding the occurrence of the accident, he was on said premises merely as an idle spectator, or on a frolic of his own, or out of curiosity, or for his own pleasure or convenience, or wrongfully and without any legitimate business or purpose. The removal of said pulley-blocks from respondent's hoisting apparatus was fully as much within the contemplation of respondent's express permission of the user of said hoisting apparatus by decedent's employer, as had been the attaching of said blocks to said apparatus, preparatory to said user. And, in both instances, said decedent was there, with the consent and knowledge of the respondent, in the course of his employment and doing work for his employer, the Baker Iron Works, in the performance of the latter's contract relative to the construction of said City Hall building."

[1, 2] It is in this last passage that the fallacious argument of appellants reaches its climax. As shown by the next preceding quotation, the admission of respondent was only that Brust "was merely waiting for respondent's employees to finish using the hoist" in order that he and others might remove the blocks of the Baker Company. To admit, even, that he "was on the premises in question exclusively for the purpose and business of removing" the blocks is very far from stipulating that he was on the *platform of the tower*, rightfully, for any such purpose, or that he was in any place whatever "with * * * the consent" of respondent. It is utterly futile to argue that respondent "consented" that he should be anywhere for the purpose of removing the blocks while respondent's servants were actually lowering the wire cable, and the evidence shows no such thing. Reduced to its essence, the argument of appellants is that, because decedent worked the preceding day until the hour of 4:30, under the permission of respondent, he had permission to remove the blocks at any time thereafter, willy-nilly, and no matter what activities in and about the tower might be engrossing the attention of respondent's servants. Of course, the Baker Company had the right to the possession of its blocks at some time, but its servants could not take them until permission was given by the Kubach Company, or, at least, until the tower was idle, and they might then perhaps be taken under a permission to be implied under such circumstances. The fact that Brust was "waiting" is enough of itself to show that he had no business on the platform of the tower. If he chose to "wait" there, he did so at his own risk. The series of quotations we have taken from appellants' reply brief shows, without looking elsewhere, to our minds, that Brust was a mere trespasser while he stood upon the platform and when his life was wrenched away in such a cruel and heartrending manner. There is absolutely nothing in the evidence to indicate that at that unhappy moment he was either an invitee or a licensee. Upon such a conclusion we are bound to affirm the judgment, as the unfortunate wife and children of the trespassing Brust, under authorities too numerous to mention, cannot recover. Under the special findings of the jury—indeed, under the volume of evidence introduced in the case—there is not the slightest gleam of a showing that Kubach Company was guilty of that wantonness or heinousness of behavior toward Brust while alone would entitle appellants to the relief they demand. The rope by means of which the wire cable was being lowered simply broke. That was all.

However, if we unwarrantably go so far as to concede that at the moment of his death Brust was a licensee on the platform, the result is the same. That this statement is just is a thing which is demonstrable, again, from appellants' reply brief and from the authorities cited therein. This proposition is stated in the brief; the italics being ours: "The cases cited by the appellants in support of the proposition to the effect that a mere licensee can recover only for wilful or wanton injury, are all cases where the plaintiff was either a trespasser or a mere licensee, and was injured *solely by reason of the unsafe condition of the premises and without any active, or overt act of, negligence committed against him* by the occupant or owner of the premises." To this statement many cases are cited. We give only the California output. Grundel v. Union Iron Works, 141 Cal. 564, 75 P. 184; Schmidt v. Bauer, 80 Cal. 565, 22 P. 256, 5 L. R. A. 580; Herzog v. Hemphill, 7 Cal. App. 116, 93 P. 899; Means v. Southern Cal. R. Co., 144 Cal. 473, 77 P. 1001, 1 Ann. Cas. 206.

Immediately following these and the foreign citations we find this in the brief; the italics again being ours: "The expression found in some of such cases to the very broad effect that no duty is owed to the licensee except not to injure him wilfully or wantonly, was but obiter, and has no application to a case where the plaintiff is upon the premises of the defendant, and is injured by an *overt act of negligence* committed against plaintiff by defendant. A licensor does owe the duty to exercise ordinary care to avoid by any *overt act* injuring a licensee upon his premises with his knowledge and consent, and is responsible in damages for any injury resulting to the licensee from his *overt act of negligence.*" After citing a long list of cases, the brief writer goes on, with our italics: "After stating the rule to the effect that the landowner *owes no duty to keep his premises safe* toward a mere licensee, the court, in Pomponio v. New York, H. H. & H. R. Co., 66 Conn. 528 (50 Am. St. Rep. 124, 32 L. R. A. 530, 34 A. 491), said, 'But while this is so, it is also true that the landowner must not himself, by what has been called "*his own active negligence*," injure either the licensee or the party invited, while they are upon his land. This is a duty to both equally. Toward both, in this respect, he is bound to exercise the same amount of care.' "

[3] We have quoted enough for our purpose. Disregarding what is said in the last excerpt about an invitee, and viewing Brust for the moment as a licensee, it will be observed that appellants certify to us—and they are correct in doing so—that a licensee, or his heirs, as here, can recover damages only for an *overt act of negligence* on the part of the defendant pursued. Appellants even assure us that an owner is not bound "to keep his premises safe toward a mere licensee." How do these matters affect the present case? Here there was no *overt act* or any act of negligence. The rope by means of which the cable was being lowered simply broke, as we have observed. It will be remembered that one of the special verdicts was to the effect that the catastrophe to Brust was caused by "Parting of the rope, cause unknown." There was some evidence as to why the rope parted. One of the employees of Baker Company said it "was frayed" and "we didn't think it was safe"; this "we" not including Brust. Another worker for Baker Company referred to the thing as "a lime-eaten rope." Another called it a "weak rope," and referred to it as "the rotten rope." On the contrary, it is fair to observe employees of Kubach Company testified that the rope was in good condition, and one said that it was "new." Also, what was identified as the rope in question was introduced in evidence and exhibited to the jury. But the condition of the rope was entirely immaterial to the case of appellants. If it be granted that it was rotten, the circumstance merely indicates that Kubach Company had failed "to keep its premises safe" as to the licensee. For this reason the jury may be excused for not resolving, one way or the other, the evidence as to the state of the rope, and merely finding that its parting was through some "cause unknown." Perhaps, indeed, the jury found that the rope was "new" and for that reason said that the cause of its parting was unknown. But, as we have said, all this makes for nothing. There was not the slightest showing of any overt act of negligence by the servants of Kubach Company. Upon this score, therefore, appellants were not entitled to recover, even if we go so far as to consider the trespassing Brust as a licensee.

[4] Appellants offered many instructions upon the doctrine res ipsa loquitur, but the trial judge refused to give them. He was right in doing so. There is nothing here which "speaks for itself" so that appellants may hear. It is said in a standard publication, concerning the rule res ipsa loquitur, "that in order for the doctrine to apply it must appear that the injured person was in a place where he had a right to be, and the doctrine cannot be invoked so as to raise a presumption of negligence when the defendant is only under the duty to avoid affirmative or active negligence, such as that owing to a trespasser or to one on his premises by virtue of mere passive acquiescence or a naked license." 45 C. J. 1209. Among other cases, Powers v. Raymond, 197 Cal. 126, 239 P. 1069, is cited in support of this text, but in the opinion the question is not thoroughly discussed. We think the quoted text states the correct rule. It were strange if it were otherwise.

We see no error in the refusal of the trial judge to give any of the instructions proffered by appellants. The evidence which establishes Brust's status as he stood upon the platform of the tower is undisputed, and a case is therefore presented in which appellants could not possibly recover.

[5] In civil cases no appeal lies from an order denying a motion for a new trial.

The appeal from the order denying a new trial is dismissed.

Judgment affirmed.

We concur: STEPHENS, J.; ARCHBALD, Justice pro tem.

130 Cal.App. 212

PEOPLE v. FRANK.

Cr. 2280.

District Court of Appeal, Second District, Division 1, California.

March 2, 1933.

Rehearing Denied March 10, 1933.

Hearing Denied by Supreme Court March 30, 1933.

Criminal law ⚷620(1).

Under statute authorizing consolidation of charges of offenses of "same class," consolidation of charges of robbery and burglary with charge of assault with deadly weapon with intent to murder *held* prejudicial error, such offenses not being of "same class" (Pen. Code § 954).

[Ed. Note.—For other definitions of "Same Class," see Words and Phrases.]

Appeal from Superior Court, Los Angeles County; William Tell Aggeler, Judge.

George E. Frank was convicted of robbery and burglary and assault with a deadly weapon with intent to commit murder, and he appeals.

Reversed.

John F. Groene, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

HOUSER, Justice.

By respective counts in an indictment filed against him, defendant was accused of the commission of each of the criminal offenses of robbery and burglary. By a separate information, defendant also was accused of the crime of assault with a deadly weapon with intent to commit murder, alleged to have been committed more than four months after the date when the robbery and the burglary offenses were committed. Over the objection of defendant, by order of the trial court, all the several charges against defendant were consolidated for the purpose of trial. Following his conviction on each of the said charges, defendant has appealed to this court from the ensuing judgment, as well as from the order by which his motion for a new trial was denied.

Appellant urges the point that, in ordering the consolidation of the two actions, the trial court committed error which was prejudicial to the substantial rights of defendant.

It seems to be conceded by respondent that, in the absence of a statute by which a consolidation of causes of the nature of those herein involved is authorized, the trial court was in error in making the order in question. But it is asserted that the provisions of section 954 of the Penal Code are sufficient in the premises. That part of said section upon which the respondent relies is as follows: "An indictment, information, or complaint may charge two or more different offenses connected together in their commission, or different statements of the same offense or two or more different offenses of the same class of crimes or offenses, under separate counts, and if two or more indictments or informations are filed in such cases the court may order them to be consolidated. * * *"

The particular language of the statute to which attention is directed is that wherein the trial court is authorized to consolidate "two or more different offenses of the same class of crimes or offenses." In that connection, the reasoning by respondent is to the effect that, since in title 8 of part 1 of the Penal Code (section 187 et seq.), which concerns "Crimes Against the Person," are included provisions which relate respectively to many different criminal offenses, the enabling portion of section 954 of the Penal Code which provides for the consolidation of offenses "of the same class" justifies the action of the trial court herein wherein the several charges against defendant were consolidated and, in effect, tried as one action; in other words, that because each of the several offenses of which defendant was charged is defined and denounced in title 8 of the Penal Code, such crimes constitute a "class," and therefore are subject to the provisions of section 954 of the Penal Code to which reference has been had.

Referring to said title 8, it is noted that in general its provisions relate to each of the offenses of homicide, mayhem, kidnapping, robbery, attempts to kill, assaults with intent to commit felony, other than assaults with intent to murder, duels and challenges, false imprisonment, assault and battery, libel, and slander. Concretely, and by way of illustration, it therefore appears that, if respondent's suggestion as to the construction to be placed on section 954 is correct, it follows that, notwithstanding the fact that in one information or indictment a defendant may be charged with the crime of murder, a felony, and in another information or indictment be charged with the offense of libel, a misdemeanor, the two charges may be consolidated.

It is also noted that title 9 of part 1 of the Penal Code (section 261 et seq.) purportedly deals with "Crimes Against the Person and Against Public Decency and Good Morals." If respondent's reasoning be sound, then it should follow that, because both the crime of rape and the various offenses which, in the contemplation of the law, may be committed by a pawnbroker in the conduct of his business are denounced in said title, it would be possible to consolidate two separate actions, in one of which a defendant may have been charged with the commission of the crime of rape, and in the other with having committed any one of the various offenses which relate to the business of conducting a pawnshop. On the other hand, for the reason that the crime of kidnaping is denounced in title 8, and the crime of child stealing is denounced in title 9, according to respondent's contention those two crimes would not be of the same statutory "class," and section 954 of the Penal Code in itself would afford no authority for their consolidation.

As far as the diligence of respective counsel has indicated, hitherto no appellate court has been called upon to pass upon the precise question here involved; nor has the attention of this court been directed to any statute that exists in any other state jurisdiction similar to those respects which hereinbefore have been quoted from section 954 of the Penal Code. The only statute which as to the feature thereof here under consideration bears a resemblance thereto is section 1024 of the United States Revised Statutes (18 USCA § 557). That section is as follows: "When there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined, instead of having several indictments the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such cases, the court may order them to be consolidated."

Considering such statute, in the case of United States v. Scott, No. 16,241, 27 Fed. Cas. page 997, it was held (syllabus) that "counts for conspiracy can not be joined with counts for murder"; also that "the latter provision of this act evidently does not alter the common law," citing authorities.

In the case of McElroy v. United States, 164 U. S. 76, 17 S. Ct. 31, 32, 41 L. Ed. 355, it was held: "Indictments for distinct felonies not provable by the same evidence, and in no sense resulting from the same series of acts, cannot be consolidated for trial."

In part, the court said: "It is clear that the statute does not authorize the consolidation of indictments in such a way that some of the defendants may be tried at the same time with other defendants charged with a crime different from that for which all are tried. And, even if the defendants are the same in all the indictments consolidated, we do not think the statute authorizes the joinder of distinct felonies, not provable by the same evidence, and in no sense resulting from the same series of acts. Under the third clause, relating to several charges 'for two or more acts or transactions of the same class of crimes or offenses,' it is only when they 'may be properly joined' that the joinder is permitted."

Reverting to a construction of section 954 of the Penal Code, it would seem most improbable that, in enacting the statute, the Legislature of this state anticipated that such a construction either would or could be placed upon the word "class," as used in the statute, as would produce results such as hereinbefore have been indicated. To even contemplate a deliberate intention on the part of the Legislature to authorize the joinder of the charge of murder with the charge of libel, or a charge of rape with a charge of usury by a pawnbroker, or to refuse consolidation of the charge of kidnaping with the charge of child stealing, would be a strain upon one's imagination relating to legal procedure. On the one hand, in effect deliberately and intentionally to completely upset or reverse longstanding rules of legal procedure and at the same time to subject a defendant to a decidedly prejudicial practice, and incidentally to deprive him of a substantial right in the premises; or, on the other hand, in pursuance of a situation such as has been illustrated with reference to the refusal to unite a kidnaping case with one of child stealing, to cause added inconvenience and expenses on account of witnesses, jurors, lawyers and the court, is wholly inconceivable as an act of a Legislature presumably composed of representative, capable, and right-thinking citizens of the state. Although in the connection in which used, the word "class" possibly might bear the construction which respondent claims for it, the untoward consequences which probably would result from such a construction forbid its natural or spontaneous acceptance in such a sense. The probabilities are that the word was used as a synonym for some such word as "kind," or "sort," or "variety," or at least as a medium for expressing the thought that, because of a recognized similarity in the manner or the means ordinarily employed in the commission of specified crimes, or because of some generally understood attributes which frequently pertain or inherently attach to certain types of criminal offenses, irrespective of possible unfavorable consequences to the accused, the good of society as a whole demanded the joinder or the consolidation of such charges for the purpose of trial.

The prejudicial effect of an improper consolidation of alleged offenses upon the substantial rights of a defendant is so obvious that to dwell upon a consideration of the point is unnecessary. Suffice it to say, from time immemorial such a practice has been universally condemned.

It is ordered that the judgment and the order by which the motion for a new trial was denied be, and they are, reversed.

We concur: CONREY, P. J.; YORK, J.

130 Cal.App. 304

WEYGANDT et al. v. LARSON et al.

Civ. 8770.

District Court of Appeal, First District, Division 1, California.

March 10, 1933.

Hearing Denied by Supreme Court May 8, 1933.

1. Venue 🔑72.

Nature of action is to be determined from complaint, in determining venue.

2. Account 🔑14.

Action for accounting is proceeding in equity, and is essentially personal action.

3. Venue 🔑5(1).

Statute prescribing venue of actions involving interest in real property is controlling only when land or interest therein is exclusive subject-matter (Code Civ. Proc. § 392, subd. 1).

4. Venue 🔑5(1).

Where real and personal actions are joined in same complaint, case must be tried in county of defendant's residence (Code Civ. Proc. § 395, and § 392, subd. 1; Const. art. 6, § 5).

> Such an action falls within Code Civ. Proc. § 395, and not within provision providing that actions involving interest in real property must be brought where such real estate is situated.

5. Venue 🔑5(1).

Statute prescribing venue in actions involving real estate, being limitation on jurisdiction of Superior Court, must be strictly construed, and prohibition confined to actions enumerated (Code Civ. Proc. § 392, subd. 1).

6. Venue 🔑5(1).

Complaint *held* to show action was to force defendants to accounting and restrain them from disposing of property embraced in trust, and so need not be brought where land was situated (Const. art. 6, § 5; Code Civ. Proc. § 395, and § 392, subd. 1).

> Complaint alleged defendant, as trustee, in conjunction with another defendant, had collected funds belonging to trust for which they failed to account; that they threatened and intended to dispose of property covered by trust, and to fail to account to the beneficiary; and judgment was asked enjoining defendants from disposing of such property, and requiring an accounting from them; that trust be dissolved, and distribution of property made to beneficiaries; and that judgment be entered against defendants for any amount found due on such accounting. Defendants contended that the purpose of such suit was to establish interest in land, and therefore should have been brought in county where land was situated.

7. Trusts 🔑305.

In suit for accounting under trust, judgment was not void because some of beneficiaries were not made parties, though such beneficiaries could have been joined.

8. Receivers 🔑57.

In suit for accounting under trust, failure to make timely objection to appointment, as receiver, of attorney for some of persons interested, was waiver of right to make such objection (Code Civ. Proc. § 566).

9. Appeal and error 🔑101(1).

Order appointing receiver is appealable.

10. Appeal and error 🔑870(3).

On appeal from judgment, court cannot review any decision or order from which appeal might have been taken (Code Civ. Proc. § 956).

11. Trusts 🔑327.

In action for accounting under trust, deficiency judgment against beneficiaries who owed estate *held* proper, where proceeds of land owned by trust estate were insufficient to pay off debt.

> Original judgment provided receiver should not sue for sum owing trust estate from beneficiaries until after sale of all lands owned by estate, and that, if after such sale it should develop that shares of each beneficiary were less than their respective debts, personal judgment should be rendered against them for the amount of such deficiency.

12. Trusts 🔑194.

Beneficiaries under trust were not entitled to notice of proceeding of receiver as to petitions and orders for power to deed away estate where court granted authority, and approved receiver's action.

13. Receivers 🔑87.

That receiver released certain debtors from indebtedness to trust estate would not release other debtors from their indebtedness.

14. Executors and administrators 🔑453(2).

Judgment against administratrix will be modified to add omitted words "in due course of administration" (Probate Code, § 730).

> Probate Code, § 730, provides that judgment against executor or administrator must be that the executor or administrator pay the amount found to be owing by the estate in due course of administration.

Appeal from Superior Court, Los Angeles County; William S. Baird, Judge.

Action by Katherine E. Weygandt and another against Alfred Larson and others to foreclose a mortgage. From a judgment, defendants appeal.

Modified and affirmed.

M. B. Butler, of Pasadena, for appellants.

Victor Ford Collins, of Los Angeles, for respondent.

JAMISON, Justice pro tem.

This appeal is from a deficiency judgment rendered by the court on motion of Morris M. Ferguson, receiver, against the above-named defendants. This deficiency judgment is based upon a judgment theretofore rendered in a case brought by respondent, as distributee of and representing the heirs of Julius G. Weygandt, against the above-named appellants and others. By this last-named judgment it was adjudged that Alfred Larson was the record owner of certain lands in Placer county, Cal.; that he held the title to said lands as trustee under a certain declaration of trust dated July 24, 1914; that the beneficiaries and interests in said lands were as follows: N. A. McFaul and the heirs and distributees of Julius G. Weygandt, an undivided two-ninths each; estate of Berdena Larson, an undivided one-eighth; George A. Tate, an undivided one-eighth; Charles W. Spitley, an undivided one-sixth; and William Milchrist, an undivided five thirty-sixths; that said interests were held subordinate to certain indebtedness owing by certain of said beneficiaries to said trust estate as follows: N. A. McFaul, $13,298.60; Alfred Larson and estate of Berdena Larson, $8,135.91; George A. Tate, $5,243.75; William Milchrist, $5,610.39; Charles W. Spitley, $2,631.35, together with accrued interest.

It was further adjudged that defendant Larson was the record owner of certain lands in Yuba county, Cal., under a declaration of trust dated May 18, 1912, and held the title as trustee under said declaration; that the beneficiaries and interests of each in said lands are as follows: N. A. McFaul, Alfred Larson, heirs and distributees of V. S. Colbert, heirs and distributees of Julius G. Weygandt, and heirs and distributees of John Liebold, one-fifth each. It was further adjudged that the said trusts be dissolved; that M. M. Ferguson be appointed receiver; and that Alfred Larson execute a deed conveying said land to said M. M. Ferguson as such receiver, the said receiver being given full power to handle and manage said lands, and to collect all indebtedness due the said trust estate from the beneficiaries or other persons owing money to said trust estate. Thereafter the said receiver, under the orders of the court, proceeded to wind up the affairs of said trust estate, and on January 28, 1931, filed a motion for a deficiency judgment against appellants, and on March 3, 1931, appellants having filed objections to said motion, a hearing was had and judgment was rendered in favor of the receiver and against appellants for the several amounts of their indebtedness to the trust estate.

Appellants contend that the original judgment is void upon its face; that the suit in which that judgment was rendered was commenced in Los Angeles county while the land involved therein is situated in Yuba and Placer counties, and that the purpose of said suit was to establish interests in said land. The complaint in said suit alleges that appellant Alfred Larson, as a trustee, in conjunction with appellant McFaul, has collected funds belonging to the trust, for which they have failed to account; that they threaten and intend to dispose of the property covered by the trust and to fail to account to the beneficiaries for the proceeds thereof, and a judgment is asked enjoining said appellants from disposing of said property and requiring an accounting from them; that said trust be dissolved and distribution of said property be made to the beneficiaries under said trust, and also that judgment be entered against appellants for the amount found to be due upon said accounting.

[1-5] The nature of the action is to be determined from the complaint. Miller & Lux v. Kern County Land Co., 140 Cal. 132, 73 P. 836; McFarland v. Martin, 144 Cal. 771, 78 P. 239; Donohoe v. Rogers, 168 Cal. 700, 144 P. 958. Section 5 of article 6 of the Constitution provides that all actions for the recovery of the possession of, quieting title to, or for the enforcement of liens upon real estate, shall be commenced in the county in which the real estate or any part thereof affected by such action is situated. Subdivision 1 of section 392 of the Code of Civil Procedure provides that actions for the recovery of real property, or an estate or interest therein, or for the determination of any form of such right or interest, must be brought in the county where such real estate or some part thereof is situated. Section 395 of the Code of Civil Procedure provides that all other actions must be tried in the county where the defendants or some of them reside at the commencement of the action. An action for an accounting is a proceeding in equity, and is essentially a personal action (Smith v. Smith, 88 Cal. 572, 26 P. 356), and it is only when land or an interest therein is the exclusive subject-matter of the action that said section 392 controls. Smith v. Smith, supra; Le Breton v. Superior Court, 66 Cal. 27, 4 P. 777. If real and personal actions are joined in the same complaint, the case falls within said section 395, and must be tried in the county of defendant's residence. Le Breton v. Superior Court, supra; Warner v. Warner, 100 Cal. 11, 34 P. 523; Donohoe v. Rogers, supra. The provisions of said section 392, being a limitation upon the jurisdiction of the Superior Courts, must be strictly construed, and its prohibi-

tion must be confined to the actions enumerated therein. Wood v. Thompson, 5 Cal. App. 247, 90 P. 38; Miller & Lux v. Kern County Land Co., supra.

[6] We are of the opinion that the nature of this action, as disclosed by the complaint, was not an action for the recovery of real property, nor of an estate or interest therein, nor for the determination in any form of such right or interest, but, on the contrary, was an action against Alfred Larson and McFaul to force them to an accounting and to restrain them from disposing of property embraced in the trust, and that the Superior Court of Los Angeles county had jurisdiction of the action.

[7] Appellants next contend that the original judgment is void on its face because some of the beneficiaries under the trust were not made parties. They rely upon Mitau v. Roddan, 149 Cal. 1, 84 P. 145, 6 L. R. A. (N. S.) 275, to support this contention. In that case necessary parties plaintiff were not joined, and the court denied defendant's request to have these parties made parties plaintiff. In the course of the opinion delivered in that case the court said at page 17 of 149 Cal., 84 P. 145, 151, 6 L. R. A. (N. S.) 275: "The only effect of the failure to make them parties is that they are not bound by the judgments appealed from." While the said beneficiaries in the case now before the court could have been joined as parties defendant, they were not necessary parties to a determination of the issues involved. Appellants made no effort to have them brought in and made parties. The failure to join them as parties defendant did not render the judgment void.

[8-10] Appellants contend that the appointment of M. M. Ferguson as receiver was in direct violation of law. Section 566 of the Code of Civil Procedure provides in part that no attorney of a party, or person interested in an action, can be appointed receiver therein. It is admitted that Ferguson was attorney for some of the heirs of the Weygandt estate prior to his appointment as such receiver. The appointment was made in open court in the presence of appellants and their attorneys. They knew that prior to the appointment Ferguson had acted as one of the attorneys for said heirs. Appellants made no objection to the appointment of Ferguson as the receiver at the time he was appointed, nor since then have they taken any steps toward vacating the appointment. During a period of two years they stood by and saw him take over the trust estate, administer its affairs, and consummate numerous transactions without any objection upon their part, and for the first time upon this appeal raise the question of his competency to act as receiver. It was the duty of appellants to make timely objection to the appointment of the receiver if they were not content to have the appointment stand. Failure to make such timely objection is a waiver of the right to make it. Title Ins., etc., Co. v. California Dev. Co., 171 Cal. 227, 152 P. 564. In First Nat. Bank v. Superior Court, 12 Cal. App. 335, 344, 107 P. 322, it was held that where, with the knowledge of the appointment of receivers, no steps were taken for nearly a year to call in question either its legality or expediency, it must be presumed that the parties acquiesced therein. The order appointing the receiver was appealable; no appeal was taken therefrom. On an appeal from a judgment the court is without authority to review any decision or order from which an appeal might have been taken. Tourny v. Bryan, 66 Cal. App. 426, 226 P. 21; section 956, Code Civ. Proc.

[11] The original judgment provided that the receiver was not to sue for or enforce the sums found to be owing to the trust estate from appellants until after the sale of all of the lands owned by the said estate, and that, if after such sale it should develop the shares of each are less than their respective debts, a personal judgment shall be rendered against them for the amount of such deficiency. There is ample evidence to support the deficiency judgment. The receiver had disposed of all the land owned by the trust estate, and the amount received did not pay off its debts. Consequently there was nothing to distribute to the beneficiaries, which left appellants owing the several amounts as set forth in the original judgment.

[12] Appellants claim that they had no notice of the proceedings of the receiver as to the petitions and orders for power to deed away the estate intrusted to him. In the case of Free Gold Min. Co. v. Spiers, 136 Cal. 484, 69 P. 143, 144, the court said: "By virtue of its jurisdiction over the parties, and the previous appointment of the receiver, the court had jurisdiction to give the direction to the receiver upon his ex parte application therefor, and without notice to the parties to the action (see Beach, Rec. § 272)." 22 Cal. Jur. 508. In the case at bar the receiver was granted authority by the court to execute the conveyance in each instance where he executed such conveyance, and his actions in that respect were duly approved by the court.

[13] Appellants also complain that the receiver released Spitley, Tate, and Milchrist from their indebtedness to the trust estate without receiving anything from them. The record is silent as to the circumstances under which this was done, or that it was done at all. Admitting that this is true, it would in no wise release appellants from their indebtedness to the said estate. If the release of these parties was an unauthorized and wrongful act upon the part of the receiver, appellants have their remedy, but such

action upon the part of the receiver affords no reason why appellants should not pay that which they justly owe the said trust estate.

[14] Appellant Youngren, as administratrix of the estate of Berdena Larson, claims that the judgment against her is erroneous, in that it does not contain the qualifying words "in due course of administration." Section 730 of the Probate Code provides that a judgment against an executor or administrator must be that the executor or administrator pay the amount found to be owing by the estate in due course of administration. Vance v. Smith, 124 Cal. 219, 56 P. 1031. Therefore the judgment against the said administratrix should be, and is hereby, modified by adding the words "in due course of administration."

Appellants raise some additional points in their brief which we deem unnecessary to discuss.

The judgment as modified is affirmed; the appellant Youngren as administratrix to recover her costs of appeal.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

CRYSTAL PIER AMUSEMENT CO. et al. v. CANNAN et al. *

Civ. 4638.

District Court of Appeal, Third District, California.

Feb. 24, 1933.

Rehearing Denied March 25, 1933.

Hearing Granted by Supreme Court April 24, 1933.

1. Fraud ⚷41.

In action for damages for false representations relating to creosote treatment of piling and timber furnished under contract for amusement pier, allegations of amended complaint *held* to state cause of action.

> Amended complaint, in first cause of action, alleged, in substance, the making of the contract requiring defendants to furnish piling and timber for amusement pier; that defendants represented that piling and timber given described creosote treatment would withstand attacks of ocean water and animal life therein; that plaintiffs relied on the representations made by the defendants; that piling and timber was not treated as required by contract and was not of first class quality; that as result of defendants' failure to properly treat piling and timber it would be short lived; that pier would have to be rebuilt; and that plaintiffs were damaged in stated amount.

2. Assignments ⚷24(1).

Action for damages arising out of tort, where violation of property right is involved, may be assigned (Civ. Code, § 954).

3. Assignments ⚷24(3).

Cause of action for damages for false representations relating to creosote treatment of piling and timber used in pier, *held* assignable (Civ. Code, § 954).

4. Assignments ⚷80.

Mere transfer of title to amusement pier *held* not to operate as assignment of cause of action for damages for false representations relating to creosote treatment of piling and timber used (Civ. Code, § 954).

> Transfer of title to amusement pier did not operate as assignment from vendor to vendee of cause of action for damages for false representations relating to creosote treatment of piling and timber used in pier, in view of general rule that a cause of action based on deceit in respect to real property does not run with the land and pass by transfer to a grantee of the party defrauded.

5. Corporations ⚷378.

Fact that one corporation owned majority of stock of another corporation *held* insufficient to establish unity of ownership which would authorize former to maintain action for fraud on cause of action vested in latter.

6. Corporations ⚷1.

Corporation to which amusement pier was transferred after construction *held* not entitled to maintain action for false representations against contractors, vested in transferor corporation, on theory that corporate entity will be disregarded when necessary to prevent fraud and protect rights of third parties.

> Facts disclosed that transferor corporation made contract and erected pier before transferee corporation was organized; that transferee corporation was not party to any of agreements out of which alleged false representations arose relating to creosote treatment of piling and timber furnished by the defendant contractors; and that the transferee corporation was not a party to the alleged false representations.

7. Fraud ⚷59(2).

Measure of damages for fraud inducing purchase of property is difference between actual value of what purchaser received and value of property if fraudulent representations had been true.

8. Fraud ⚷50.

Where buyer retains property without offer to return, buyer, suing for damages for false representations, has burden of

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⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 25 P.2d 839.

showing that property was entirely worthless for every purpose.

9. Fraud ⚿66.

In action for damages for false representations relating to piling and timber furnished for pier, finding that structure was unsafe for use for any purpose was not finding that property was valueless.

10. Appeal and error ⚿931(1).

Appellate court has duty to adopt such construction of findings as will uphold judgment if it can reasonably be done.

11. Fraud ⚿59(1).

In action for damages for false representations relating to creosote treatment of piling and timber furnished for amusement pier, measure of damages based on original cost of constructing pier and superstructure *held* erroneous.

Measure of damages based on original cost of constructing pier and superstructure was erroneous, because trial court made no findings on question of salvage value of property, nor did it find that present structures were valueless, although it did find that pier was unsafe for use as an amusement pier or any other purpose. The trial court did not find that plaintiffs were damaged generally, but definitely rendered judgment for cost of each structure, namely, the pier and ballroom.

Appeal from Superior Court, Los Angeles County; Thomas L. Ambrose, Judge.

Action by the Crystal Pier Amusement Company and another against Arnold M. Cannan, as administrator with the will annexed of the estate of Emil F. Cykler, deceased, and others, doing business under the fictitious firm name and style of the California Creosoting & Timber Company, wherein the defendants filed a cross-complaint against the plaintiffs and Earl Taylor and others. From a judgment in favor of the plaintiffs, the defendants appeal.

Reversed.

J. A. Kennedy, of Oakland, and Stanley W. Guthrie and Victor Ford Collins, both of Los Angeles, for appellants.

Cooper & Collings and Amos Friedman, both of Los Angeles, for respondents.

TUTTLE, Justice pro tem. delivered the opinion of the court.

This action was brought to recover damages arising out of false representations made in respect to piling and timber which were furnished by defendants under contracts, and used by plaintiffs in the construction of an amusement pier. Trial was had before the court, which resulted in findings in favor of plaintiffs upon all the material issues, and a judgment against defendants, canceling the contracts and allowing damages in the sum of $91,961.63. Defendants appeal from the judgment.

During the month of March 1926, plaintiff Crystal Pier Amusement Company, a corporation, decided to erect an amusement pier at Pacific Beach in San Diego county. The officers of said plaintiff interviewed one of the defendants, who with two others, formed a partnership known as California Creosoting & Timber Company. As a result of these negotiations, an order was sent to defendant partnership for a certain amount of creosoting piling to be creosoted with twelve-pound treatment, to be delivered f. o. b. cars at the plant of defendants, at an agreed price. This order was accepted by defendants by letter dated March 17, 1926. On April 3, 1926, plaintiff amusement company entered into a contract with defendants, whereby the latter agreed, at a certain price, to drive, cap, and brace said piling for the Crystal pier at Pacific Beach. Defendants thereafter furnished the piling, and drove, capped, and braced the same, all of said acts being completed on or before July 5, 1926.

In the month of March, 1927, plaintiff Crystal Pier Holding Company was incorporated, and proceeded to erect certain structures upon said pier, including a ballroom. Prior to the erection of the ballroom, plaintiff Crystal Pier Amusement Company transferred the pier to plaintiff holding company, which held title to all of said property at the time this action was commenced.

The trial of the action extended over four months, and the record is exceedingly voluminous. Much of the time was taken up with expert testimony bearing upon the treatment of piling to withstand the effect of salt water and marine insects.

The pertinent portions of the first cause of action in the amended complaint read as follows:

"That heretofore, and about the month of March, 1926, plaintiffs were desirous of building an amusement pier of approximately five hundred fifty (550′) feet in length, with a maximum width of two hundred forty (240′) feet and a minimum width of one hundred (100′) feet, at Pacific Beach, in the city of San Diego, county of San Diego, state of California, and at said time, defendants, their agents and employees and Emil F. Cykler, represented and stated to plaintiffs who at said time were without knowledge concerning the art or science of the building or maintenance of structures or piers for marine purposes, that the said defendants were experts in the building of piers and the preparation of piling and pier timber for such piers, and stated and represented to plaintiffs that the use of piling and lumber for pier construction treated and impregnated with a twelve (12#) pound treatment of creosote, was the proper material to be used in and about the construction of such a pier as contemplated by plaintiffs herein, and represented to plaintiffs that piling and timber so treated and impregnated would have long life, to-wit, in the excess of twenty-five (25) years, and that said piling so impregnated with a twelve (12#) pound treatment would have a minumum penetration of three-quarters (¾″) of an inch on the piling and timber so treated, and that such piling and timber by virtue of such treatment and impregnation would have a perfect resistance against chemical and other action, including teredos, limnoria and other marine borers of the ocean and of ocean water in which said pier was to be constructed. That plaintiffs believed such representations to be true and relied upon such representations, and in pursuance thereof and on or about the 17th day of March, 1926, executed an order in writing with the defendants herein for the purchase of piling and lumber impregnated with a twelve (12#) pound treatment of creosote, at a price of seventy (70c) cents per lineal foot for piling and sixty-five ($65.00) dollars per thousand feet for lumber, and thereafter, and on or about the 3rd day of April, 1926, entered into a further agreement with the defendants herein for the delivery of such piling and lumber, and for the driving of such piling on a basis of twelve ($12.00) dollars per pile, driven, capped and braced, and for the placing on such piling of creosoted lumber and braces, properly bolted and spiked, and thereafter defendants delivered to plaintiffs certain piling and lumber, and set and drove such piling and installed and placed thereon the necessary caps and braces, spiked and bolted as hereinbefore set forth.

"That in said order of material hereinbefore set forth, and in the acceptance and agreement on the part of defendants to drive and place such piling, caps and braces, defendants represented to and agreed with plaintiffs that such piling would be of first-class material, properly treated and impregnated with a twelve (12#) pound treatment of creosote, and according to the usual custom and standards of the wood preserving trade and industry, and that such piling would have a minumum of a fourteen (14″) inch butt and an eight (8″) inch tip. That the total amount of defendants' bill to plaintiffs therefore was the sum of Twenty-six thousand, seven hundred sixty-five and 91/100 ($26,765.91) Dollars.

"That plaintiffs, relying upon the representations and statements of defendants as hereinbefore set forth, and believing them to be true, proceeded with the completion of such pier after the completion of the work by the defendants, as hereinbefore described, and built therein a large ball room or pavilion and other structures, all of which were contemplated to be built, and were known by the defendants to be so contemplated to be built at the time of the execution of the agreements hereinbefore described, so that the total cost of such contemplated pier and improvements thereon to plaintiffs was and is a sum in excess of one hundred eighty-seven thousand, two hundred three and 30/100 ($187,203.30) Dollars.

"That defendants did not furnish, drive and install the piling, timber, braces and caps as hereinbefore provided, impregnated with a twelve (12#) pound treatment of creosote, but furnished, delivered and installed piling and timbers painted, covered or treated with a dark substance, which plaintiffs are informed and believe and upon such information and belief allege, to have been cresoil, a combined preparation of petroleum oil and cresylic acid, or a similar substance thereto; that such piling, timber and lumber was not impregnated with a twelve (12#) pound treatment of creosote or any treatment of creosote, and that such piling, timber and lumber is not the material contemplated to be used in the erection of such pier under the agreements of plaintiffs and defendants, and that such piling was not of a first-class quality and material, and was not treated and impregnated in a good and workmanlike manner or with creosote, or according to the customs, methods, uses and practices of the wood preserving industry and that such piling and the majortiy thereof was less in size than a fourteen (14″) inch butt and eight (8″) inch tip, and that such piling was defectively treated with a material used thereon as a substitute for creosote, in that said piling was not properly prepared for treatment and that such piling so treated was not treated or impregnated with creosote of a minimum penetration of three-fourths (¾″) of an inch, and that the same was known to the defendants not to be the material contemplated or agreed to be used in the construction and erection of such pier, but was a cheap and inferior grade of material, and that such piling, lumber and timber did not and will not withstand the effects and action of the ocean and ocean water and animal life therein, and that such was or should have been known to the defendants and each of them at all times herein: and as well it was or should have been known to the defendants that in furnishing and placing the materials they did furnish and place, that the structure pier or foundation was not and could not be a structure pier or foundation of long life, as hereinbefore set forth, but that the same would and did in a short time become unsafe and of no use for an amusement pier, the purpose for which it was originally intended and designed.

"That the defendants in continuance of their false and fraudulent representations, and as plaintiffs are informed and believe and therefore allege the fact to be, for the purpose of covering up and concealing from plaintiffs the fact that they, the defendants herein, were not treating said piling, timbers, braces and caps with a twelve (12#) pound treatment of creosote, but painting, covering or treating the same with a dark substance as a substitute therefor, continued in their false and fraudulent acts and representations by ordering cut-offs of the tops of the piling after the same were driven, to be painted with a dark substance so that the plaintiffs would not or could not ascertain that said material was not creosoted or impregnated with creosote and was not treated with a twelve (12#) pound treatment of creosote, all for the purpose of deceiving plaintiffs, and further and on or about the 24th day of April, 1926, after the commencement of the work of driving the piling and installing thereon the caps and braces, again stated and represented to the plaintiffs, their officers and agents, that the piling, timbers, braces and caps were treated and being treated and impregnated wtih a twelve (12#) pound treatment of creosote and that the creosote used in such treatment was imported from foreign countries and was a high priced and expensive material, and that the minimum penetration of the creosote in the said piling, timber, braces and caps would be not less than three-fourths (¾″) of an inch, and that such treatment would act as a perfect and absolute preservative of said piling, timber, braces and caps against the effects and action of the ocean and ocean water and animal life therein, and that the life of the pier would be long, to-wit, in the excess of twenty-five (25) years, and that the same as constructed by the defendants herein would be one of the best piers built in Southern California, and that the defendants were experts in the construction thereof and that plaintiffs could rely upon the defendants for the construction of such pier in such good and workmanlike manner, and that it would be unnecessary for the plaintiffs herein to have and attain the services of an architect or supervisor in the construction of such pier, for the reason that the defendants herein were experts in such matters, and would use their expert knowledge and ability in and about the construction of such pier in a good and workmanlike manner, all of which statements were false and fraudulent and made for the purpose of deceiving the plaintiffs and said statements were relied upon to be true, and that the plaintiffs herein were misled and deceived by said statements.

"That the said pier and improvements thereon as constructed by defendants, as plaintiffs are informed and believe and upon such information and belief allege, will be short lived and not of long life, as hereinbefore set forth, as it would have been, had the piling, lumber and material contemplated to be delivered, driven and placed in said pier by the defendants herein under the terms of their said agreements, and that said pier, had the same been constructed with the materials as provided for in said contracts hereinbefore referred to, would have had a value at the present time of approximately the sum of two hundred fifty thousand ($250,000) dollars, but that said pier, constructed with the inferior materials and the materials different from those contracted for, has only a nominal value, and that the cost of replacing said piling, lumber and material as contracted for and placing the same in said pier, would cause said pier to have to be entirely pulled down, dismantled and would cost, to rebuild said pier with the piling, lumber and materials as contracted for, the said sum of one hundred eighty-seven thousand, two hundred three and 30/100 ($187,203.30) dollars, plus the cost of dismantling said pier and entirely tearing same down, which plaintiffs are informed and believe, and upon such information and belief allege, would be the sum of approximately fifty thousand ($50,000) dollars."

The second cause of action is based upon an express warranty to the effect that pier, piling, and timbers used therein were warranted by defendants to be of unlimited life. The findings, however, relate to the first cause of action; hence the second does not require further elaboration.

The findings follow substantially the allegations of the amended complaint, and judgment is rendered against defendants in the sum of $91,961.63.

[1] Appellants rely upon no less than fifty grounds for reversal. Some of these can be summarily disposed of. As to the sufficiency of the complaint, we agree with respondents that it states a cause of action based upon fraud and deceit practiced by defendants as an inducement to the entering into an execution of the contracts between the parties. The numerous assaults made upon the findings, except as hereinafter specified, have no substantial merit. There is ample evidence in the record to sustain the finding of fraud. The only meritorious contentions made by appellants are in respect to the right of plaintiff Crystal Pier Holding Company to maintain the action, and the matter of the measure of damages. Both of these points are presented in the findings.

It is contended that the findings do not support the judgment in favor of Crystal Pier Holding Company. The court finds "that the plaintiff and cross-defendant, Crystal Pier Aumsement Company, a corporation, is the owner of a large majority of the issued capital stock of the plaintiff and cross-defendant Crystal Pier Holding Company, a corporation, and that the legal title to the property hereinafter referred to is held by and stands in the name of Crystal Pier Holding Company, a corporation." It is also found:

"That at all times herein mentioned, the cross-defendant Neil Nettleship was the president of the plaintiff and cross-defendant Crystal Pier Amusement Company, a corporation. That one B. W. Tye was on and after the 22nd day of April, 1926, the secretary and treasurer of said corporation.

"That the plaintiff and cross-defendant Crystal Pier Holding Company was incorporated under and pursuant to the laws of the state of California on the 11th day of March, 1927, and that during all the times thereafter, the said B. W. Tye was and is the president of said corporation, and the said cross-defendant Neil Nettleship was and is the secretary and treasurer of said corporation, and that thereafter and prior to the commencement of this action the title to the property hereinafter described was transferred to and vested in the name of plaintiff and cross-defendant Crystal Pier Holding Company, a corporation, and that a large majority of the issued capital stock of said plaintiff and cross-defendant Crystal Pier Holding Company was issued to and ever since said time has been held and owned by the plaintiff and cross-defendant, Crystal Pier Amusement Company."

At the time the contracts were entered into plaintiff holding company was not in existence, consequently it could not have been a party to oral representations relied upon for recovery. The court expressly finds that such representations were made to plaintiff amusement company. There is no evidence or any finding to the effect that these contracts were assigned to plaintiff holding company. The only finding connecting the holding company directly with the matter is one to the effect that prior to the commencement of the action the property was transferred to the holding company.

Several points are relied upon by respondents in an attempt to uphold the right of the holding company, under these circumstances, to maintain an action based upon fraudulent representations made to its predecessor. They first state that "in fact there was but one corporation, and that is the Crystal Pier Amusement Company, and that the other corporation that was formed was formed as a matter of convenience, expediency and policy." There is no finding to this effect, nor has our attention been directed to any testimony to support such a theory, except the finding that two parties were officers of both corporations. Certainly the latter fact would not merge the identity of the two corporations. Respondents have not stressed this point by argument or authorities.

[2-4] It is next contended that by a transfer of the property the right to maintain the action was assigned to plaintiff holding company. It is the rule in this state that an action based upon damages arising out of a tort, where a violation of the right of property is involved, may be assigned. This is expressly authorized by section 954 of the Civil Code, and the rule was followed by this court in the case of Stapp v. Madera Canal & Irr. Co., 34 Cal. App. 41, 166 P. 823. The representations in the instant case arose out of the violation of a right of property, a tort to personal property, and the cause of action based thereon was therefore assignable. Did the mere transfer of the property operate as an assignment of the cause of action? Respondent relies upon Emmons v. Barton, 109 Cal. 662, 42 P. 303; Rued v. Cooper, 109 Cal. 682, 34 P. 98; Kemp v. Enemark, 194 Cal. 748, 230 P. 441; and Harris v. Miller, 196 Cal. 8, 235 P. 981. In each of these cases there was an actual assignment of the contract or chose in action. No authority has been brought to our attention which holds that a transfer of the property affected by the fraudulent representations carries with it the right to maintain an action based upon such representations.

In 27 C. J., page 6, it is said: "A stranger to the transaction who does not claim under the party defrauded has no right of action. Thus, where fraud occurred in the original sale of property, there can be no recovery for such fraud by a subsequent donee, grantee, trustee, or purchaser."

Misrepresentations made by the giver of an option do not give an assignee of the option the right to maintain an action for fraud, although the option is to the assignor and his assigns. Puffer v. Welch, 144 Wis 506, 129 N. W. 525, Ann. Cas. 1912A, 1121.

It was held in Ettar Realty Co. v. Cohen. 163 App. Div. 409, 148 N. Y. S. 625, 626: "The deed was taken by the Ettar Realty Company, which was not in existence at the time of the contract, and the action is brought by said company. There is no evidence of any assignment to plaintiff of the cause of action for deceit. It therefore cannot recover under Fox v. Hirschfeld, 157 App. Div. 364, 142 N. Y. S. 261."

In this state it has been held that a cause of action based upon deceit in respect to real property does not run with the land and pass by a transfer to a grantee of the party defrauded. Lawrence v. Montgomery, 37 Cal. 183. We therefore conclude that a mere transfer of the title to the property did not operate as an assignment of a cause of action based upon deceit arising out of its purchase by the transferor.

[5, 6] Appellants seek to invoke the rule that corporate entity will be disregarded when it is necessary to prevent fraud and to protect the rights of third parties. Clark v. Millsap, 197 Cal. 765, 242 P. 918. The court does not find the facts which constitute the necessary elements upon which that rule is founded, nor has our attention been called to sufficient evidence to uphold the application of that rule. In the case of Erkenbrecher v. Grant, 187 Cal. 7, 200 P. 641, 642, the court said: "In order to cast aside the legal fiction

of distinct corporate existence as distinguished from those who own its capital stock, it is not enough that it is so organized and controlled and its affairs so managed as to make it 'merely an instrumentality, conduit or adjunct' of its stockholders, but it must further appear that they are the 'business conduits and alter ego of one another,' and that to recognize their separate entities would aid the consummation of a wrong."

In the case of Minifie v. Rowley, 187 Cal. 481, 202 P. 673, 676, the court also held: "Before the acts and obligations of a corporation can be legally recognized as those of a particular person, and vice versa, the following combination of circumstances must be made to appear: First, that the corporation is not only influenced and governed by that person, but that there is such a unity of interest and ownership that the individuality, or separateness, of the said person and corporation has ceased; second, that the facts are such that an adherence to the fiction of the separate existence of the corporation would, under the particular circumstances, sanction a fraud or promote injustice."

We know of no instance where a corporation, as in the instant case, has been permitted to invoke the rule to enforce any obligation or claim of its own. Invariably the doctrine has been applied to actions where a party, who has dealt with the alter ego, attempts to enforce a liability. In such cases the individual or corporation is, in effect, estopped from setting up a defense based upon corporate entity, provided that the necessary elements are present. Furthermore, the finding that the amusement company held a majority of the stock of the holding company does not establish the unity of ownership required. The rule has been applied where an individual owns all the capital stock of a corporation, or where one corporation owns all the capital stock of another except, perhaps, for qualifying shares of directors. In such cases the courts have held that there is a merger of identity, but we have never been directed to any case where the ownership of a mere majority of stock entitled one to invoke the doctrine. In the instant case the amusement company made the contracts and erected the pier before the holding company was organized. The latter erected the ballroom upon the pier, and is permitted to recover judgment for the cost of the ballroom—$65,000. Appellants state that it is no concern of defendants as to how the fruits of the judgment are divided, hence the latter are not prejudiced by such judgment. Appellants, in their opening brief, and under the heading, "Summary of Facts," state that: "The evidence is uncontradicted that the plaintiff, Crystal Pier Amusement Company, had nothing to do with the building of the superstructures on the pier. The ballroom and superstructures on the pier were built by an entirely different and separate corporation, which was not incorporated until March, 1927, and which corporation, the Crystal Pier Holding Company, was not a party to any of the agreements involved in this action, and was not created, and did not exist, until long after any alleged representations had been made, and therefore could not have been a party to the same." The foregoing statement is not questioned or challenged by respondents, and we accept the facts as correct. It is true the findings state that "plaintiffs" erected the superstructures, but this is in conflict with the uncontradicted evidence, and hence is without force or effect and cannot be accepted by this court. But whether plaintiff holding company furnished all or a part of the funds necessary to erect such structures, is immaterial, as no representations were made to plaintiff holding company prior to the execution of the agreements, and hence the latter, as we have indicated, has no cause of action whatever. It follows that defendants are vitally concerned with the matter of who is the proper party to maintain the action. If plaintiff amusement company is the sole plaintiff, the judgment for the damages sustained by reason of the erection of the ballroom cannot stand, as plaintiff holding company holds the title to the same and constructed it.

We therefore conclude that, under the findings here, plaintiff holding company was a stranger to the transaction out of which the alleged fraudulent representations arose, and that the findings do not sustain a judgment in its favor.

[7-11] Upon the matter of damages, the trial court made the following findings: "That such timber and piling treated with cresoil, as hereinbefore set forth, did not and could not withstand the effects and action of the teredo, limnoria and other marine borers of the ocean and of ocean water, so that the said pier is now unsafe for use as an amusement pier or any other purpose, and three-fourths of said pier will have to be torn out and replaced, and said ballroom and structures thereon will have to be torn down and replaced, to plaintiff's and cross-defendants' damage in the sum of sixty-five thousand dollars, the cost of said ballroom, and the further sum of thirty thousand seven hundred fifty ($30,750) dollars, the cost of three-fourths of the length of the said pier, less the sum of three thousand seven hundred eighty-eight and 37/100 ($3,788.37) dollars, the amount unpaid by plaintiffs and cross-defendants to defendants and cross-complainants herein, as hereinbefore set forth, to plaintiffs' and cross-defendants' total damage in the sum of ninety-one thousand nine hundred sixty-one and 63/100 ($91,961.63) dollars."

It thus appears that the trial court adopted as the sole measure of damages the original cost of constructing the pier and superstructure. The measure of the damages for fraud inducing the purchase of property is the difference between the actual value of what the purchaser received and the value which it would have had if the fraudulent representations had been true. Perry v. Ayers, 159 Cal. 414, 114 P. 46. The foregoing rule has been applied to the sale of personal property in Glindemann v. Ehrenpfort, 29 Cal. App. 87, 154 P. 481. Defendants produced evidence to the effect that this property has a present salvage value of $13,357.50. The court makes no findings upon that question. Neither does it find that the present structures are valueless. True, it finds that the pier "is now unsafe for use as an amusement pier or any other purpose," but the rule is "that if the vendee retains the property, without any offer to return, he takes upon himself the burden of showing that the property purchased is entirely worthless, not only for the purpose for which it was purchased, but for every purpose." J. Thompson Mfg. Co. v. Gunderson, 106 Wis. 449, 82 N. W. 299, 302, 49 L. R. A. 859. A finding that a structure is unsafe for use for any purpose is not a finding that the property is valueless. Harron, Rickard & McCone v. Wilson, Lyon & Co., 4 Cal. App. 488, 88 P. 512. It cannot be presumed that the materials of which the structures were made are without any value whatever, even though they are not suitable for the use intended to be made of them by plaintiffs. The court found the cost of the ballroom to be $65,000, but does not find that it was valueless, and yet this sum is allowed in full. Likewise, the court finds the cost of three-fourths of the pier (the portion damaged) to be $30,750, and gives judgment for this amount, less $3,788.87 still due defendants upon the purchase price. The court does not find that plaintiffs were damaged generally, but definitely and explicitly states that judgment is rendered for the cost of each structure—the pier and the ballroom. While we are mindful of the salutary rule which makes it incumbent upon us to adopt such a construction of the findings as will uphold the judgment if it can reasonably be done, nevertheless, the trial court has so tied its measure of damages into the cost of the structures that we cannot reasonably say it took other elements into consideration. Respondents make no attempt to answer appellants' contention that the trial court failed to find the value of the structures, assuming that the representations were false. They cite Hines v. Brode, 168 Cal. 507, 143 P. 729, which lays down the precise rule followed in Perry v. Ayers and Glindemann v. Ehrenpfort, supra. And in the Hines Case the court holds that the price paid may be considered only as evidence of value in an action for deceit. We therefore hold that the finding upon the question of damages cannot be upheld.

The judgment is reversed.

We concur: R. L. THOMPSON, J.; PULLEN, P. J.

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130 Cal.App. 74

PEOPLE v. SHAFER.

Cr. 2283.

District Court of Appeal, Second District, Division 1, California.

Feb. 27, 1933.

1. Licenses 🔑40.

Statute forbidding issuance of certificate of interest in profit-sharing agreement without procuring required permit does not require existence of profit-sharing enterprise at time such interest is assigned to sustain conviction for violating statute (St. 1917, p. 673, § 2, as amended by St. 1931, p. 938).

2. Patents 🔑202(1).

To limited extent assignment of interest in patent right ordinarily carries right to participate in profit from resale or from royalty paid to owners.

3. Licenses 🔑40.

Assignment entitling assignee of interest in patent to participate in any future enterprise arising from invention, assigned greater right than would have passed by operation of law, in absence of assignment, hence sale thereof without required permit was unlawful (St. 1917, p. 673, § 2, as amended by St. 1931, p. 938).

4. Licenses 🔑18½.

Sale of interest in patent right, together with execution of profit-sharing agreement, *held* "issuance of security" within statute requiring permit therefor (St. 1917, p. 673, § 2, as amended by St. 1931, p. 938).

5. Criminal law 🔑1134(6).

If admitted evidence is relevant and material to issue, its reception on wrong theory will not be prejudicial.

6. Criminal law 🔑1134(6).

Where parol evidence admitted in prosecution for violating securities act threw light on defendant's intent, its admission would not be error, though language of written assignment involved was unambiguous (St. 1917, p. 673, § 2, as amended by St. 1931, p. 938).

Appeal from Superior Court, Los Angeles County; Fletcher Bowron, Judge.

🔑For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

W. G. Shafer was convicted for violation of the Corporate Securities Act, and he appeals.

Affirmed.

R. T. Lightfoot, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Warner I. Praul, Deputy Atty. Gen., for the People.

HOUSER, Justice.

On each of five counts contained in an information filed against him, defendant was convicted of the offense of "violation of the Corporate Securities Act" (St. 1917, p. 673, as variously amended). From the ensuing judgment, as well as from an order by which his motion for a new trial was denied, defendant has appealed to this court.

It appears that defendant was the owner of a certain patent right which related to an amusement device, and that, without first having procured a permit from the commissioner of corporations so to do—as evidenced by an instrument in writing—defendant sold to each of several persons a 1/100 interest in said patent right, and that one of the provisions of said instrument of sale was the following: "It being understood for the purpose of this agreement that 1/100 shall be of the value of Five Hundred and No/100 ($500.00) Dollars. And it being further understood that this agreement shall entitle the party of the second part to participate to the amount of his or her interests in any future enterprises of any nature whatever which may grow out of or arise from said invention or any letters patent which may be issued thereon in the United States of America only."

[1] The prosecution of defendant was based upon the contention that, without first having obtained the required permit so to do, under the condition expressed in said instrument the sale of an interest in the patent right constituted a violation of that portion of the act which in substance forbids the issuance of a "certificate of interest in any profit-sharing agreement."

Appellant first contends that the evidence was insufficient to support the judgment for the reason that the prosecution failed to show that at the time the assignment was made any profit-sharing enterprise based upon the patent right was in existence. But in terms, the statute contains no such requirement. On the other hand, the lack of necessity of a present existence of an enterprise from which profits are or may be expected is indicated in the provision in the statute (section 2 as amended by St. 1931, p. 938) that "words used in this act in the present tense include the future as well as the present." See, also, People v. Oliver, 102 Cal. App. 29, 36, 37, 282 P. 813, and authorities there cited.

[2, 3] Appellant also contends that the quoted provision contained in the assignment, to the effect that the assignee was entitled to participate "in any future enterprises" which might "grow out of or arise from said invention," was superfluous for the reason that "the law would have given that right, even if no statement in that regard had been made." It is clear that to a limited extent an assignment of an interest in a patent right ordinarily would carry with it the proportionate right to participate in any profit which might result either from a resale of the patent right, or from any royalty which might be paid to the owners of the patent right by a manufacturer of an article or device to which the patent right related. But an examination of the language of the provision in question discloses that its scope embraces much more than a mere resale of the patent right to some third person, or the payment of a royalty by any person who might be duly authorized to use the patent right in the manufacture or sale of the device described in the letters patent. By its terms, the provision includes "*any* future enterprises *of any nature whatever*, which may grow out of or arise from said invention." Clearly such language is sufficiently inclusive to embrace not only the manufacture of the patented device, but as well its actual operation; to say nothing of the "enterprises" which in the manufacture of the device might be regarded as basic; and it is possible that, having been manufactured, the device to which the patent right relates would find a ready sale and thus afford a financial profit to the owners thereof. Again, assuming that the owner of an interest in a patent right would be entitled to participate in any profits which might arise either from an outright sale thereof to a third person, or from any royalty which might accrue by reason of the permissive use of such patent right, certainly in the absence of some agreement to that effect such owner would not be entitled to participate as a profit-sharer in any and all enterprises which might result from "such invention." For example, in pursuance of the use of the patent right by an authorized third person, although the owner of the patent right might become entitled to a royalty, ordinarily, in the absence of express stipulation to that effect, he would not be entitled to any part of the net profits which might arise from the manufacture and sale of the patented device. Nor, in similar conditions, having been manufactured and sold, would the patentee be entitled to share in any of the profits which might result from the operation of the device. However, the right to participate in "any future enterprises of any nature whatever which may grow out of or arise from" the patent right, a part of which was assigned by defendant, was included within and was a part of the sale made by him. We think it manifest that the

right thus assigned was far greater than that which, in the absence of the all-inclusive language of the assignment, would have passed to the assignee by operation of law.

[4] Appellant urges the point that he was not "an issuer of any security," and consequently that no criminal offense was committed. In that regard, no question is raised as to whether the assignment made by defendant of the interest in the patent right constituted a "security" within the intent of the statute. It is argued by appellant that since the patent right was originally created by the United States government, any division of that right would not result in the issuance of a security. But even assuming (without deciding) the correctness of the position thus taken by appellant, it is apparent that a conclusion in favor of his contention in that regard would not relieve him from the consequence of his act. He does not go far enough in his statement of facts. His alleged offense consisted, not necessarily in that he separated the patent right into several parts and then sold such divided interests; but that in connection with such sale, in violation of the terms of the statute, he issued a "security," in that he executed a "profit-sharing agreement" without first having obtained from the constituted authority a permit so to do. The division of the original patent right into fractional parts, the sale thereof, together with the additional right conferred upon the purchaser of participation by him "in any future enterprises," etc., was no part of any original creation by the United States government, but was solely the act of defendant; from which it follows that his point cannot be sustained.

[5, 6] Finally, appellant asserts that prejudicial error was committed by the trial court in the admission of "evidence in parol to vary the terms of the assignment." In that connection, it is claimed that some confusion existed in the mind of the trial judge as to the theory on which the questioned evidence was admitted. However that may be, it is clear that, although the "theory" on which evidence may be admitted may be untenable, if the admitted evidence be relevant and material to the issue, its reception on a wrong theory will not be prejudicial. In the instant matter the evidence to which attention has been directed more particularly related to a determination of the intention of defendant in the premises. If it is a fact that the language of the assignment is perfectly clear and that no evidence was necessary to explain it, nevertheless, if the evidence threw some light on the purpose and intent of defendant, no error was committed. In other words, if the language was free from ambiguity, it would seem plain that defendant had violated the provisions of the statute as hereinbefore set forth. On the other hand, if in fact the language employed in the instrument was susceptible of two or more constructions, each differing from the other, or from each of the others, then not only was the evidence proper for the purpose of ascertaining the sense in which the language was used, but as well for the purpose of establishing, if possible, the guilty intent of defendant.

No prejudicial error appearing in the record, it is ordered that the judgment and the order by which the motion for a new trial was denied be, and the same are, affirmed.

We concur: CONREY, P. J.; YORK, J.

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130 Cal.App. 269

PEOPLE v. LINEHAN et al.

Cr. 1699.

District Court of Appeal, First District, Division 2, California.

March 7, 1933.

1. Criminal law 🔑572.

Evidence sustained convictions for robbery in first degree, as against alibi defense.

2. Criminal law 🔑1186(4).

In robbery prosecution, alibi instruction *held* not prejudicial, notwithstanding it assumed commission of crime, referred to how alibi is "established," and referred to alibi as "defense" (Const. art. 6, § 4½).

Instruction was not prejudicial because assuming the commission of the crime, since the uncontradicted and unimpeached testimony of several witnesses showed that a robbery had been committed; and the use of the word "established" could not have misled the jury, in view of the instruction that jury must find accused not guilty if, after hearing all the evidence in the case, they entertained a reasonable doubt as to the identity of the guilty parties; and the use of the word "defense," although not strictly accurate, was not in any manner prejudicial when the instruction was read with other instructions given.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

William Linehan, Thomas Cozzo, and Charles Ocken were convicted of robbery in the first degree, and they appeal.

Affirmed.

Nathan C. Coghlan, of San Francisco, for appellants.

U. S. Webb, Atty. Gen., and W. R. Augustine, Deputy Atty. Gen., for the People.

SPENCE, Justice.

The defendants were convicted of robbery of the first degree. They have appealed from the judgments of conviction and from the order denying their motion for a new trial.

[1] The robbery was committed by three men shortly after 9:30 on the morning of May 7, 1932, in an establishment known as the White Front Market located at 18th and Bryant streets in San Francisco. A lunch and delicatessen counter was located on one side of this market and a butcher's counter on the other side. At the time of the robbery there were five persons present in addition to the three perpetrators. These five persons include the two who operated the lunch and delicatessen counter, namely Thomas Lagares and Grace Helfrich, and two others who operated the butcher's counter, namely Charles Scheufele and Leonard Mullane. These four were called as witnesses for the prosecution. The fifth person present was an old lady customer about 82 years of age who was not called as a witness.

The testimony of the witnesses for the prosecution showed that the defendant Linehan entered the market alone and ordered something to eat at the lunch counter. A few minutes thereafter defendants Cozzo and Ocken entered and with drawn guns announced: "This is a hold up." Defendant Linehan joined the other defendants and the three proceeded with the robbery, taking money from the cash registers and also from the person of Mr. Lagares. On the afternoon of the same day the three defendants were arrested while driving out of the city along the Bay Shore highway. At the time of their arrest there was a grip in the car containing two loaded guns. Three of the witnesses for the prosecution positively identified all three of the defendants as the men who perpetrated the robbery. The fourth witness identified two of the three men. The defendants offered evidence tending to show that all three men were in another part of the city at the time of the robbery.

On this appeal appellants urge but two grounds for reversal. They first contend that the evidence does not sustain the verdict. A recital of the above-mentioned testimony is a sufficient answer to this contention. While appellants point to certain discrepancies and inconsistencies in the testimony of the several victims of the robbery, there was nevertheless abundant evidence to sustain the verdicts of conviction.

[2] Appellants further contend that the trial court erred in instructing the jury on the subject of alibi. In this connection appellants direct our attention to the following instructions which were given by the trial court:

"The court instructs the jury that in this case the defense contends that the defendants were not present at the time and place of the commission of the offense with which they are charged. This defense is what is known to the law as an alibi.

"An alibi is established by showing that the person charged with a crime was at some other place than that where the crime was committed at such a time that he could not have been at the place of the commission of the crime at the time it was committed, or that he was in such a position at such a time that he could not have perpetrated the crime."

In addition to the foregoing instructions referred to by appellants, the trial court gave among others the customary general instructions on reasonable doubt and also gave the following specific instruction: "The court instructs the jury that if, after hearing all the evidence in this case, you entertain a reasonable doubt as to the identity of the persons who it is claimed by the People did the things which are described in the information, it will be your duty to find the defendants not guilty."

In support of their last-mentioned contention, appellants cite and rely upon People v. Roberts, 122 Cal. 377, 55 P. 137, People v. Ross, 89 Cal. App. 132, 264 P. 314, and People v. Derwin, 78 Cal. App. 781, 248 P. 1029. In each of the cases cited the court comments upon certain instructions relating to the defense of alibi, but we find none of these authorities directly in point. A reversal was had in People v. Roberts, supra, because of erroneous instructions on this subject, but the judgments were affirmed in the other two cases cited. Further comment upon various instructions together with reference to the decision in People v. Roberts, supra, is to be found in People v. Arnold, 199 Cal. 471, 250 P. 168, People v. Hammer, 74 Cal. App. 345, 240 P. 56, and People v. Froehlich, 65 Cal. App. 502, 224 P. 471, in all of which cases the judgments were affirmed.

We find no prejudicial error in the giving of the challenged instructions. Said instructions are practically entirely free from the objectionable features found in the instructions given in the various cases to which reference has been made. Appellants insist that the instructions given herein were prejudicial because the trial court assumed in said instructions that a crime had been committed. An instruction embodying a similar assumption was held to be erroneous in People v. Roberts, supra, but as pointed out in People v. Froehlich, at page 508 of 65 Cal. App., 224 P. 471, 473, "the case of People v. Roberts, supra, was decided before the adoption of section 4½ of article 6 of our Constitution." In the present case the uncontradicted and unimpeached testimony of several witnesses showed that a robbery had been committed. The defense made no claim to the contrary but relied solely on their claim that appellants were not present at the time. Under the circumstances no prejudice could result from the assumption found in the instructions given. Appellants further insist that it was prejudicial to instruct the jury "that an alibi is a defense which must be established by the defendants." The first answer to this contention is that the jury was not instructed that anything "must be established by the defendants." While the word "established" is used in one of the instructions, the jury was also instructed that they must find the defendants not guilty "if, after hearing all the evidence in this case, you entertain a reasonable doubt as to the identity of the persons who it is claimed by the People did the things which are described in the information." A reading of the entire charge convinces us that the jury was fully and fairly instructed and we are satisfied that the use of the word "established" could not have misled the jury. We are further of the opinion that the use of the word "defense" in one of said instructions, although not strictly accurate, when used with reference to alibi, was not in any manner prejudicial when said instruction is read with the other instructions given. People v. Ross, supra, page 140 of 89 Cal. App., 264 P. 314.

The judgments and order appealed from are and each of them is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

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130 Cal.App. 234

MASONIC TEMPLE ASS'N OF SACRAMENTO v. STOCKHOLDERS AUXILIARY COPORATION.

Civ. 4690.

District Court of Appeal, Third District, California.

March 2, 1933.

Hearing Denied by Supreme Court May 1, 1933.

1. Landlord and tenant 🔑160(2).

Option granting lessee privilege to renew lease and authorizing remodeling of building on condition premises were restored to original condition at termination of lease required that lessee restore building though lease was not renewed.

2. Contracts 🔑147(3).

Nature of instrument must be determined by ascertaining intention of contracting parties from consideration of entire document.

3. Landlord and tenant 🔑160(2).

Benefits lessee derived from remodeling building for purpose of banking business *held* sufficient consideration for its promise to restore property to original condition, at termination of lease (Civ. Code, § 1605).

4. Appeal and error 🔑932(1).

In absence of evidence to contrary, reviewing court must assume it was reasonably necessary for lessors to expend for restoring property to original condition, amount which judgment for damages to leased premises awarded them.

Appeal from Superior Court, Sacramento County; George H. Thompson, Judge.

Action by the Masonic Temple Association of Sacramento against the Stockholders Auxiliary Corporation. From a judgment for plaintiff, defendant appeals.

Affirmed.

Louis Ferrari, C. H. White, and Tobias J. Bricca, all of San Francisco, and McLaughlin & McLaughlin, of Sacramento, for appellant.

Butler, Van Dyke, Desmond & Harris, of Sacramento, for respondent.

Mr. Justice R. L. THOMPSON, delivered the opinion of the court.

Judgment was rendered in favor of the plaintiff for costs incurred in restoring to its original condition demised premises after the termination of a lease. The interior of the building which is situated on the leased premises was altered by the lessee pursuant to an agreement to restore the property to its original condition at the expiration of the lease. The appellant claims that the obligation to restore the premises is conditioned upon its exercise of an option to renew the lease for an additional five-year term. The option was not exercised. The appellant refused to restore the building. This suit depends upon the construction of the agreement under which the building was remodeled.

The plaintiff, a corporation, owns lot 5 and the east twenty feet of lot 6, in a block bounded by I and J and Eleventh and Twelfth streets in Sacramento. September 11, 1923, the plaintiff executed a five-year lease of a portion of this lot, together with the building which is situated thereon, to the Bancitaly Corporation, for $150 rental per month, to be used for the purpose of conducting a banking business. This lease was immediately assigned to the defendant corporation. By written consent of the plaintiff, the interior of the building was radically altered by the appellant, at its expense, and occupied as a banking business during the entire term of the lease. The remodeling of the building included the installing of a concrete vault, toilets, sinks, and radiators;

the removal of partitions and a stairway; the laying of marble floors and the closing of two entrances into the building. The lease contains the usual provisions that all alterations of the building are to be made at the expense of the lessee and only with the written consent of the owner, and that at the termination of the lease the premises shall be surrendered in as good condition as reasonable use thereof will permit. December 17, 1924, pursuant to the requirement of the original lease, the appellant secured a written authorization from the plaintiff to make certain alterations in the building. This instrument was termed an "option." In addition to authorizing the remodeling of the building, it granted the appellant the privilege of renewing its lease at the termination thereof for another five-year term upon conditions therein expressed. The chief purpose of the written document was apparently to secure a permit to remodel the interior of the building to adapt it to use as a banking business. Regarding the obligation for the cost of the alterations and the restoration of the building to its original condition at the termination of the lease this instrument provides that: "It is agreed that in the event of the alteration or improvement of said premises by the lessee with the consent of the lessor, then all such expenses of alteration shall be paid and borne by the said lessee, the Stockholders Auxiliary Corporation; and upon termination of said lease the said premises shall be restored to the condition in which the same now are, at the option of said lessor or its successors in interest."

The option to renew the lease for an additional five-year term was not exercised by the appellant. At the end of the original five-year term of the lease, the possession of the property was surrendered and the lease was abandoned. The plaintiff demanded of the appellant restoration of the property to its original condition, which was refused. The plaintiff expended the sum of $4,802.02 in restoring the building to its original condition. Since the building was remodeled to adapt it to the use of a banking business, it became reasonably necessary to restore the interior in several material respects to make it rentable for ordinary purposes. This suit was instituted to recover the cost incurred in restoring the building to its original condition. The cause was tried upon a written stipulation of facts. Judgment was rendered in favor of the plaintiff. From this judgment the lessee has appealed.

[1, 2] The appellant contends it is not obligated to restore the building to its original condition since the written consent to make the alterations was coupled with and dependent upon an option to renew the lease for an additional five-year term, which privilege to renew the lease was not exercised; that the option agreement was executed without consideration; and that the alterations were a benefit and not a detriment to the property.

This appeal depends upon the construction of the written instrument, dated December 17, 1924, which authorizes the making of the alterations. In spite of the fact that this document is labeled an "option," it is apparently more than a mere option. In conformity with the terms of the lease, this written authorization for the alterations was procured. Without this written consent of the owner the changes in the building could not have been lawfully made. These alterations were allowed upon condition that "said premises shall be restored to the condition in which the same now is," at the expiration of the lease. The chief object of this written instrument was to obtain consent of the owner to make the changes in the building. A reading of the entire document impels this conclusion. The authorization for alterations is coupled with an option for the appellant to renew the lease for an additional five-year period of time upon terms which are therein specified. The instrument does not provide that the necessity of restoring the building to its original condition shall depend upon the exercise of the option to renew the lease. We are of the opinion the document may not reasonably be so construed. The option to renew the lease should be held to be separate and distinct from the authorization to make alterations in the building. This appears to have been the intention of the contracting parties. The mere fact that the instrument is designated an "option" is not necessarily controlling. The nature of the instrument must be determined by ascertaining the intention of the contracting parties from a consideration of the entire document. 22 Cal. Jur. 1097, § 147; Lundy Furniture Co. v. White, 128 Cal. 170, 60 P. 759, 760, 79 Am. St. Rep. 41. In the case last cited it is said: "The calling of this agreement a 'lease' did not make it such. Reference is to be had to the instrument itself, to a reading and consideration of all its terms, conditions, and covenants, to determine its true character."

[3] There was an adequate consideration for the execution of this agreement. The appellant enjoyed for the full term of its original lease the benefits of the use of the remodeled building which was thereby adapted to its special purpose of conducting therein a banking business. The benefits derived by the appellant from the remodeling of the building constitute a sufficient consideration for the promise to restore the property to its original condition at the termination of the lease. Section 1605 of the Civil Code provides: "Any benefit conferred, or agreed to be conferred, upon the promisor, by any other person, to which the promisor is not lawfully entitled, or any prejudice suffered,

or agreed to be suffered, by such person, other than such as he is at the time of consent lawfully bound to suffer, as an inducement to the promisor, is a good consideration for a promise."

[4] It is true that some of these changes in the building were a permanent benefit to the structure. It is reasonable to assume, however, that some of them became a detriment to the property, rendering it less desirable for ordinary business purposes. The closing of exits, the removal of partitions, and other alterations which adapted the building to a banking business made it less suitable for other enterprises. In the absence of evidence to the contrary, we must assume it was reasonably necessary for the owners to expend the amount for which the judgment was awarded in restoring the property to its original condition.

The judgment is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

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130 Cal.App. 79

NELSON et al. v. WESTERGAARD et al.

Civ. 7613.

District Court of Appeal, Second District, Division 2, California.

Feb. 27, 1933.

Rehearing Denied March 27, 1933.

Hearing Denied by Supreme Court April 27, 1933.

1. Automobiles 🔑181(1).

Automobile host is guilty of "gross negligence" toward guest under the vehicle act when he fails to exercise slight care (St. 1923, p. 517, § 141¾ as added by St. 1929, p. 1580).

[Ed. Note.—For other definitions of "Gross Negligence," see Words and Phrases.]

2. Automobiles 🔑244(20).

Evidence *held* to show that automobile host was "grossly negligent" toward guest within meaning of vehicle act (St. 1923, p. 517, § 141¾ as added by St. 1929, p. 1580).

Evidence disclosed that host swerved to left of cars which had stopped at intersection to permit motorist to cross highway and collided at a speed of from 35 to 40 miles an hour with such motorist.

3. Trial 🔑295(6).

Instructions, which set forth ordinary rules before stating how such rules had been changed by vehicle act, were not erroneous where instructions as a whole clearly stated duties and liabilities of automobile host under such act (St. 1923, p. 517, § 141¾ as added by St. 1929, p. 1580).

4. Trial 🔑251(8).

Failure to define ordinary negligence was not error in action against automobile host under vehicle act (St. 1923, p. 517, § 141¾ as added by St. 1929, p. 1580).

5. Automobiles 🔑246(3).

Instruction that "willful misconduct" would imply purposeful disregard of care and diligence which automobile host owed guest was not error, where court had previously instructed jury as to degree of care which host owed guest (St. 1923, p. 517, § 141¾ as added by St. 1929, p. 1580).

[Ed. Note.—For other definitions of "Willful Misconduct," see Words and Phrases.]

6. Automobiles 🔑181(1).

"Gross negligence" implies want of slight care or exercise of so slight degree of care as to justify belief that there was indifference to duty owing by host to automobile guest (St. 1923, p. 517, § 141¾ as added by St. 1929, p. 1580).

7. Automobiles 🔑181(7).

Whether collision occurred in residential district was immaterial where motorist violated speed laws and law against reckless driving (St. 1923, pp. 553, 557, § 113, as amended by St. 1927, p. 1436, § 30, and § 121 as amended by St. 1929, pp. 539, 540, § 49; St. 1923, p. 517, § 141¾ as added by St. 1929, p. 1580).

8. Automobiles 🔑246(3).

Refusal of instruction, in guest's action against automobile host, that "gross negligence" was an utter disregard of the rights of others, *held* not error (St. 1923, p. 517, § 141¾ as added by St. 1929, p. 1580).

9. Appeal and error 🔑1170(9).

Errors, if any, of trial court relating to care owed automobile guest by host, did not require reversal where verdict for prevailing party was demanded (Const. art. 6, § 4½).

Appeal from Superior Court, Los Angeles County; John L. Fleming, Judge.

Action by George R. Nelson and another against Waldemar C. Westergaard and another. From judgment for plaintiffs against named defendant only, the named defendant appeals.

Affirmed.

W. I. Gilbert, of Los Angeles, for appellant.

Otto A. Gerth, of Los Angeles, for respondents.

WORKS, Presiding Justice.

This is an action for the recovery of damages for personal injuries suffered by plaintiff Henriette Nelson. It was tried by a jury. Defendants are sued as joint tort feasors. Judgment went for plaintiffs against defendant Westergaard alone, and he appeals.

Mrs. Nelson was riding in a sedan automobile with Westergaard, as his guest. Westergaard was at the steering wheel and operated the car. Mrs. Nelson sat beside him, while the father of Westergaard occupied the rear seat. The car was proceeding eastward along Wilshire boulevard in Los Angeles until it reached Highland avenue, a thoroughfare which intersects Wilshire, at which point occurred the catastrophe out of which the action arises. There is a "jog" in Highland at the place where it intersects Wilshire. Coming into Wilshire from the southward at a certain point, Highland leaves that boulevard on the north at some little distance westward from the location of its southern entry into it. As the Westergaard car neared the intersection from the westward, respondent Dryden approached Wilshire from the southward, also in a sedan car, coming along Highland; his purpose being to enter into Wilshire, make the left turn necessary to enter the northerly prolongation of Highland therefrom, and proceed thence along that thoroughfare. Dryden sat at the driver's seat of his car. His wife was at his right, on the front seat. Senator R. F. Del Valle sat in the middle of the rear seat. As required by a "boulevard stop" sign at the intersection, Dryden brought his car to a full stop before entering Wilshire. The boulevard appearing sufficiently clear, after a pause of a few seconds Dryden started his car and proceeded into Wilshire, indicating by appropriate signal his intention to make the left turn necessary to carry his machine into the northerly prolongation of Highland. As he progressed, two cars came along Wilshire from the westward and came to a full stop at the intersection, awaiting the completion of his maneuver. One of these stood from four to six feet from the southerly curb of Wilshire, the other at its side and toward the north. Westergaard came up from behind these two cars. For some distance he had been driving at least comparatively close to the southerly curb of Wilshire, but despite the fact that the two cars were at a standstill he made the necessary swerve toward the left to pass them and struck Dryden's car at the second door toward its rear. The impact occurred from six to ten feet southward of the center line of Wilshire, which at that point is in width seventy feet from curb to curb and one hundred feet over all. At the moment of the crash Dryden's car, having just fairly started after its stop at the Wilshire southerly line, was proceeding at the rate of from five to seven miles the hour. There is no substantial dispute in the evidence that for some considerable distance before he reached the intersection and, indeed, up to the very instant when the two cars came together, Westergaard was traveling at the rate of from thirty-five to forty miles per hour.

This assertion requires a particular examination of the facts bearing upon the question, for the reason that Westergaard testified at one place in the record that his car was traveling at a speed of less than ten miles the hour at the moment of impact between the two vehicles, "possibly five or six," and again, "I think it was about five or six." We shall show from the record conditions which demonstrate that these statements are unworthy of belief, but as we cannot charge Westergaard with willful falsification, we shall first show from his own testimony circumstances which tend somewhat to indicate that his recollection of the events surrounding the catastrophe was extremely clouded, as it well might have been, because of the appalling nature of the occurrence and because of the shakeup he must have received. That it was appalling we shall show by later statements from the record. First, then, as to Westergaard's state of mind during and immediately after the accident as somewhat indicated by himself. He said: "I was too busy trying to avoid hitting him to pay very much attention to the brakes. I haven't a very definite recollection of it, except that I do know that I applied the foot brakes as I approached; as I saw danger looming up." Dr. Kocher, a wholly disinterested witness, testified at the trial. His testimony is so direct and circumstantial, agrees so thoroughly with that of other witnesses, that he was undoubtedly at the scene. He testified to a conversation he had with Westergaard just following the accident. Westergaard said concerning Kocher: "I am not aware that I made any statement to him. I did not make any statement to him. I have no recollection of ever having seen the man until I saw him here in the courthouse." Mrs. Dryden testified to a conversation with Westergaard. As to this matter the latter said: "She said to me, 'What are you trying to do', or something to that effect. So far as I recall—I do not pretend to recall everything—I said something about going down with my father to the train and I also expressed my regret for what had taken place. I do not recall that I said that I was to blame for the accident; so far as I know, I did not. So far as I know, of my own memory."

We shall now recite the testimony bearing upon occurrences surrounding the catastrophe and shall later describe the state of the two cars after they had collided. Police Officer Slope arrived on the scene soon after the accident. He said: "I asked Mr. Westergaard how fast he was driving. He told me between 35 and 40. That he was going east on Wilshire and came around two cars and saw Mr. Dryden crossing the boulevard.

He swerved to the left trying to go to the rear of Mr. Dryden, but Mr. Dryden stopped, he claimed, and he crashed into the rear end. He said he slowed down; I could not find any skid marks, although I looked for them; there were no skid marks. * * * Mr. Westergaard said he was going 35 or 40 miles an hour. I just told him it was kind of fast going down Wilshire at the intersection." The statement of Westergaard to the officer that Dryden stopped his car requires brief attention before we proceed. That statement and testimony of Westergaard to the same purport comprise the entire showing of the record to that effect. The testimony of other witnesses was that, after leaving the southerly line of Wilshire, Dryden proceeded at a uniform speed of from five to seven miles the hour until his car was struck. Dryden did not see Westergaard's car until it was between ten and fifteen feet away from him. Senator Del Valle first saw it at a distance of about eight feet, and Mrs. Dryden's first view of the car was when "it was right up against us." Officer Slope also testified: "On the pavement there were a couple of brush marks where the car had been pushed a little bit; shove marks. It was the Chandler; Mr. Dryden's car. Those marks were caused from the wheels, where the wheels rest; and the car was pushed, causing a friction on the concrete; that would indicate a side skid. It was not over two or three feet; it was caused by both wheels; front and back; it was to the east. You don't call it skid marks as a rule; we don't call that skid marks as a rule; we call that skid marks where the brakes are applied. A side skid would describe this all right. * * * I could not find a mark on the pavement to show where Dr. Westergaard had slid his car forward an inch. I could not find any indication where he had skidded an inch." Dr. Kocher was driving his car westward on the northerly side of Wilshire at the time of the accident. His vehicle—whether standing or moving the record does not show—was at a point where the east property line of that part of Highland south of Wilshire, if projected, would pass through its location not far from the north curb of Wilshire. In other words, he was diagonally across the intersection, formed by Wilshire and the "jogging" Highland, from the two cars which had stopped at the southwest to allow Dryden to make his left turn and cross. Dr. Kocher testified: "Dr. Westergaard's car hit Mr. Dryden's car on the left, the middle left; that is where he hit the car. It would be the left front of Westergaard's car that hit Dryden's car. After making this stop at Wilshire, Dr. Westergaard's car was moving at a great speed; around 35 to 40 miles an hour. Dryden's car was barely moving. * * * At the time of the impact, the two wheels on the left side of Dryden's car left the ground; the car heads back toward me. If it was pushed on the ground, and how far, I don't know. * * * I did not see Dr. Westergaard apply his brakes to his car; I couldn't tell any difference as to his slowing up; I couldn't swear to it." Dr. Kocher says he talked with Westergaard: "He said, 'I was in a hurry to catch a train; it was totally my fault.'" The witness said he first saw Westergaard's car when it was 500 feet from the "west curb line of Highland," but a mark he made on a map in the record indicates, according to figures thereon, a distance of not more than one hundred feet. Dr. Kocher went on: "From the time I first saw Dr. Westergaard's car up to the time of the collision I did not notice any difference in his speed. * * * I observed the Dryden car from the time it entered Wilshire up to the time of the collision. I would approximate his speed at five miles an hour. * * * I saw Westergaard's car go 200 feet while Dryden's car went 35 feet. * * * I did not see any skid marks where this Ford sedan [Westergaard's car] went into the side of the Chandler."

We come now to the testimony of Dryden. He said: "I should judge I was driving from five to seven miles an hour as I started to enter Wilshire boulevard. * * * There was traffic going down the street from the west, and as I gradually pulled out onto the boulevard the traffic came to a stop at the street line of Highland avenue to let me pass. * * * As I started forward there was no cars in front of me going up and down Wilshire boulevard. * * * The cars had stopped on the street line of Highland avenue. Two cars had stopped; they were at my left. * * * I don't think he [Westergaard] was traveling less than 35 miles an hour. At the time I first saw him Mr. Westergaard was in the intersection of Wilshire and Highland." Dryden spoke to Westergaard after the accident: "I asked Mr. Westergaard what he was trying to do. He said, 'I don't know. My, I never have done such a thing in my life before. I know I am to blame. If there is anything to do that I can make it right, I will endeavor to do it.'" The witness further said: "I don't believe that he [Westergaard] applied the brakes to his car that I knew or know of. I didn't hear him. He did not give me any alarm with the horn or sound of his car. * * * As to the time that elapsed between the time that I first saw Dr. Westergaard and the impact—I saw him and then he hit me; that is all there was to it. At the time he hit me my speed was just the same as I started out; I had not changed my speed any faster. I was just going the same way. * * * I did not see any [cars] stop except the first two as I was driving out into the street; I saw the first two; that was all it was necessary for me to see. I saw the first two stop and I thought the balance of them would stop." Senator Del Valle was a witness at the trial. He said: "I think Mr. Dryden was driving about six, or seven miles as he proceeded out into the intersection. * * * Before the impact I saw his [Westergaard's] car when it was a very short distance from ours; about eight feet. * * * I have no opinion as to the speed of this car from the time I saw it; I would say it was going very fast, but I could not say as to the number of miles per hour." Mrs. Dryden testified that as her husband started to enter Wilshire he "put his hand out and went along very slowly." She remarked to Westergaard just after the accident: " 'What were you trying to do? Look what you have done.' He said, 'I am awfully sorry, lady, but I was trying to catch a train.' " Mrs. Nelson testified that just before the Westergaard car reached the Wilshire-Highland intersection she had looked at her watch. Then she said: "There were some cars going ahead of Mr. Westergaard going in the same direction. I know, when I looked at my watch, there were two cars ahead of us. That was the last I remember. * * * I don't know anything about the accident. I looked at the watch and the next thing I know was when, I saw Senator Del Valle (I didn't know his name) standing in the road with a bleeding head; that is the next I know. I don't remember anything from the time I looked at the watch until I saw him on the street. It must have been a very short time, of course. When I looked at my watch I know that we were very near the curb, or [sic] near that nobody could come between; and the next I saw him, standing in the road. I don't know anything about how far we were from Highland. We were in the intersection when I saw him standing there. We had not reached the intersection when I looked at my watch." And shortly afterward she said: "I heard Dr. Westergaard make some remarks concerning the accident; I came to, then. He was talking to Mrs. Dryden when I heard him. He said he was awfully sorry; that he was going to make a train with his father; was going to the train. He was awfully sorry that it happened. That he was going too fast."

The elder Westergaard, the occupant of the rear seat in his son's car, testified: "I would say that Mr. Westergaard was driving fast at the time of the collision; middling fast, I guess. * * * By 'middling fast' I mean just the way the crowd goes, generally." Westergaard himself, the driver of the car, testified: "When I got to within 100 feet of the intersection I was driving perhaps 30 to 35 miles an hour; that is my best judgment. There were other machines moving in traffic with me, going in the same direction. So far as I recall, I was following the general speed that obtained along there at that time. As I approached the intersection, I came within perhaps 20 or 30 feet of it, roughly—these figures are bound to be rather rough—because things happened very quickly at a time like that—I noticed a car coming from the right, coming in from the right hand on Highland; coming in on Highland from the right. I started to move to the left and saw that the car continued to move regardless of my turn; and so I swerved in the other direction; and in the meantime we were getting uncomfortably close together, and so I attempted to swerve right, and apparently the other car had either very nearly stopped or stalled, or something, I couldn't quite tell. I was too busy trying to avoid hitting him to be able to say that. And this collision occurred." Westergaard testified further: "I was perhaps ten or twenty feet from Highland when I saw the Dryden car coming into Wilshire. I do recall that I gave my deposition a while ago. I did not say that I was a distance of 100 feet away from the intersection when I first saw the Dryden car; I think I said 50; I said I wasn't sure. It might have been 50 to 100 feet. As I approached Highland avenue I saw the Dryden car just going into the intersection. At that time I was not quite in the intersection and the Dryden car was near the middle line of Highland going into the intersection. At the time I saw this car coming into Wilshire boulevard I was a distance of from 50 to 100 feet away; and that is true, regardless of what I said in the deposition. Then I first swerved to the left and I was afraid I was going to hit him in front and then I swerved to the right. I finally did hit him toward the rear." And again: "I did not give Mr. Dryden any warning of a horn, but I did apply the foot brakes. I did not find any skid marks in the wake of my car; the policeman and I looked. I showed the policeman where I came along on the cement street so far as I recall; he asked me about that. We could not find any skid marks."

We have reserved for separate consideration the matter of the personal injuries suffered by those concerned in the accident, for severe casualties occurred to occupants of both cars. Although Dryden occupied the driver's seat in his car and the vehicle was struck toward the rear, he suffered a fractured rib. Dryden testified, in part, concerning his wife: "Her leg was hurt and skinned a little bit; her stockings tore off. * * *" Mrs. Dryden said: "The force of the impact threw me out of the door. My side must have hit the handle of the door knob and it threw me out; and the next thing I knew I was down on the street. I was injured." Senator Del Valle, it will be remembered, was in the middle of the rear seat of the Dryden car. He testified: "The Dryden car was struck on the back door. I felt the impact, and it sent me against the glass in the back seat, and I broke the glass with my head. The impact was on the righthand side of the car; I was rendered unconscious at that moment. I don't remember anything at that time. I came to about three-quarters of an hour afterwards." Dryden testified: "The impact threw Senator Del Valle's head through the glass in the right hand side in the rear; it cut his head open across the top." The elder Westergaard said of his own experience at the moment of the collision: "When this impact took place it broke my glasses and I drove against his seat and so I bruised my arm a little bit; my left arm. After the impact I found myself in front of my son's shoulders, in the front seat of the car. He was in his seat, of course. The three of us kept the seats; I was just shoved into the front seat with my arm; I didn't fall down or anything like that." This is somewhat difficult to comprehend, but Westergaard the younger testified: "At the time of the impact I found my father huddled up on my shoulders." Whether Westergaard himself was physically injured the record does not show. If he was not, he was the only one of the six concerned who escaped. Mrs. Nelson suffered the most severe casualties of all. She, herself, and her physician testified as to the nature of her injuries. Her left knee was broken and the left leg from knee to hip was badly bruised. The discoloration caused by this bruise lasted "a good many weeks." Her left shoulder was dislocated and she could not move her left arm. She suffered a painful injury to her breast which made it difficult for her to breathe, the pain persisting two or three weeks. Her left wrist was cut and bleeding. "I hurt my right elbow, and there were many weeks before I could ever lift my hand up here; I could not hold anything in that hand." Her right knee was bruised and at the time of the trial it still pained her. Much of her apparel was ruined and her watch was stopped. "I had a big bump on top of my head; I went through the windshield." As a result of her injuries she was confined to her bed for a week or two and was in bed the greater part of the time for five weeks. She found it necessary to use crutches, but began to employ them only after nine weeks. After she discarded the crutches she used a cane. She testified: "I use a cane even up to now; I use it when I go on rough ground." Her physician testified: "The condition of her knee is extremely chronic and may be permanent."

It has already been shown by the testimony of Dr. Kocher and Officer Slope that when the two cars crashed together both the left wheels of Dryden's vehicle rose from the ground and that it was pushed, or made a "side skid" of from two to three feet. This alone is enough to show that Westergaard's car was traveling no mere five or six miles the hour at the time of the collision. But let us see, in addition, what was done to both cars by the impact between them. Dryden testified: "As to my car, the running board on the left hand side was broken; and the fender on the left hand side also; the left rear door was jammed in, and the frame was bent; the rear axle was sprung; and the glass broke out of the window on the right side next to the rear seat. The impact was so hard it cracked the battery." The other car was damaged in a much greater degree, as this testimony of Westergaard will show: "After the impact my car was towed to a garage; it had lost its own running power. As to the damage to the car, the left front end was pretty well jammed up one way or other and the radiator was smashed and jammed in and the front left headlight was broken. I think the bumper was bent and the body frame was bent also. * * * The entire frame of my car had to be straightened and the bumper had to be straightened and I had to install a new horn as a result of this accident. I had to replace the windshield glass, and I had to replace the left front fender and had to replace the front axle entirely."

This somewhat exhaustive recitation of the evidence is necessary for the general purposes of the decision, as well as to demonstrate that there is no substantial dispute of the evidence to the effect that at the moment of the collision Westergaard's car was moving at the rate of at least thirty-five miles an hour. It is impossible that a car moving at five or six miles an hour could have wrought the havoc that this engine of destruction did. It is much to be doubted whether Westergaard ever applied his brakes, despite his assertion that he did. It is certain that if he did the application was unsuccessful. It is quite likely, in what was surely a great flurry, a most unnerving moment, that he attempted to apply the brake and missed it. Indeed, any hypothesis is possible rather than the one that he applied the brake with any measure of success whatever. Finally, we conclude that there is nothing in the record which conflicts with the evidence that Westergaard struck the Dryden car while he was running at the same speed his car had maintained for some distance before it reached the intersection of Wilshire and Highland.

[1, 2] It is in effect provided by section 141¾ of what is generally known as the California Vehicle Act that a guest passenger in an automobile, or his heirs, can recover damages from the driver or owner of the car only "for injury to or death of such guest proximately resulting from the intoxication, wilful misconduct, or gross negligence of such" driver or owner. St. 1929, c. 787, p. 1580. It is contended by appellant, because of the language of this enactment, that the evidence was insufficient to support the

verdict of the jury and that the trial judge erred in refusing to grant a motion for nonsuit which was presented to him. These points are to be resolved upon the question whether Westergaard was guilty of gross negligence. There is no intoxication in the case and the question of willful misconduct may be disregarded. One is guilty of gross negligence when he fails to exercise slight care. This statement is so well settled under all the authorities as to be practically axiomatic. If, then, Westergaard exercised slight care, as shown by evidence undisputed and uncontradicted, the verdict is unsupported and the motion for nonsuit should have been granted. We think, however, there is no substantial evidence of the exercise of slight care in the record, much less a conflict or dispute upon the question. To state it conversely, the evidence of lack of slight care is overwhelming and occupies the field practically by itself. There is no evidence in the record, upon the part of Westergaard, which was worthy of the serious consideration of the jury. The undisputed physical facts of the case meet him at every turn. As we have so thoroughly reviewed the evidence, with a view to the consideration of the two points now under the glass, as we have come to the conclusion already expressed as to the one-sided aspect in which we view the evidence, further discussion of the two points would be useless. Appellant was grossly negligent in the operation of his car at the time when Henriette Nelson was injured.

[3] Appellant complains of various instructions which were given to the jury, because, it is said, the jury was told in them that Westergaard owed to Mrs. Nelson the exercise of ordinary care while she was but a guest passenger in his car. Some parts of the instructions, when severed from the remainder, will undoubtedly bear the construction appellant condemns, but we think the charge as a whole clearly enough informed the jury that the exercise of slight care was all that was necessary, or, conversely, that Mrs. Nelson could recover only if the jury believed Westergaard to have been guilty of gross negligence.

As an instance showing this situation the trial judge gave the following instruction:

"Every person is responsible not only for the results of his willful act, but also for an injury occasioned to another by the want of his ordinary care or skill in the management of his property or person, except so far as the latter has willfully, or by want of ordinary care, brought the injury upon himself. The extent of liability in such cases is defined in other instructions.

"With regard to the defendant Waldemar C. Westergaard, and he is the only defendant left in this case as the other defendant is out of the case so far as the jury are concerned, the general rule of law regulating a failure to exercise ordinary care and its consequence is modified by a legislative enactment requiring not only a showing of want of ordinary care, but either willful misconduct or gross negligence or both on the part of the defendant Waldemar C. Westergaard, and that the plaintiff's injury and damages proximately resulted therefrom before the plaintiffs can recover. This proposition of law will be more fully defined to you in other instructions."

Appellant takes exception to the first paragraph of this instruction, but a mere reading of the instruction as a whole serves to convince that the first paragraph was but introductory to the second, and that, taking both paragraphs together, the law was correctly given to the triers of the facts. The use of the phrase "ordinary care" in the second paragraph did not, we think, operate to confuse the jury, considering the expressions contained in the latter portion of that paragraph.

Immediately following the instruction just considered the trial judge gave another, which we shall also quote. It is lengthy, but we nevertheless set it down, as it alone practically answers the argument covering many pages of appellant's brief and inveighing against alleged instructions to the effect that Westergaard owed to Mrs. Nelson the exercise of ordinary care. The instruction:

"It is admitted in the pleadings and by the evidence that at the time of the accident referred to in plaintiffs' complaint the plaintiff O. Henriette Nelson was a guest passenger in the automobile driven and operated by the defendant Westergaard. As to the liability of the defendant Westergaard to the plaintiffs or either of them, the law is as follows:

" 'Any person, who as a guest, accepts a ride in any vehicle, moving upon any of the public highways of the state of California, and while so riding as such guest receives or sustains an injury, shall have no right of recovery against the owner or driver or person responsible for the operation of such a vehicle.

" 'Nothing in this section contained shall be construed as relieving the owner or driver or person responsible for the operation of a vehicle from liability for injury to such guest proximately resulting from the willful misconduct or gross negligence of such owner, driver or person responsible for the operation of such vehicle; provided, that in any action for injury or damage to person or property by or on behalf of a guest, the burden shall be upon the plaintiff to establish that such willful misconduct or gross negligence was the proximate cause of such injury or damage.'

"The legislature of the state of California in 1929 undertook to create a different situation in the matter of negligence between the driver of an automobile who carried a person as his guest, and the driver of other cars. You will understand that a recovery may be had against the drivers of other cars than that in which a guest is riding, by proof of the fact that the drivers of other cars are guilty of negligence, as the same is herein defined to you; but by this act of the legislature, an entirely different situation was created in so far as the driver of a car in which a guest was riding is concerned. The plaintiff can only recover against the defendant Westergaard by proof of the fact that he was either intoxicated or was guilty of willful misconduct or gross negligence.

"It is alleged in plaintiffs' complaint that the defendant Westergaard did operate his car willfully, recklessly and with an utter disregard of the safety of the plaintiff O. Henriette Nelson, and did operate his car in a grossly careless and negligent manner. The burden of proving this allegation rests upon the plaintiffs, and must be established to your satisfaction by a fair preponderance of all of the evidence, and unless it is so established, or if the proof thereon be evenly balanced, then your verdict will be for the defendant Westergaard."

After quoting these two instructions we think it necessary to say but little more upon the point presented by appellant. The charge, so far as quoted, so clearly and properly stated the law to the jury that it would have required most unusual and impressive language elsewhere in the charge to confuse the jury upon the question as to the degree of care owing by Westergaard to Mrs. Nelson. There is nothing in the instructions as a whole which could have had that effect.

[4-6] Appellant insists that the trial judge failed to define to the jury the "distinction between ordinary negligence, gross negligence and willful misconduct." No definition of ordinary negligence was necessary, as the point was not in the case. This instruction was given: "'Willful misconduct' would imply a purposeful disregard of the care and diligence which the said defendant owed the said plaintiff." We think this instruction properly defined the term "willful misconduct," the jury having already been instructed as to the degree of care owing from Westergaard to Mrs. Nelson. The following instruction was also given: "The term 'gross negligence' implies the want of slight care; or, the exercise of so slight a degree of care as to justify the belief that there was an indifference to the duty owing the plaintiff or her welfare." This instruction contains a fair definition of the term "gross negligence." We think, certainly, that the two definitions, together, taken with the entire charge, were sufficient to inform the jurors as to the distinction between willful misconduct and gross negligence. We doubt if the distinction could have been better presented to the lay mind than it was on the face of the entire charge.

[7] The trial judge gave to the jury several instructions upon the theory that there was evidence from which the jurors could justly have found that the intersection at which the collision between the two cars occurred was in a residential district, as that term is defined in the Motor Vehicle Act. Appellant contends that there was no evidence upon which the jury could have based such a finding. We think there was sufficient evidence to go to the jury on the question. Further, the question whether the intersection was in a residential district was of no real moment in the case. Under the evidence, Westergaard plainly violated the law against driving on a highway at a rate of speed which, "having due regard to the traffic," would not be careful and prudent, and against driving "at such a speed as to endanger" life, limb or property (St. 1927, p. 1436, § 113). He also violated the law against reckless driving on a highway (St. 1929, pp. 539, 540, § 121). On this latter point, observe, particularly, his own testimony as to the distance from which he first saw Dryden's car, as to his attempt to pass ahead of Dryden, the latter being first in the intersection, and as to his attempt then to turn and pass to Dryden's rear.

[8] Appellant requested but the trial judge refused to give the following instruction: "You are instructed that gross negligence and wilful misconduct mean a recklessness which indicates an utter disregard of the rights of others, and in this case the plaintiffs have alleged that the defendant Westergaard is guilty of such negligence, and the burden of proving that negligence is upon the plaintiffs, and unless they establish the same, by a fair preponderance of all the evidence, or if the evidence thereon be evenly balanced, your verdict will be for the defendant, Westergaard." The refusal was proper. Gross negligence does not indicate "an utter disregard of the rights of others." It indicates something less than a slight regard for their rights—a failure to exercise slight care. The proffered instruction therefore did not state the law.

[9] It is provided by section 4½ of article 6 of the Constitution that no judgment shall be set aside in any case because of error unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error has occasioned a miscarriage of justice. Under this rule, even if the trial court had committed the errors charged by appellant, the judgment must be affirmed. We do not perceive how the jury could have done otherwise than render ver-

dict for plaintiffs, whether the trial court erred or not.

Judgment affirmed.

We concur: CRAIG, J.; ARCHBALD, Justice pro tem.

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131 Cal.App.(Supp.) 791

PEOPLE v. HOROWITZ et al.

Cr. A. 887.

Appellate Department, Superior Court, Los Angeles County, California.

March 7, 1933.

1. Criminal law 🔑163.

Plea of once in jeopardy does not apply where jeopardy took place at same trial as conviction sought to be set aside.

2. Criminal law 🔑200(1).

Though dismissal of count charging defendants with putting on immoral scene or part of show be regarded as acquittal, judgment of conviction for putting on immoral show supported by evidence would stand.

3. Criminal law 🔑186.

Where court found defendants guilty of putting on immoral show, dismissal of count charging putting on immoral scene *held* not "acquittal" (Pen. Code, § 954).

[Ed. Note.—For other definitions of "Acquit; Acquittal," see Words and Phrases.]

4. Criminal law 🔑302(4).

Court could dismiss superfluous count of complaint in furtherance of justice (Pen. Code, § 1385).

Appeal from Municipal Court of Los Angeles; Thomas L. Ambrose, Judge.

Harry Horowitz and others were convicted of participating in presentation of indecent shows, contrary to section 1 of Ordinance No. 60587 of the City of Los Angeles, and they appeal.

Affirmed as to all defendants other than Edward Sweeney and James Allen, and judgment as to them reversed.

Reames, Lake & Mulvihill, of Los Angeles, for appellants.

Erwin P. Werner, City Atty., Mark L. Herron, Asst. City Atty., and John L. Bland, Deputy City Atty., all of Los Angeles, for the People.

BISHOP, Judge.

[1] At the conclusion of a juryless trial, appellants were convicted of the offense stated in count I of the complaint; count II was dismissed. It is upon the dismissal of count II that appellants pin their hope of a reversal. They contend that if they were not guilty of the charge set forth in the second count, they were not of that contained in the first, and that as the dismissal operated as an acquittal of the one charge, their conviction of the other cannot stand. We find this position untenable.

By three complaints the ten appellants were charged with the same offenses, except for some variation in the dates when the offenses were alleged to have taken place. As illustrative, we may take the two counts placed against eight of the defendants, by which they were accused in count I of violating section 1, Los Angeles City Ordinance No. 60587, in that they did, "as owners, managers, producers, directors, actors, and agents and in other capacities give, direct, present and participate in, an indecent, obscene, immoral, and impure *drama, play, exhibition, show and entertainment*, within the presence and hearing of divers youths and others at that certain theatre and playhouse located at 235 South Main Street in said City, which said *drama, play, exhibition, show, and entertainment*, then and there tended to corrupt the morals of youths and others then and there present as aforesaid." In count II the same charge was made, except we find in place of the words italicized (by us) in the first count, the following: "scene, tableau, incident, part, and portion of a drama, play, exhibition, show and entertainment." In effect, it will be noted, the defendants were first charged with putting on an immoral and indecent show, then with putting on an immoral and indecent scene or part of a show. At the conclusion of the trial by the court without a jury, the defendants, as already stated, were found guilty on the first count; the second count was dismissed.

The present convictions are, obviously, not to be disturbed because of the protection the law affords against double jeopardy. It may well be that, following a reversal of these judgments, appellants could successfully press the plea of once in jeopardy against a new trial because of the fact that they had gone to trial under the dismissed count. People v. Ny Sam Chung (1892) 94 Cal. 304, 29 P. 642, 28 Am. St. Rep. 129. A plea of once in jeopardy has no place, however, in this case, where the jeopardy referred to took place at the same trial as the conviction sought to be set aside. People v. Degnen (1925) 70 Cal. App. 567, 234 P. 129; People v. Day (1926) 199 Cal. 78, 248 P. 250; People v. Clensey (1929) 97 Cal. App. 71, 274 P. 1018.

[2] Appellants' most strongly urged argument is that the dismissal of the second count was an acquittal on that charge and that, as an acquittal, it is so inconsistent with the

finding of guilt under count I that the latter cannot stand. If we admit, for the moment only, that the dismissal was an acquittal, and that one not guilty of participating in an indecent part of a show could not be guilty of participating in an indecent show, still it does not follow that the judgments must be reversed. Authorities could be cited which would seem to support a reversal. People v. Andursky (1925) 75 Cal. App. 16, 241 P. 591; People v. Puppilo (1929) 100 Cal. App. 559, 280 P. 545. But we find more persuasive cases recognizing that such inconsistent verdicts may be caused, not by the confusion, but the mercy of the jury, of which the appellant can neither complain nor gain further advantage. People v. Stovall (1928) 94 Cal. App. 635, 271 P. 576; People v. Smith (1931) 117 Cal. App. 530, 4 P.(2d) 268; State v. Jackson (1926) 121 Kan. 711, 249 P. 688; State v. Axley (1926) 121 Kan. 881, 250 P. 284. Moreover, probably to avoid the result of those cases which interpret inconsistent verdicts as acts of stupidity rather than acts of leniency, section 954, Penal Code, was amended in 1927 so that it now reads, in the part here controlling: "An indictment * * * or complaint may charge * * * different statements of the same offense * * * under separate counts. * * * A verdict of acquittal of one or more counts shall not be deemed or held to be an acquittal of any other count." This last sentence is applied in People v. Ranney (1932) 123 Cal. App. 403, 11 P.(2d) 405, 406, where a contention had been made that a conviction on two counts could not stand because of an acquittal on five counts. In part the court said: "Each count must stand upon its own merit. The amendment to section 954 of the Penal Code conclusively settles this controversy adversely to the contention of the appellant." Nowhere do we find the validity of the amended section questioned; nowhere else do we find that it came to the attention of the court. We conclude that even if the dismissal be regarded as an acquittal, that is no reason why the judgment of conviction, based on ample evidence, should be reversed.

[3, 4] We are of the opinion, however, that the dismissal was not an acquittal. While the record fails to contain the reasons for the dismissal, as required by section 1385, Penal Code, there is no reason to presume that it was because of the insufficiency of the evidence, for that is not a ground of dismissal. People v. Fouts (1923) 61 Cal. App. 242, 214 P. 657. It is quite evident that, in People v. Clensey, supra, the court considered a dismissal something else, and less, than an acquittal. A dismissal connotes a refusal to determine guilt rather than a finding that there is no guilt. Particularly is this true under the circumstances of this case. The trial judge, at the conclusion of the evidence, found the defendants guilty of the offense charged in the first count. It was apparent that the first was so allied to the second that a conviction on the second count would but lead to complications. No sentence could be imposed, for that would result in double punishment. People v. Degnen, supra; In re O'Connor (1927) 80 Cal. App. 647, 252 P. 730; In re Nichols (1927) 82 Cal. App. 73, 255 P. 244; People v. Marks (1927) 83 Cal. App. 370, 257 P. 92; People v. Oliver (1929) 102 Cal. App. 29, 282 P. 813; People v. Clemett, 208 Cal. 142, 280 P. 681; In re Crawford (1930) 109 Cal. App. 33, 292 P. 520. He did not want to find the defendants not guilty, for he was convinced of their guilt. There was but one logical way out—dismiss the superfluous count. This he had a right to do, under section 1385, Penal Code, "in furtherance of justice." People v. Smith (1904) 143 Cal. 597, 77 P. 449, 450; People v. Brown (1919) 42 Cal. App. 462, 183 P. 829.

We are of the opinion, therefore, that there is no formula, framed to safeguard the rights of those charged with crime, which is offended by the affirmance of these judgments; nor is there statute or case authority justifying a reversal.

No useful purpose would be served by a review of the evidence. We find it sufficient to support the convictions of all appellants save Edward Sweeney and James Allen; as to them a strong suspicion of guilt is the most that the record discloses. The judgments and orders appealed from are, therefore, affirmed as to all appellants other than Edward Sweeney and James Allen; the judgments and orders affecting them are reversed.

McLUCAS, P. J., and FOX, J., concur.

130 Cal.App.(Supp.) 789

WHITE v. GOBEY et al.

No. 291.

Appellate Department, Superior Court, City and County of San Francisco, California.

Feb. 28, 1933.

1. **Exemptions 🔑14.**

Defendant's husband, not joined as defendant, may claim exemption of his earnings from execution, though not strictly "judgment debtor" (Code Civ. Proc. § 690, subd. 10).

While husband was not judgment debtor in technical sense, theory on which his earnings were levied on was that his liability was in nature of that of debtor to extent of community earnings, and he cannot be treated for one purpose as judgment debtor, and then not be permitted to assert rights that every judgment debtor has.

[Ed. Note.—For other definitions of "Judgment Debtor," see Words and Phrases.]

2. **Exemptions 🔑48(1).**

Earnings of husband, needed for support of family, may not be subjected to execution to satisfy judgment against wife for debt for clothing bought on her own credit before marriage (Code Civ. Proc. § 690, subd. 10).

3. **Husband and wife 🔑268(1).**

Wife's debt for clothing bought before marriage becomes husband's debt payable from community property only.

4. **Exemptions 🔑48(1).**

Statute rendering half of husband's earnings subject to execution for debts incurred by "his wife" for necessaries refers to time while she is his wife (Code Civ. Proc. § 690, subd. 10).

[Ed. Note.—For other definitions of "His," see Words and Phrases.]

5. **Exemptions 🔑4.**

Statute exempting property from execution should be fairly and liberally construed and as far as practicable beneficially to debtor.

Such rule prevails, because such statutes are evidently intended to protect the debtor and enable him to follow his vocation and thus earn a support for himself and family.

Appeal from Municipal Court, City and County of San Francisco; Thomas F. Prendergast, Judge.

Action by Lewis P. White against Camilla Gobey in which plaintiff recovered judgment, and an execution was rendered against the earnings of Arthur J. Gobey, who filed a third party claim to exempt such earnings. From an adverse order, the third party claimant appeals.

Modified and affirmed.

Theo. Roche, Jr., of San Francisco, for appellant.

G. J. Irwin, of San Francisco, for respondent.

GOODELL, Judge.

This appeal involves the question whether, in view of the exemptions allowed by law, earnings of the husband, needed for support of the family, may be subjected to execution to satisfy a judgment against the wife, upon a debt for clothing bought by her on her own credit before her marriage.

The trial court held in this case that only one-half of the earnings of the husband for services rendered within thirty days prior to the levy was exempt, and that the other half was subject to execution.

On January 3, 1929, the plaintiff recovered judgment against the defendant, Camilla Gobey, on a clothing bill incurred by her before she married appellant, Arthur J. Gobey, and when she was known as Camilla Connelly. It is assumed that the clothing she bought was a necessity. The husband, Arthur J. Gobey, was not made a party to the action, but an execution was levied against his earnings, and he filed a third party claim to exempt such earnings under subdivision 10 of section 690 of the Code of Civil Procedure.

Admittedly plaintiff proceeded, in making this levy, upon the theory that a husband is responsible for antenuptial debts of the wife recoverable out of community property, under the holding of this department in Johnson v. Taylor, 120 Cal. App. (Supp.) 771, 4 P. (2d) 999. The appellant concedes that community property is thus liable, but insists that he is entitled to the exemption claimed, for the reason that the debt out of which the levy arose was not a debt contracted by him, nor was it a debt contracted by Mrs. Gobey for necessities while she was his wife.

[1-4] Respondent contends that the exemption can be availed of only by a "judgment debtor," and that the appellant is not one. But, while the appellant was not joined as a defendant in the action, and is therefore not a judgment debtor in the technical sense, nevertheless the very theory upon which his earnings were levied upon is that his liability was in the nature of that of a debtor (to the extent of community earnings). The levy certainly was not made on the theory that appellant owed his wife this money, and that it was, therefore, subject to garnishment by her creditor. The husband cannot be treated

for one purpose as a judgment debtor, and then not be permitted to assert the rights that every judgment debtor has.

We are satisfied that the total exemption should have been allowed. It by no means follows that, because community earnings of either spouse, or of both spouses, are answerable for antenuptial debts of the wife, resort may be had to that part of the community property which, for good reasons of public policy, the Legislature has said cannot be touched. The obligation is one imposed by law for the reasons stated in Johnson v. Taylor, supra, and cases there cited. As a result of the marriage, it becomes the husband's debt without any doubt (payable only out of community property), but is of no higher dignity than any debt incurred by him in the first instance and for his own purposes. An ordinary loan obtained by him to carry on his business, if reduced to judgment, could not be collected out of earnings, if the debtor made a proper showing under subdivision 10 of section 690, C. C. P; and it is difficult to see how a debt contracted by the woman who afterwards becomes his wife is in any better position, or surrounded with any greater legal immunity, than an ordinary debt of his own. The language of subdivision 10 is that, "where debts are incurred by any such person, or his wife or family for the common necessaries of life * * *" one-half the earnings is subject to execution. We are satisfied that, as to debts incurred by "his wife," this must mean while she is his wife. "The underlying purpose of the statute exempting from execution certain property is to provide for the support and welfare of the family of the person claiming exemption." Bailey v. Superior Court, 215 Cal. 548, 11 P.(2d) 865, 867. So that the beneficent purposes of this statute be not carried too far, it has been wisely provided that half of the earnings for the last thirty days prior to the levy may be taken in payment for common necessaries of life. Necessities, then, used for the very maintenance of the debtor's family, for food, clothing, and the like, are what the Legislature meant to make special provision for.

The defendant in this case is now the appellant's wife; but the necessities for which she was sued were not necessities of the appellant or of his family, or necessities bought by the defendant for or on behalf of the appellant or his family or of herself as a member of it.

[5] There is no authority cited to us upon the subject, and we are confined to the language of the statute itself. We think the view we have taken conforms to the legislative intent; and it must be borne in mind that "statutes exempting property from execution should be fairly and liberally construed and, as far as practicable, beneficially to the debtor." Van Lue v. Wahrlich-Cornett Co., 12 Cal. App. 749, 753, 108 P. 717, 719. Such statutes "are evidently intended to protect the debtor, and enable him to follow his vocation, and thus earn a support for himself and family." Estate of McManus, 87 Cal. 292, 294, 25 P. 413, 10 L. R. A. 567, 22 Am. St. Rep. 250. The conclusion at which we have arrived by no means defeats the collection of this debt. It simply means that the creditor must resort to separate property of the wife or to other community property than the husband's earnings for his personal services rendered within thirty days next preceding the levy and necessary for the support of the family.

It is the determination of this Appellate Department that the earnings of said Arthur J. Gobey held under writ of execution served upon his employer, American Factors, Limited, are wholly exempt from execution, and that all said earnings are the property of said Arthur J. Gobey, and are payable to him free of any claim of the plaintiff, Lewis P. White. The order of the trial court is modified accordingly, and, as so modified, is affirmed.

We concur: JOHNSON, P. J.; CONLAN, J.

217 Cal. 501

WHITE v. VIALL et al.

L. A. 14037.

Supreme Court of California.

March 7, 1933.

Mortgages 🔑**218.**

Transaction being fully executed, trust deed securing note for part of purchase price of land became independent document, and hence subject to foreclosure proceedings as against contention that equity suit was only remedy on purchaser's default in payments on note.

In Bank.

Appeal from Superior Court, Los Angeles County; Benjamin J. Scheinman, Judge.

Action by Gladys R. White against S. W. Viall, Edward R. Young, Inc., and others, wherein the last-named defendant filed a cross-complaint against plaintiff and her husband. Judgment for the cross-complainant, and plaintiff appeals.

Affirmed.

William T. Kendrick, Jr., and William T. Kendrick, both of Los Angeles, for plaintiff, cross-defendant, and appellant.

Young, Lillick, Olson, Graham & Kelly, of Los Angeles, for defendants and respondents and defendant, cross-complainant and respondent Edward R. Young, Inc.

PER CURIAM.

Plaintiff purchased from defendant Viall a residence lot in Beverly Hills, received a deed therefor, and entered into possession of the same. The purchase price was paid in the following manner: $2,850 cash, a note secured by deed of trust on the property for $6,625, and the balance by the assumption of an existing mortgage on the property. The transaction was fully executed by both of the parties. Plaintiff defaulted in her payments on the note secured by deed of trust. Her default was declared and a sale had of the property, at which defendant Viall became the purchaser. He later conveyed the property to Edward R. Young, Incorporated. Defendant Farmers' & Merchants' National Bank of Los Angeles was the trustee under the deed of trust. Plaintiff brought an action to cancel the deed made by the trustee on the ground that it had not observed the necessary legal requirements to constitute a valid sale. Edward R. Young, Incorporated, cross-complained to quiet title against plaintiff and her husband. The issues tendered by both the complaint and the cross-complaint were traversed, and the cause was brought to trial. Findings and judgment were rendered against plaintiff and in favor of the cross-complainant. Plaintiff alone lodged a judgment roll appeal in this court, claiming that the transaction consisted of an executory contract to buy and sell, of which the deed was but an incident. Plaintiff contended that a suit in equity was the only remedy open upon her default in the premises.

Inasmuch as the transaction was fully executed, the deed of trust became an independent document, and therefore subject to foreclosure proceedings in the usual manner.

The judgment is affirmed.

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217 Cal. 517

PACIFIC STATES SAVINGS & LOAN CO. v. SUPERIOR COURT IN AND FOR ALAMEDA COUNTY.

S. F. 14713.

Supreme Court of California.

March 20, 1933.

1. Prohibition 🔑**10(2).**

Superior Court *held* to have jurisdiction to determine law and fact questions in injunction suit by certificate holder against building and loan association to enjoin defendant from applying less than half of monthly receipts to withdrawals, case involving construction and validity of 1931 statute, and whether plaintiff agreed to be governed by statute; hence prohibition did not lie (Const. art. 6, § 5; Civ. Code, § 642; St. 1931, § 6.01, p. 500).

Case was not a proper one for issuance of peremptory writ of prohibition since Superior Court, under Const. art. 6, § 5, had original jurisdiction in such cause, and since court had jurisdiction to pass upon all questions of law presented and all questions of fact which might be interposed as defense in such action, particularly to construe provisions of St. 1931, § 6.01, p. 500, as affecting rights of one who became certificate holder before repeal of Civ. Code, § 642, and to determine effect of plaintiff's alleged waiver, if interposed as defense, taking into consideration circumstances surrounding its execution.

2. Courts 🔑**1.**

"Jurisdiction" is power to hear and determine cause (Const. art. 6, § 5).

[Ed. Note.—For other definitions of "Jurisdiction (Of Courts)," see Words and Phrases.]

3. Courts 🔑**26.**

Court having jurisdiction of parties and subject-matter of action has power to determine all law and fact questions properly presentable under issues tendered.

In Bank.

Proceeding on the petition of the Pacific States Savings & Loan Company for a writ of prohibition directed to the Superior Court of the State of California, in and for the County of Alameda. On general demurrer to the petition.

Peremptory writ denied.

Orrick, Palmer & Dahlquist, of San Francisco, for petitioner.

H. Boyarsky and Emile Grossman, both of Oakland, for respondent.

Louttit & Marceau, Nutter & Rutherford, and A. P. Hayne, all of Stockton, amici curiæ for respondent.

O'Melveny, Tuller & Myers, Paul Fussell, and Homer I. Mitchell, all of Los Angeles, amici curiæ for California Building Loan League in support of petition for writ of prohibition.

Thomas M. Gannon and Roland Tognazzini, both of San Francisco, amici curiæ for Friend W. Richardson, Building & Loan Commissioner of State of California.

PER CURIAM.

This is a petition for a writ of prohibition to restrain the respondent court from taking further action in an injunction suit entitled Joseph Emanuel and Ethel Emanuel, Plaintiffs, v. Pacific States Savings and Loan Company, Defendant, No. 123,879, pending in said court. The present matter is submitted on a general demurrer to the petition.

The plaintiffs in said action are husband and wife. On January 6, 1930, they made a payment of $1,020 to the petitioner and received from it one 6 per cent. cumulative investment certificate, No. 2017. Thereafter and until January 2, 1931, payments were made on the principal. On January 5, 1932, the value of the certificate, principal and interest, was $2,873.34. On April 12, 1932, the Emanuels notified the petitioner in writing of their intention to withdraw $100. On April 22, 1932, they gave notice of withdrawal of the balance of the fund. The amounts specified in the notice were not paid at the expiration of thirty days from and after the second notice, whereupon, after demand and on May 31, 1932, the Emanuels commenced the action now pending in the respondent court. It was alleged in the complaint that the plaintiffs were entitled to withdraw the value of the investment certificate after the expiration of the thirty days from the notice of intention to withdraw, or, if not so entitled, they had the right to have said notice registered; that the petitioner is not applying and will not apply one-half of the gross monthly receipts to the payment of withdrawals, and is applying its monthly receipts to the establishment of certain reserves for the payment of taxes, assessments, insurance, interest on its property loans, principal and interest on borrowings, interest on investment certificates, rent, compensation to officers, agents, salesmen and other employees, and other usual and ordinary operating expenses, and that the sums so set aside exceed one-half of its gross monthly receipts. The prayer of the complaint is that the petitioner be enjoined from applying less than one-half of its gross monthly receipts to withdrawals of that month and be restrained from making payments of money to, and permitting withdrawals of money by, investors and depositors from their respective investment certificate accounts without regard to the order of the filing of notices of withdrawal and particularly without regard to the order of registering of the plaintiffs' notices of withdrawal.

Upon the filing of the complaint the respondent court issued an order to show cause why a preliminary injunction should not be granted as prayed for in the complaint and set a date for the hearing of the order to show cause. Prior to the date set for said hearing, the petitioner moved the respondent court to dismiss said action for want of jurisdiction. The motion was denied, whereupon the present proceeding was commenced to prevent the respondent court from taking further action in the pending case, including the hearing on the order to show cause.

The basis of the cause of action of the plaintiffs in the pending action is certain provisions of section 642 of the Civil Code in effect at the time the investment certificate was issued to them. The pertinent provisions of said section are as follows: "A stockholder or investor, desiring to withdraw from any such [building and loan] corporation or to surrender a part or all of his stock, or investment certificate, may do so by giving thirty days' notice, in writing of his intention or desire so to do. On the expiration of such notice, he is entitled to receive the full amount paid in upon the stock or investment certificate surrendered; * * * but not more than one-half of the monthly receipts in any one month must be applied to withdrawals for that month, without the consent of the board of directors. * * * All withdrawals must be paid in succession in the order that the notices of intention are given. Whenever the demands of withdrawing stockholders or investors exceed the money applicable to their payment, the notices of intention to withdraw must be registered in the order of filing and payments thereon must be made in succession, in the order that such notices were filed and registered. * * *"

In 1931 the Legislature recast the law of this state with reference to building and loan associations, thereby providing a complete plan for the regulation, management and control of such associations. St. 1931, p. 483. By section 6.01 of the act it is provided that each association must provide by its by-laws, or by contract with certificate holders, or by both, the period of notice of intention to withdraw, which period shall not be less than thirty days nor more than six months. When withdrawal notices are filed, the claim, subject to provisions of the act not now necessary to mention, becomes a matured withdrawal claim, the payment of which is subject to the power of the association to make the same secondary and subsequent to certain reserves for the payment of charges hereinbefore enumerated as contained in the allegations of the complaint.

It is the position of the plaintiffs in said action that the foregoing provisions of the enactment of 1931 are in violation of their contract rights which had become vested under section 642 of the Civil Code, notwithstanding the fact that said section 642 had been repealed and they had not filed their notice of withdrawal until the new statute had taken effect; and that if this be not so their rights under the old statute had been preserved under certain savings clauses contained in the new statute.

It is the contention of the petitioner herein that the rights of the Emanuels under the old law were inchoate and did not become vested by reason of the fact that they did not file their notices of intention to withdraw until after the new law took effect and that prior to the filing thereof the petitioner had amended its by-laws to require a six months' notice of intention to withdraw; that no contract or other rights were possessed by the Emanuels under the old statute and their investment certificate which were immune from the power of the Legislature to change and curtail in the exercise of the police power; that the business of building and loan associations is affected with a public interest in connection with which the Legislature may in the exercise of its lawful power provide for reserves to which the claims of investment certificate claimants may be made subordinate, especially in times of great economic stress, when, if the rule were otherwise, financial disaster might result to many of the 200 or more building and loan associations in this state, and to approximately 600,000 persons having investments therein of approximately $440,000,000.

[1] When the alternative writ was issued herein we were impressed by the showing made on behalf of the petitioner. However, on further consideration of the matter we feel impelled to hold that this is not a proper case for the issuance of the peremptory writ.

[2, 3] As above indicated, the cause pending in the respondent court is an action in equity. Under section 5 of article 6 of the Constitution the trial court has original jurisdiction in such a cause. Jurisdiction is the power to hear and determine the cause. "Having jurisdiction of the parties and the subject-matter of the action, the respondent court has the power to determine all questions of law and fact properly presentable under the issues tendered. * * * The respondent court has jurisdiction to construe the provisions of the statute * * * and that jurisdiction in the first instance is full and complete." United Security, etc., Co. v. Superior Court, 205 Cal. 167, 174, 270 P. 184, 187.

The petitioner may argue that no questions of fact are involved. But this is not so. Attached to the petition and made a part thereof is a copy of the first notice of intention to withdraw filed with the petitioner and dated April 12, 1932. Included in this notice above the signatures of the Emanuels is the following: "I claim all of the benefits of the Building and Loan Association Act of 1931, and in consideration thereof, I agree that my right to withdraw shall be at all times subject to the provisions of Article 6 of said Act of 1931 and your by-laws in conformance therewith, as if said act of 1931 and said by-laws had been in effect at the time of the issuance of said certificates." This waiver is defensive matter in the superior court action. If it be given the effect imported by its terms, the question of the effect of the old statute on the original investment certificate contract is out of the case and there would seem to be no occasion to pass upon the effect of the new law on contracts entered into by the Emanuels under the old law. The effect of the waiver, if interposed as a defense, is a matter which the trial court should first decide, taking into consideration the circumstances surrounding its execution. The cases of Hiroshima v. Bank of Italy, 78 Cal. App. 362, 248 P. 947, and Grisinger v. Golden State Bank, 92 Cal. App. 443, 268 P. 425, are not determinative, as matter of law, of the rights of the parties in this regard. Likewise all questions of law arising under the terms of the act, applicable to the terms of the waiver and otherwise in connection with the claims of the petitioner herein, are within the jurisdiction of the trial court to decide.

It is not alleged in the petition herein that the respondent court will, unless restrained, issue a temporary injunction against the petitioner. It is merely alleged that the court threatens to proceed with the hearing of the order to show cause, and thereafter with the trial of the action; and that said court will thereby proceed in excess of its jurisdiction in interfering at the instance of the plaintiffs in said action with the petitioner's conduct of its business. No temporary restraining order was issued upon the issuance of the order to show cause, and it must be assumed that the respondent court will give due consideration to the contentions of the parties in the pending action. Certainly it has jurisdiction to pass upon all questions of law presented and all questions of fact which may be interposed as a defense in said action. To prohibit the respondent court from proceeding under the circumstances here disclosed would be an unwarranted interference with its functions in the exercise of its original equity jurisdiction.

The peremptory writ is denied.

217 Cal. 504

TALBOTT et al. v. TURLOCK IRR. DIST. et al.

Sac. 4746.

Supreme Court of California.

March 15, 1933.

1. Eminent domain ⚷96.

Items for land taken for construction of irrigation ditch itself, for loss of other land of use of which landowners would be deprived, and for severance damages and previous damages suffered through excavation work done along right of way, *held* proper elements in award in eminent domain.

2. Eminent domain ⚷121.

In action against irrigation district and improvement district within it to enjoin further trespasses on plaintiffs' land for purpose of constructing irrigation ditch, where defendants in effect brought cross-action for condemnation, claiming to be in joint charge of public use, defendants *held* jointly liable for damages (St. 1927, p. 1415).

In Bank.

Appeal from Superior Court, Stanislaus County; L. W. Fulkerth, Judge.

Action by M. C. Talbott and another against the Turlock Irrigation District and Improvement District No. 1 of the Turlock Irrigation District. From the judgment, defendants appeal.

Affirmed.

Thomas C. Boone and Griffin & Boone, all of Modesto, for appellants.

J. W. Hawkins and Hawkins & Hawkins, all of Modesto, for respondents.

PRESTON, Justice.

Plaintiffs, on May 29, 1928, as owners of a certain tract of land in Stanislaus county, sued defendants to enjoin them from further trespassing on said land for the purpose of constructing, operating, and maintaining an irrigation ditch through it and as incidental to such relief plaintiffs sought damages for injury already done the premises by excavation and similar work.

Defendants, a duly organized irrigation district and an improvement district within it, the latter organized in 1928 pursuant to the act of 1927 (Stats. 1927, p. 1415), in response to said action filed an answer and later a cross-complaint. The cross-complaint alleged that they were jointly in charge of a public use for the construction and operation of an irrigation ditch within the general boundaries of said district; that the said ditch was to be of large proportions; and that in the prosecution of said purpose it was necessary to traverse the above-mentioned lands of plaintiffs with the ditch. In other words, defendants in effect brought a cross-action for condemnation of a forty-five foot strip of land through the premises above described.

The cause when at issue, and in the year 1930, was tried by the court sitting without a jury. Upon the trial the cause of action alleged by plaintiffs was practically absorbed in the cross-action. The court granted the relief asked by the cross-complainants, assessed plaintiffs' damages for taking of the strip at $755, decreed that payment of this sum was a condition precedent to prosecution of said purpose by cross-complainants, and enjoined them from further proceeding therewith until payment was made. Both cross-complainants, being dissatisfied with the decree, appealed.

[1, 2] The court, in making up the item of total damages as specified, figured as follows: $205 for .82 of an acre of land taken for construction of the ditch itself; $250 for the loss of another acre of land of the use of which plaintiffs would be deprived by the improvement; and, lastly, $300 for severance damages and for previous damages suffered by plaintiffs through excavation work done along the right of way by defendants.

Basing their injury upon this method of itemizing by the court, appellants urge that the improvement district did the condemning and trespassing and not the irrigation district; hence all sums that are to be paid are to come from the treasury of the improvement district, and, further, that in so far as damages for the trespass committed by defendants is concerned, the improvement district cannot be held liable as no provision of the law authorizes the levy of an assessment to pay such a claim.

A ready answer to both these contentions is that all items of the judgment are proper elements in an award in eminent domain. The excavations made were part of the construction of the improvement itself, and hence the court presumably gave plaintiffs by its judgment no more than they would have received had no trespass been committed and their lands remained intact. The only purpose that could be served by specification of the item of $300 damages is that in case defendants should abandon the project, plaintiffs might have it as a foundation for their claim for injury already suffered. Another sufficient answer to the claim of appellants is that both districts claim to be in joint charge of the public use and both districts committed the trespass upon appellants' lands; hence no reason whatsoever exists for segregation of their liability.

The judgment is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; THOMPSON, J.; SEAWELL, J.

SHENK, J., and LANGDON, J., deeming themselves disqualified, do not participate herein.

217 Cal. 523

LEVEE v. HARRIER.

S. F. 14823.

Supreme Court of California.

March 20, 1933.

As Modified on Denial of Rehearing April 18, 1933.

1. Statutes ⚷225½.

Specific code provision that superior court order of transfer of cause therein must be "to another superior court" or municipal court if action be cognizable therein, governs general code provisions establishing jurisdiction otherwise in the several courts (Code Civ. Proc. § 398).

2. Venue ⚷80.

Superior court of county to which place of trial of action to recover $975.91 was transferred by another superior court had jurisdiction of subject-matter, though there was a justice's court in township in such county wherein defendant resided which would have had jurisdiction had action been originally commenced in such county (Code Civ. Proc. § 112, as amended by St. 1931, p. 409, § 1, and §§ 395–398; Const. art. 6, § 5, as amended in 1928).

In Bank.

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by S. M. Levee against Jessie V. Harrier, as executrix of the last will and testament of L. G. Harrier, deceased. From a judgment of dismissal, plaintiff appeals.

Reversed.

Prior opinion, 14 P.(2d) 782.

Francis O. McInnis, of Fairfield, and Clarence N. Riggins, of Napa, for appellant.

George M. Naus, of San Francisco, for respondent.

SHENK, Justice.

This is an appeal from a judgment of the superior court in and for the county of Alameda dismissing the action for want of jurisdiction.

The plaintiff commenced the action in the superior court in and for the county of Solano. It was brought on a claim presented to and rejected by the defendant as executrix of the estate of L. G. Harrier, deceased, the administration of which was pending in Solano county. In due time the defendant filed a demurrer to the complaint and at the same time moved and demanded "that the place of trial of the above entitled action be transferred from the superior court of the state of California in and for the county of Solano to the superior court of the state of California in and for the county of Alameda," the county of the defendant's residence. The order of transfer was made. After the cause had reached the superior court of Alameda county, the defendant filed an amended demurrer specifying lack of jurisdiction of the court to entertain the cause as an additional ground of demurrer. When the demurrer came on for hearing in the superior court of Alameda county the defendant objected to the jurisdiction of that court on the grounds (1) that it appeared from the face of the complaint that the demand constituting the claim against the estate was for the sum of $975.91, and (2) that the township in which the defendant resided contained a population of 30,000 and upwards and therefore the justice's court in that township had exclusive jurisdiction of the subject-matter of the action. The trial court took that view of the question and accordingly, on November 25, 1931, dismissed the action for want of jurisdiction.

It must be assumed that the action was properly commenced in the superior court of the county of Solano and could have been tried therein with full jurisdiction of the parties and subject-matter in the absence of the demand by the defendant for a change of the place of trial to the county of her residence. It must also be taken for granted that the superior court of the county of Solano had no power under the statute to transfer the cause to the justice's court in which the defendant resided in Alameda county.

Prior to the amendment of section 5 of article 6 of the Constitution in 1928 the jurisdiction of the superior court was specifically defined by the Constitution. By the amendment the superior court was vested with jurisdiction in all civil cases and proceedings, except in said article otherwise provided and "except, also, cases and proceedings in which jurisdiction is or shall be given by law to municipal or to justices or other inferior courts."

The present action was commenced in Solano county on August 17, 1931, which was after the effective date of the amendment of section 112 of the Code of Civil Procedure in 1931 (St. 1931, p. 409, § 1). There is no municipal court in that county and no judicial township having a population of 30,000 and more. There is no municipal court in Alameda county, but the township in which the defendant resides contains a population of 30,000 and more, and the justice's court in said township has jurisdiction of cases at law in which the demand exclusive of interest amounts to $1,000 or less, as provided by said section 112. It is clear that, if the present action had been commenced in Alameda county, said justice's court and not the superior court of said county would have had jurisdiction of the subject-matter.

Under present law the jurisdiction of the superior court in civil causes and proceedings is, except as in the Constitution itself otherwise provided, dependent upon legislative action vesting jurisdiction in municipal, justices', and other inferior courts. In other words, the superior court has jurisdiction in all such cases when jurisdiction is not vested in municipal and justices' and other inferior courts.

The question presented is whether the Legislature has, by the amendment of section 112 of the Code of Civil Procedure, or otherwise, so covered the field as to deprive the superior court of Alameda county of jurisdiction to hear and determine a cause transferred to it by a valid order of transfer by the superior court of another county.

Section 395 of the Code of Civil Procedure provides, except in cases not material here, that the action must be tried in the county in which the defendant resides. Section 396 provides that, if the action is commenced in a county which is not the proper county, the action may be tried therein unless the defendant demands a change of place of trial. Section 397 provides that the court may, on motion, change the place of trial to the proper county; and section 398 provides that, if an action is commenced in the superior court and the place of trial is changed, the order of transfer must be for trial to another superior court, or to a municipal court if the action be cognizable therein. As stated, there is no municipal court in the county of Alameda.

[1, 2] It will thus be seen that when an action is, as here, properly commenced in the superior court of one county and an order of transfer is made, the statute provides specifically that the order must transfer the cause for trial to the superior court of the proper county. When we find this specific provision in the law governing jurisdiction in causes transferred from one superior court to another, such specific provision, under familiar rules, should be deemed to govern the general provisions of the code establishing jurisdiction otherwise in the several courts. There is nothing in the Constitution expressly or impliedly preventing this construction of the Code sections, and, when read together, they clearly provide a special rule for the transfer and trial of cases from one superior court to another. Any other construction would lead to the inevitable conclusion that a superior court, having original and complete jurisdiction of a cause commenced therein, subject to the right of the defendant to demand a change of place of trial, must transfer the cause on a proper demand to a superior court having no jurisdiction, thereby terminating the litigation. Such an absurd result is not required or justified in view of the special and complete rule in such cases laid down by the Legislature in a matter within its exclusive cognizance.

The judgment is reversed.

We concur: WASTE, C. J.; SEAWELL, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.; IRA F. THOMPSON, J.

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128 Cal.App. 567

SMELLIE et al. v. SOUTHERN PACIFIC CO.

Civ. 4668 (3).

Supreme Court of California.

March 9, 1933.

In Bank.

Appeal from Superior Court, Madera County; Leon E. Gray, Judge.

Hearing denied.

For opinion of District Court of Appeal, see 18 P.(2d) 97.

W. H. Stammer, of Fresno, for appellant.

Conley, Conley & Conley, of Fresno, for respondents.

PER CURIAM.

Respondents' petition to have the above-entitled cause heard and determined by this court after judgment in the District Court of Appeal of the Third Appellate District is denied.

Such denial, however, shall not be construed as an approval by this court of that portion of the opinion of the District Court of Appeal which holds that admission of evidence of the rules adopted by the defendant for the government of its business was incompetent and prejudicial.

217 Cal. 515

BUTTERS v. BOARD OF SUP'RS OF IMPERIAL COUNTY et al.

S. F. 14831.

Supreme Court of California.
March 17, 1933.

Mandamus 🔑74(1).

County board of supervisors, which failed to make first publication of proposed new charter for county within 15 days after filing of copy with county clerk, could not thereafter be compelled to publish charter (Const. art. 1, § 22; art. 11, § 7½, amended in 1914).

County board of supervisors could not be compelled to publish the proposed new charter, since the provision of Const. art. 11, § 7½, amended in 1914, that the board of supervisors shall cause the proposed new charter to be published for at least ten times and the first publication shall be made within fifteen days after the filing of a copy thereof in the office of the county clerk, are mandatory, by virtue of art. 1, § 22, which provides that the provisions of the Constitution are mandatory unless by express words they are declared to be otherwise.

In Bank.

Petition by George Butters for writ of mandate prayed to be directed to The Board of Supervisors of the County of Imperial, and others, to compel respondents to publish a freeholders' charter, and to proceed to submit it to the electorate.

Petition denied.

Fred Trude and Whitelaw & Whitelaw, all of El Centro, for petitioner.

Elmer W. Heald, Dist. Atty., C. G. Halliday, Chief Deputy Dist. Atty., and S. L. McCrory, Deputy Dist. Atty., all of El Centro, for respondents.

PER CURIAM.

This is a petition for a writ of mandate. The facts are undisputed. Pursuant to article 11, section 7½, of the California Constitution, the requisite number of qualified electors of Imperial county petitioned for the election of a board of fifteen freeholders to prepare a new charter for said county. An election was held and the persons elected prepared a charter, which was duly signed and copies filed with the county clerk and county recorder on November 1, 1932. On November 14, the respondent board of supervisors passed a motion to publish the charter, as required by said section of the Constitution, the first publication to be November 15; but for some reason this direction was not carried out on that date. Thereafter, the board was advised that there was doubt as to its power to proceed further in the matter, and it therefore refused, and still refuses, to publish the charter. Petitioner, a resident elector and property owner, seeks this petition to compel respondents to do so.

The relevant provision of the above-mentioned section of the Constitution is as follows: "Said board of supervisors shall thereupon cause said proposed charter to be published for at least ten times * * * and the first publication * * * shall be made within fifteen days after the filing of a copy thereof, as aforesaid, in the office of the county clerk." Respondents contend that, since the board has failed to make the first publication within fifteen days from filing, it is without jurisdiction to take any further steps toward publication or completion of the proceedings. We are reluctantly forced to agree with this contention. The provisions of our Constitution are mandatory unless by express words they are declared to be otherwise. Cal. Const., art. 1, § 22. The provisions of article 11, § 8, requiring advertisement of the availability of copies of proposed city charters, were held to be mandatory in People v. City of San Buenaventura, 213 Cal. 637, 3 P.(2d) 3; and the section involved in the instant case was held to invalidate a charter filed too late by the freeholders. Doran v. Foster, 189 Cal. 610, 209 P. 548. No satisfactory reasoning or authority has been cited to us which would indicate that a different construction can be placed on the section under the facts herein presented.

The petition is denied.

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217 Cal. 503

CHIAPELLA v. COUNTY NAT. BANK & TRUST CO. OF SANTA BARBARA.

L. A. 13891.

Supreme Court of California.
March 7, 1933.

Courts 🔑475(2, 3).

Action on rejected claim against estate is not exercise of probate jurisdiction requiring trial in county of probate, but is transitory action on contract following person of defendant.

In Bank.

Appeal from Superior Court, Santa Barbara County; A. B. Bigler, Judge.

Action by S. E. Chiapella against the County National Bank & Trust Company of Santa Barbara, administrator with the will annexed of the Estate of Cora E. Freeze, deceased. From an order dismissing the action, plaintiff appeals.

Affirmed.

James Donovan, of Los Angeles, for appellant.

Griffith & Thornburgh, of Santa Barbara, for respondent.

PER CURIAM.

The lower court dismissed this cause for want of jurisdiction.

A suit upon a rejected claim is not an exercise of probate jurisdiction. The action is upon the contract, and venue is determined as in other civil cases. McLean v. Crow, 88 Cal. 644, 647, 26 P. 596; Gallagher v. McGraw, 132 Cal. 601, 64 P. 1080. Such a suit is also recognized as a transitory action. It follows the person of the defendant, and may be tried in a county other than that wherein the estate is being probated. Thompson v. Wood, 115 Cal. 301, 47 P. 50.

The order is affirmed.

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217 Cal. 499

LUDWIG v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

L. A. 14000.

Supreme Court of California.
March 1, 1933.

1. Executors and administrators ⚷97.

Order authorizing executor to secure reporter's transcript of hearing so as to correct proposed bill of exceptions and to employ counsel in matter, fees to be fixed upon settlement of bill of exceptions, *held* valid (Probate Code, §§ 900, 910).

2. Executors and administrators ⚷82.

Although statute does not require that executors or administrators secure in advance authorization for proper expenditures, it is better practice to do so (Probate Code, § 900).

3. Executors and administrators ⚷82.

Order authorizing executors to incur expense is merely permissive and tends to show good faith on part of executors in making application but does not finally determine propriety of expenses (Probate Code, § 900).

In Bank.

Petition for writ of review by Clarence Ludwig to annul an order of the Superior Court of the State of California, in and for the County of Los Angeles, entered by Leon R. Yankwich, Judge, authorizing Haakon Berg and Sigrid Meyers, executors of the estate of Stephen M. Meyers, deceased, to secure reporter's transcript and employ attorney.

Order affirmed.

Prior opinion, 14 P.(2d) 321.

Pottle & Pottle, of Los Angeles, for petitioner.

Everett W. Mattoon, Co. Counsel, and S. V. O. Prichard, Deputy Co. Counsel, both of Los Angeles, for respondent Superior Court.

Charles R. Dyer and Mark A. Hall, both of Los Angeles, for respondent executors.

PER CURIAM.

Petition for writ of review.

The executors of the estate of Stephen M. Meyers, deceased, respondents herein, filed in the Superior Court of Los Angeles County their first report and account. Petitioner, a creditor, objected to a number of items and filed his exceptions. After the hearing, the court entered its order sustaining some exceptions, overruling others, and settling the account. Petitioner gave notice of appeal, and presented a proposed bill of exceptions. The executors, claiming that said proposed bill was inaccurate and should be corrected before settlement, applied to the court for authorization to procure a reporter's transcript of the proceedings, and to employ special counsel to prepare amendments. The court granted the application, entering an order in the following language: "Application of executors * * * for an order authorizing them to secure a reporter's transcript at legal rates and to employ counsel to prepare amendment to bill of exceptions and on appeal is granted. The fees to be fixed by the court upon the settlement of the bill of exceptions." Petitioner seeks this writ of review to annul the order as beyond the jurisdiction of the court, contending that the executors cannot charge the estate with the expense of defending on appeal those items of the account which deprive the estate of money; that the order for the transcript is anticipatory of a judgment for costs on appeal; and that the court cannot, in advance of the performance of legal services, determine that they are extraordinary, or fix the fees therefor.

No authority in point is presented on behalf of petitioner and we think the objections raised are untenable. An executor or administrator is entitled to charge the estate with all necessary expenses in the care, management, and settlement thereof (Cal. Probate Code, § 900); and a reasonable sum may be allowed by the court to attorneys rendering extraordinary services to the estate. Cal. Probate Code, § 910. In seeking assistance in the present appeal, the executors are protecting the interests of other creditors and acting in consonance with the fiduciary duties imposed upon them, and there is no reason why, if they are in good faith, they should be precluded from charging the estate with this expense. See In re Rose, 80 Cal. 166, 22 P. 86; Pinckard v. Pinckard, 24 Ala. 250. The application to the court in advance was not required by the statute, although it is said to be the better practice. Estate of Smith, 118 Cal. 462, 50 P. 701. The order of the court rendered upon such application in advance is merely permissive, and tends to show good faith on the part of the executors in making the application. No fees can be fixed prior to the rendition of the services, and the order involved herein does not purport to fix any sum as fees. Likewise, if petitioner is successful in his appeal, the lower court will not be precluded thereafter, in its discretion, upon the presentation of a later account, from refusing to allow these expenses as a charge against the estate. Estate of Smith, supra.

Since the order does not finally determine any matters which might tend to injure petitioner's rights, and constitutes a reasonable procedure upon the part of the executors and the court, there is no ground for its annulment.

The order is affirmed.

ORIGINAL MIN. & MILL. CO. v. SAN JOAQUIN LIGHT & POWER CORPORATION. *

Sac. 4622.

Supreme Court of California.

March 1, 1933.

Rehearing Granted March 31, 1933.

1. Limitation of actions 🔑95(1).

Directors' ignorance of fraudulent stock transactions of corporation secretary enjoying directors' trust and having complete charge of all records tolled statute of limitations, as regards corporation's action for secretary's fraud (Code Civ. Proc. § 338, subd. 4).

2. Fraud 🔑58(1).

Evidence in action for fraud in stock transaction established that plaintiff's secretary-treasurer and defendant's agent conspired to defraud plaintiff corporation (Code Civ. Proc. § 338, subd. 4).

3. Principal and agent 🔑159(1).

Principal is liable for agent's willful torts committed within scope of his authority (Civ. Code, §§ 2338, 2339).

4. Corporations 🔑426(1).

Defendant corporation signing agent's fraudulent stock transaction contract with plaintiff, knowing stock was issued to agent rather than to plaintiff, and not communicating with plaintiff regarding resale transaction, ratified agent's transaction, rendering it liable for fraud.

5. Action 🔑25(3).

Trial 🔑388(2).

Action for damages for conspiracy to defraud in stock transaction, though prayer was for alternative relief of issuance of shares, *held* legal in character, so that court's failure to make findings was not fatal to judgment.

In Bank.

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action by the Original Mining & Milling Company against the San Joaquin Light & Power Corporation. From a judgment for plaintiff, defendant appeals.

Affirmed.

F. H. Pearson, of Fresno, for appellant.

Conley, Conley & Conley and W. M. Conley, all of Fresno, for respondent.

PER CURIAM.

This is an appeal from a judgment in favor of plaintiff in an action for fraud and deceit. The case was tried before a jury and resulted in a verdict for plaintiff. For many years prior to the transactions which form the basis of the controversy, plaintiff corporation had conducted a mining business in Merced county, its mine being located in Mariposa county. J. B. Hart, vice president of the Farmers' & Merchants' National Bank of Merced, was also secretary and treasurer of plaintiff, and in full charge of its books and funds. At this time Raleigh Casad was district manager of defendant corporation in that locality, having power to act on behalf of his company in soliciting contracts, collecting money due, and other similar business. The complaint alleges, and the evidence sufficiently shows, that Hart and Casad were close friends, and that they entered into certain transactions for the purpose of defrauding plaintiff. In brief, these took the following form. Plaintiff entered into a contract with defendant by the terms of which defendant was to extend its facilities and furnish electrical energy, and plaintiff was to pay stipulated sums and also to purchase 274 shares of preferred stock of defendants at $98.50 per share, agreeing also not to dispose of said shares for five years. The contract was authorized by the board of directors of plaintiff and executed

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🔑For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 30 P.2d 47.

by its president, C. E. Kocher, and by Hart as secretary. On behalf of defendant it was executed by its president and secretary. Thereupon, Casad instructed I. W. Alexander, manager of the stock sales department of defendant, to issue the shares in his (Casad's) own name, and meanwhile borrowed $17,000 from one Bloss, agreeing to give 200 of the shares as security. Hart then took $9,989 from plaintiff's account, deposited it to Casad's account, and Casad paid defendant $26,989 for the shares. The following July, at Casad's request, defendant bought back the stock at $95 per share, and subsequently disposed of it to other parties. With the sum received from defendant, Bloss was paid. Meanwhile Hart had drawn checks of plaintiff for $10,000 and $7,000 in payment of the balance supposedly due on the stock, which were apparently cashed by him. Eliminating further nonessential details, the net result of the transaction was that plaintiff paid out the full purchase price of shares which it never received; and defendant sold the shares for a certain price and repurchased them at a lower price.

About six years after the stock transaction, a federal bank examiner ordered suspension of business by Hart's bank, and the latter committed suicide. It was found that he had embezzled large sums of money from the bank and from plaintiff. On December 27, 1927, plaintiff filed this action. Because of the obvious bar of the statute of limitations on other possible causes of action, the complaint alleged, in substance, that Casad, as agent of defendant, conspired with Hart to defraud plaintiff; that the facts were not discovered by plaintiff until Hart's suicide, and that the action was brought promptly thereafter. The jury brought in a verdict for $42,011 in favor of plaintiff. Defendant in its appeal contends that the action is barred by the statute of limitations, and that the evidence does not show any authority on the part of Casad which would fasten liability upon the defendant.

[1] The serious question is as to the statute of limitations. The fraud took place in 1921 and 1922, but the action was not brought until 1927. Plaintiff relies upon section 338, subdivision 4, of the Code of Civil Procedure, which provides, in actions based upon fraud and deceit, that the cause of action shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud. The directors of plaintiff testified that Hart enjoyed a high reputation in the community; that they placed absolute trust in him; that he had complete charge of all of their books, records, funds, securities, and similar property; and that they never examined his books. The record clearly establishes actual ignorance of the fraud. Defendant contends, however, that such ignorance cannot be a justification on the ground that it is a result of lack of diligence on the part of plaintiff's directors, who failed to scrutinize their books. While it is true that these directors showed remarkable neglect in their handling of the corporation's affairs, there is no satisfactory showing that greater care would have led to discovery of the fraud. From time to time Hart made reports, orally and in writing, to the board, in which he gave the members every assurance of the proper handling of their affairs, and represented to them on one occasion that the stock was in the bank vault. The numerous false entries and deliberate misrepresentations of Hart might have deceived any but trained accountants. Moreover, we think this question is no longer an open one, but is practically concluded by our decision in the case of Original Mining & Milling Company v. Casad, 210 Cal. 71, 290 P. 456, 458, which action also arose out of certain fraudulent activities of Hart and Casad. In that case plaintiff pleaded substantially the same facts which are pleaded and proved herein, namely, the implicit trust placed in Hart, his high reputation in the community, false representations and entries in the records of the company, and the ultimate discovery of the fraud after Hart's suicide. The lower court sustained a demurrer to the complaint. After reviewing the pleadings and the relevant authorities, this court reversed the judgment, saying: "* * * We are of the opinion that the facts pleaded are, if sustained by the evidence, sufficient in law to excuse the plaintiff for failure to earlier discover the fraud pleaded." The proof in the instant case is sufficient to bring it within said decision.

[2, 3] On the merits we are satisfied that the judgment is correct. There is, of course, no doubt that Casad directly participated with Hart in the fraudulent acts, and the conspiracy is satisfactorily established. There is also no question but that Casad was the agent of defendant corporation, with rather broad powers. There remains the question whether he had authority, either expressly granted or created by subsequent ratification, to act for defendant in the stock transaction. If so, defendant is liable, under the settled rule that a principal is liable for even the wilful torts of an agent committed within the scope of his authority. Cal. Civ. Code, §§ 2338, 2339; Blair v. Guarantee Title Co., Inc., 103 Cal. App. 260, 284 P. 719; Muehlebach v. Paso Robles Springs Hotel, 65 Cal. App. 634, 225 P. 19; 1 Mechem, Agency (2d Ed.) pp. 366 et seq.; pp. 316 et seq.; pp. 333 et seq.

[4] The record shows that Casad, on behalf of his company, conducted negotiations with the directors of plaintiff, for the purpose of

securing the contract to sell electrical energy; and Casad, in the course of those negotiations which were clearly within his actual authority, stipulated that plaintiff should purchase 274 shares of defendant's stock and should agree not to sell the same for five years. This stipulation became part of the contract, and, even if Casad had no authority to require it, the signing of the contract by defendant constituted a ratification of the transaction. Thereafter Casad, fraudulently and with knowledge of the improper designs of Hart, had the stock issued in his own name. This stock was so issued upon Casad's request and with the knowledge of the head of the stock sales department of defendant; and the stock subscription was signed by Casad. The defendant therefore had full knowledge that plaintiff was, by its contract, agreeing to purchase and pay for certain shares of stock, and that those shares, instead of being issued to plaintiff, were actually being issued to defendant's own agent. Under these circumstances, it ratified, if it did not actually authorize, the fraudulent negotiations carried on by Casad. In order to escape the implication of ratification by acquiescence and acceptance of benefits with knowledge of the facts, it would have to show that some effort was made to ascertain from plaintiff whether this wholly unlawful transaction was actually intended by plaintiff. But, on the contrary, defendant did not communicate with plaintiff at all. Subsequently, when Casad commenced further negotiations with defendant, this time for the purpose of selling back to it these shares, defendant again dealt with Casad alone, taking the property of plaintiff without any inquiry of plaintiff's directors as to the authorization for the transfer. Upon resale of the shares, defendant realized a profit, thus deriving a direct benefit from Casad's acts. In short, whether the evidence is viewed as establishing original authority or ratification, it unquestionably leads to the conclusion that defendant corporation is responsible for his fraudulent acts.

[5] The final point urged by defendant is that this action is equitable in character, and that the failure of the lower court to make findings is fatal to the judgment. The essential nature of the action is, however, legal in character, since it seeks damages for conspiracy to defraud; it was tried as an action at law, a jury being demanded by defendant; it is conceded that the stock could not be delivered; and the prayer for the alternative relief of issuance of equivalent shares does not affect the substance of the action.

The judgment is affirmed.

In re SMEAD'S ESTATE.

SMEAD v. COATES et al.[*]

Civ. 8635.

District Court of Appeal, Second District, Division 1, California.

March 9, 1933.

Hearing Granted by Supreme Court May 8, 1933.

1. Appeal and error 🔑1011(1).

Trial court's determination of issue upon conflicting or contradictory evidence will not be disturbed on appeal.

2. Appeal and error 🔑1056(1).

In proceedings by legatees to require decedent's husband as executor to account for real property conveyed to wife, exclusion of evidence of estoppel based on decedent's answer to complaint in inheritance tax case involving property in question *held* not prejudicial error.

HOUSER, J., dissenting.

Appeal from Superior Court, Los Angeles County; Albert Lee Stephens, Judge.

Account and petition for discharge by Chester R. Smead, executor of the estate of Lillian C. Smead, deceased, in which Della F. Coates and others filed objections. From an order refusing to settle the executor's account and requiring accounting for certain real property, the executor appeals.

Affirmed.

See, also, 215 Cal. 439, 10 P.(2d) 462.

Richard Hartley and Freston & Files, all of Los Angeles, for appellant.

M. C. Spicer, of Los Angeles, for respondents.

YORK, Justice.

The decedent executed an holographic will under date of March 10, 1920, bequeathing certain specified sums of money totaling $35,000 to her aunts and cousins, making her husband, the appellant here, the residuary legatee, and also naming him executor of her said last will. Appellant, the said husband, was appointed executor on July 9, 1930, and ever since that time has been and now is the duly appointed, qualified and acting executor of said estate. On September 23, 1930, said executor filed his first and final account and his petition for discharge, setting forth therein that the deceased had left no property of any kind, whereupon the legatees and their successors in interest filed their objections to the settlement of the account, also petitioned the court for the removal of the executor, and alleged that said executor had property in his possession belonging to the said estate which he was concealing.

🔑For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

[*] For subsequent opinion see 28 P.2d 348.

The case was tried upon the issues raised by the objections to the final account, and this is an appeal from the order of the court refusing to settle the account of said executor, and ordering him to account to the estate for two pieces of real property of great value.

The two parcels of property referred to consisted of one piece of fifty acres and another of one hundred thirty-seven acres. The smaller piece had been sold for cash and the larger piece had been sold also, but the method used was to convey the same to a trust company as trustee under what is commonly known as a subdivision trust. The decedent had been originally set up in the trust as the sole beneficiary, but later had assigned her interest therein to her husband, the said executor, to whom most of the money was paid. The money received from the two parcels amounted approximately to a quarter of a million dollars, and the action here actually resolves itself into an effort to secure the sum of $35,000 for the benefit of the objectors, inasmuch as the balance of the property would revert to the husband executor in any event.

The two parcels of land herein referred to were received by the decedent from her uncle, one John J. Charnock, who was a very elderly man. The decedent at the time of the conveyance was married to appellant, but the deed ran to her as "Lillian Charnock Price," and the objectors maintained that Mr. Charnock at the time he conveyed the property to his niece did not know that she was married to appellant, and that, therefore, such deeds represented gifts and as such constituted the sole and separate property of the decedent. They further contended that at the time the decedent conveyed the beneficial interest in the trust to her husband, appellant, she was incompetent, and that the conveyance was invalid and should be set aside, or that in any event the conveyance did not show that it was made for a valuable consideration or was intended as a gift, and that the property continued to exist as the sole and separate property of the decedent, and that the executor appellant was accountable to the estate for the money received from the trust as a debt owing from him to the decedent.

Appellant maintains that the real property in question was deeded to decedent as community property, and, instead of being a gift, was deeded by way of payment for services rendered to the uncle during his lifetime and for the promise of decedent and appellant to continue to render such services to the uncle. Appellant further contends that the fact that the deeds ran to decedent by her maiden name was done because of the uncle's eccentricity, i. e., that he was opposed to marriage in general and of any of his relatives in particular. Appellant contends that he and decedent concealed the fact of their marriage from the uncle for some time, but after the uncle became acquainted with appellant and came to like and trust him, he withdrew any objections to the marriage of appellant and decedent, and their true status was then disclosed to him, but he desired to conceal from the rest of the family that he had yielded in this one instance, and, in order to avoid disclosing the fact that he had approved of the marriage of appellant and decedent, the deeds were made to decedent under her maiden name.

The main issue upon this appeal is whether the property constituted the community property of decedent and appellant, or formed part of the separate estate of decedent. Appellant contends that findings IV and V were not justified by the facts and were erroneous as a matter of law.

Finding IV: "The court further finds that the transfers of the two pieces of real property above described from John J. Charnock to Lillian Charnock Price were conveyances to her alone from her uncle, and that no service of Chester R. Smead or of Lillian Charnock Price Smead, after her marriage with Chester R. Smead, formed any part of the consideration for such conveyances, and that the said described property became the sole and separate property of Lillian Charnock Price (Smead)."

Finding V: "The court further finds that the piece of property described as Sub-division of tract of land No. 3 of the allotment of Machado containing 50.18 acres was sold for $1000.00 per acre, and that the Ro La Ballona Tract containing 137.52 acres was sold for $1750.00 per acre; that in the sale of the Ro La Ballona tract a trust was created, the Title Guarantee and Trust Company being the trustee and Lillian Charnock Price Smead the beneficiary under the trust."

[1] There was a decided conflict in the evidence relating to the facts covered by these two findings, and, where the trial court determines an issue in favor of either party upon conflicting or contradictory evidence, such determination will not be disturbed upon appeal.

[2] The exclusion of evidence of the prior action, Hunt, Treasurer, v. Price, did not constitute such error as would result in prejudice to the appellant.

The order appealed from is affirmed.

CONREY, Presiding Justice (concurring).

I concur in the judgment. But it appears to me that some further comment should be made upon the ruling of the court excluding the evidence offered by appellant in support of his claim that respondents were estopped by the answer made by decedent to the complaint in the inheritance tax case which was prosecuted against her, entitled Hunt, Treasurer, etc., v. Price.

The verified answer of appellant to the petition filed by respondents in this proceeding in the court below alleges that subsequent to the acquisition of said property (that is subsequent to the conveyance made by Charnock to Mrs. Smead as Lillian Charnock Price), in an action on behalf of the state to recover an inheritance tax accruing by reason of said transfer, claim was made by the state that said property was subject to an inheritance tax by reason of its testamentary nature, and by reason of the fact that it was a gift; that said claim of the state was litigated, and it was judicially determined that said conveyance was for a valid and sufficient consideration, and that said property was not subject to an inheritance tax. Appellant also contends in his answer by appropriate allegations that, in fact, the property was community property.

At the trial of this present case appellant first offered in evidence the decree in the Hunt Case, as a decree showing that the property was given for a valid consideration and for services rendered and agreed to be rendered, etc. Respondents objected that they were not bound by the decree, as the Hunt Case was an action solely between the plaintiff there and Mrs. Smead. The court, at that time, reserved its ruling. Thereafter the matter was again brought up and the court sustained the objections. The offer, in its definite form as made by appellant at the time of the final ruling, is as follows: "There is one further thing which was an oversight, Your Honor. The judgment roll, the judgment decree in the case of Hunt v. Price, that was offered during the time when the objectors were putting on their case. Now, we have proceeded on the case in defense and we would like to offer that judgment again as a part of the evidence for the defense on the ground of estoppel on the part of the objectors to raise—as evidentiary, at least, of estoppel to the objections that are being made by the objectors in this case." To which the attorney for respondents replied: "That is objected to on the grounds that it is incompetent to show any estoppel, for the reason that Chester R. Smead was not a party to the record, and for the further reason that the only thing that was decided by the court in that case was whether or not Lillian Charnock Smead should pay an inheritance tax." Appellant now claims that the court erred in its ruling sustaining the objection to this evidence.

It is not claimed that the judgment in Hunt v. Price is in itself a binding determination of the issues in this case; in other words, it is not res adjudicata with reference to this proceeding. Nor do I think that the answer to appellant herein was good as a plea of estoppel. It may be admitted that respondents, to the extent of their interest in the estate of Mrs. Smead, are bound as she would have been bound by her statements in the former case. But, on the other hand, appellant is not a person in whose favor such estoppel could be enforced. In the offered evidence there is nothing tending to prove that, in consequence of the defense made by Mrs. Smead as against the inheritance tax case, her husband, the appellant here, was led to so conduct himself that, if the truth were established, he would be damaged, or that it would work an injustice or injury to him to permit the present contentions of the respondents to prevail.

Finally, it is contended by appellant that the offered evidence was admissible as a declaration against interest, made by decedent and tending to prove that the property in question was community property. This contention rests upon the fact that said evidence, if received, would have shown that Mrs. Smead, by her verified answer, asserted that the property had been conveyed to her for a valuable consideration. Rep. Trans. p. 208. But Mrs. Smead, of course, was not a witness in this present case. Therefore her former declaration cannot be admissible for any purposes of impeachment. And to allow its use as evidence on the merits would in effect be using it as an estoppel, which, as I have said, I do not think is a defense available to appellant. Moreover, the offer was limited to the judgment roll, and was made for no other stated purpose than to establish the claimed estoppel. It was solely with that question in view that the trial court made its ruling. I agree that the judgment should be affirmed.

HOUSER, Justice (dissenting).

I dissent. Founded upon the facts as disclosed by the record herein, my conclusion is that the evidence relating to the question to which Mr. Presiding Justice CONREY has referred was properly admissible, and that, in the circumstances, the refusal by the trial court to admit such evidence prejudiced the appellant in his substantial rights in the premises and constituted reversible error.

The ultimate question of fact that was submitted to the trial court for its determination was whether certain property of the estate of Lillian C. Smead, deceased, represented her separate property in her lifetime, or whether it was community property of said Lillian C. Smead and her husband, the appellant herein. It is clear that the respondents' rights in the premises, if any, depended wholly upon the rights in the property theretofore possessed by Lillian C. Smead. Necessarily, since in effect the respondents deraign whatever title or right they may possess through, under or by virtue of the title or right theretofore possessed by Lillian C. Smead, the right or title of the respondents could be no greater nor present more strength in their favor than was possessed by their predecessor in interest. Whatever weakness existed in the title of Lillian C. Smead to the property as her separate estate descended directly and was chargeable to any person, including the respondents, who claimed under Lillian C. Smead. Her title was their title. By no act of respondents could they either add to or subtract from the title of Lillian C. Smead; but in her lifetime Lillian C. Smead might have done many different things, or made many sundry admissions of fact against her interest, relative to the source or the strength of the title which she asserted, which, in a proper action at law or a suit in equity, would have been admissible in evidence. For example, if during the lifetime of Lillian C. Smead her husband had brought an action against her for the purpose of having adjudicated whether the property here in question was a part of the community property of the parties to the action, perhaps it would not be doubted that any declaration theretofore made by the wife against her interest would have been admissible in evidence, and consequently that the allegation of Lillian C. Smead contained in the former action to which reference has been had in the opinion of Mr. Presiding Justice CONREY, to the effect that the property in question was deeded to Lillian C. Smead "for a valuable and valued consideration," properly would have been received in evidence as tending to establish the nature of the tenure. Likewise, included within the testimony given by Lillian C. Smead in that action wherein, in substance, she declared that the agreed consideration paid by her for the property consisted in her "attention and care to and of the grantor and of his pets and animals * * * as long as he lived." To my mind, it is clear that, to the extent that in her lifetime the conduct, or acts, or the declarations, of Lillian C. Smead against her interest were admissible in evidence in any action in which her interest in property in which she claimed an ownership was an issue, the respondents are bound; not that in the ordinary sense the respondents necessarily are estopped, but that the evidence of such conduct, acts, or declarations at least is admissible as an item or items of fact which tend to establish the nature or character of ownership of the property in question. And again, without meaning to appear too certain of the correctness of my view of the legal situation here under consideration, nevertheless I am convinced that the authorities so indicate.

Section 1853 of the Code of Civil Procedure is as follows: "The declaration, act, or omission of a decedent, having sufficient knowledge of the subject, against his pecuniary interest, is also admissible as evidence to that extent against his successor in interest."

And, as far as is here material, the substance of subdivision 4 of section 1870 of the Code of Civil Procedure is that "evidence may be given upon a trial of * * * the act or declaration of a deceased person done or made against his interest in respect to his real property. * * *"

With reference to some of the authorities which in effect establish the admissibility of the evidence which was rejected by the trial court, and of which action appellant herein complains, in the case of Donnelly v. Rees, 141 Cal. 56, 74 P. 433, 434, which was an action brought by a daughter of a deceased person against his grantee of real property to set aside a deed made by the grantor on the ground that the said deed was fraudulently obtained, it was held that an affidavit made by the deceased in his lifetime in an attachment action filed against him, wherein in such affidavit the deceased declared that the deed which was under attack in the cited case was not sham nor made without valuable consideration, was admissible in evidence. It should also be noted that, in the suit in which such evidence was adjudged to have been admissible, neither of the litigants then before the court was a party to or in any wise concerned in the attachment action. In connection with the admissibility of the evidence, the Supreme Court of this state remarked: "* * * The same observation is true of Kean's own declaration, made in an affidavit in the Monaghan case, to the effect that the deed was not sham, or without consideration, or in fraud of creditors. This was admissible in evidence (Code Civ. Proc. § 1853), and, if the facts had been doubtful, would have been cogent in its effect, but it was not conclusive on the court. * * *"

The syllabus in the case of Stoddard v. Newhall, 1 Cal. App. 111, 81 P. 666, is as follows: "In an action by an administratrix to recover tools in possession of the decedent as the property of his estate, where the defendant was the mother of the decedent and testified that the tools belonged to her, that her son was employed as foreman in her orchard and kept the tools at his house as matter of convenience, it was error to exclude evidence of the declarations of the deceased against his interest in support of the defendant's testimony. The declarations were admissible against the plaintiff, who, in her capacity as administratrix, is successor in interest of the deceased, within the meaning of section 1853 of the Code of Civil Procedure."

The case of Broaddus v. James, 13 Cal. App. 464, 110 P. 158, was an action to set aside a deed made by an aged widow to her surviving daughter to the exclusion of children of a deceased daughter. As far as concerns the question here under consideration, the syllabus of that case sufficiently states the rule announced by the court, as follows: "The declaration of the testator showing the value of the services rendered to her by her daughter, and that she deserved the whole of the property which she proposed to deed to her, would undoubtedly be admissible against her if she were alive and contesting the deed, and they were equally admissible against her representatives, and in favor of the representatives of the deceased grantee, as being the best evidence obtainable on the question of consideration. Its weight was for the trial court."

In Estate of Hill, 167 Cal. 59, 138 P. 690, which was a proceeding between the heirs of a husband and those of a wife to determine heirship to his estate, and in which proceeding a question was involved identical with that here under consideration, to wit, whether the property was separate or community, it was held:

"Sworn statements by the wife in her inventory of her husband's estate, and in her application for a homestead, that the property was his separate estate are evidence against her successors in interest.

"Where a widow petitions to have a portion of the estate of her deceased husband set apart to her as a homestead, alleging the property to be his separate estate, the decree setting aside the homestead as prayed is binding upon her and her heirs, and estops them from asserting that the property belonged to the community (Department opinion)."

In commenting upon the admissibility and the effect of evidence such as was offered to, but rejected by the trial court herein, in part the Supreme Court said: "But we have, in addition, the sworn statement of the widow, in her application for a homestead, that the property was the separate property of Stephen Hill. There can be no question of the admissibility of this statement as a declaration against interest, operative against the appellants as successors to the right of the declarant. [Citing authorities.] Upon the same ground the widow's sworn statement, in the inventory filed by her, that the property was the separate estate of the decedent, was evidence against her successors in interest. On the question of the admissibility of these declarations the case is precisely the same as In re Bauer [79 Cal. 304, 21 P. 759], supra. And we think that, under the circumstances appearing here, the statements of the widow were entitled to considerable weight. They were formal averments, in proceedings deliberately taken by her. In each instance the declaration made was directly and materially antagonistic to her own interest. It related to a matter concerning which she in all probability had more accurate knowledge than any other living person. Certainly this twice-repeated solemn assertion was sufficient, in connection with the other facts shown, to justify the court in finding that the property was the separate estate of Stephen Hill."

And again, in the course of the department opinion written by Mr. Justice Henshaw, the following language occurs:

"This decree so setting aside the homestead was not only a judgment in rem binding upon all parties [citing authorities], but it was a decree invited by Isabella Hill, and therefore in an especial sense binding upon her, her heirs and her privies. She was not merely bound, as was all the world bound, because it was a proceeding in rem, she was bound because she had solicited and demanded a right from the estate of her husband based upon her declaration as to the character of the land. Having invited this judgment and having accepted the fruit of it, it needs no authority to show that she is bound by it. Indeed, during her lifetime she never questioned it. It will not do to argue that the character of the property as separate or community property was not involved in the homestead proceeding and decree. It was not only directly involved, but the court could not with propriety have entered the decree which it made excepting under the determination which it also made, that the property was the separate property of Stephen Hill. 'In all the cases,' says Greenleaf (1 Greenl. Ev. § 543), 'the same principle prevails, and the judgment, acting in rem, shall be held conclusive upon the title and transfer and disposition of the property itself, * * * by whomsoever the latter may be questioned; and whether it be directly or indirectly brought in question.' [Citing authority.]

"'It results then that the findings show that the question of the character of this property has been adjudicated and that this adjudication raises an estoppel against the pretensions of the heirs of Isabella Hill.'"

From a reading of the cited case it would appear that, not only was the questioned evidence in the instant case admissible, but that the judgment contained within the judgment roll which constituted a part of such evidence amounted to an estoppel, as far as the respondents herein were concerned.

Without further quotation from the adjudicated cases of this state, it is confidently asserted that in each of the following cases may be found an announcement of a rule which in principle cannot be distinguished from that so positively stated in the cases to which reference herein has been had, to wit, Steinberger v. Young, 175 Cal. 81, 165 P. 432; Rulofson v. Billings, 140 Cal. 452, 74 P. 35; Harp v. Harp, 136 Cal. 421, 69 P. 28; 10 Cal. Jur. 1098; Horton v. Winbigler, 175 Cal. 149, 165 P. 423; Harris v. Harris, 67 Cal. 455, 8 P. 8; Bias v. Reed, 169 Cal. 33, 42, 43, 145 P. 516.

Now, as to the effect of the rejection of the offered evidence: It is beyond dispute, in fact, in effect it is conceded, that on the trial of the action a decision in favor of either party thereto would find sufficient and substantial support in the evidence. Further than that, a consideration of the evidence adduced will show that, as between the respective parties to the litigation, the evidence was about evenly balanced. In such a condition it becomes manifest that, had the questioned evidence been received and considered by the trial court, its decision might have been in favor of the appellant. In other words, to paraphrase a negative of the provision of section 4½ of article 6 of the Constitution, after an examination of the entire cause, including the rejected evidence, this court should be of the opinion that the error complained of has resulted in a miscarriage of justice.

130 Cal.App. 282

MURPHY v. LYNCH.

Civ. 4752.

District Court of Appeal, Third District, California.

March 8, 1933.

Rehearing Denied April 7, 1933.

1. Appeal and error ⚿544(1).

Notice of appeal filed under old method of procedure *held* sufficient to present question whether judgment was supported by findings and jurisdictional defects appearing on judgment roll (Code Civ. Proc. §§ 940, 953a).

2. Costs ⚿262.

Where evidence was not before reviewing court, it could not assume from record that appeal was frivolous.

3. Appeal and error ⚿640, 766.

Where neither transcript nor appellant's brief conformed to court rules, motion to dismiss appeal should be granted (Rules of Supreme Court and District Courts of Appeal, Rules 7, 8, and Rule 1, § 4; Code Civ. Proc. §§ 670, 953a).

> No bill of exceptions was settled or filed, no transcript of proceedings was filed, and no notice for preparation thereof was filed with clerk. The evidence was not before the court.

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Action for damages for malpractice brought by Lula Mignon Murphy against W. P. Lynch. From an adverse judgment, plaintiff appeals. On motion to dismiss the appeal.

Motion granted, and appeal dismissed.

Lula Mignon Murphy, in pro. per.

Foltz, Rendon & Wallace, of Stockton, for respondent.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

The respondent moved to dismiss the appeal in this case on the grounds that it is frivolous; that it was not perfected within the time allowed by law; that no notice of appeal or transcript was served or filed pursuant to section 953a of the Code of Civil Procedure; that no bill of exceptions was settled or filed; that the clerk's transcript of the judgment roll which was filed in this court does not conform to the requirements of rule VII of the Rules of the Supreme Court and District Courts of Appeal, chiefly because it is typewritten and not printed, and that the appellant's brief which was filed in this court does not conform to the requirements of rule I, section 4, and rule VIII of said court rules, for the reason that the brief is typewritten and not printed, and that it contains on the first page thereof no statement of the questions involved on appeal.

[1-3] This is an appeal from a judgment which was rendered against the plaintiff in a suit for malpractice. The notice of appeal which was filed under the old method of procedure as provided by section 940 of the Code of Civil Procedure is sufficient to present to this court for determination the question as to whether the judgment is supported by the findings, and any jurisdictional defect which may appear upon the judgment roll. 2 Cal. Jur. 527, § 264; Thompson v. Hancock, 51 Cal. 110. The documents required by section 670 of the Code of Civil Procedure, constituting the judgment roll, and the notice of appeal, are all that are included in the transcript. No bill of exceptions was settled or filed. No transcript of proceedings under the provisions of section 953a of the Code of Civil Procedure was filed and no notice for the preparation thereof was filed with the clerk. The evidence is not before this court. It is too late for the appellant to present the evidence to this court by means of any method authorized by law. No contention is made in appellant's brief that the findings do not support the judgment. No reversible error appears upon the judgment roll. None is asserted which is dependent thereon. No possible benefit to the appellant would result from a ruling which would necessitate the cost and labor of filing additional briefs and submitting the cause on its merits.

Since the evidence is not before this court, we may not assume from the record that the appeal is frivolous or that it was not taken in good faith.

For the reason that neither the transcript nor the appellant's brief conforms to the requirements of the court rules above cited, the motion to dismiss the appeal should be granted and the appeal dismissed. It is so ordered.

We concur: PULLEN, P. J.; PLUMMER, J.

130 Cal.App. 217

PEOPLE v. HANSEN et al.

Cr. 2309.

District Court of Appeal, Second District, Division 2, California.

March 2, 1933.

1. Criminal law 🔑829(9).

Refusing instructions on presumption of innocence *held* not prejudicial because court gave all of prosecution's requested instructions, but refused all but one of defendant's instructions, where instruction given correctly stated law.

2. Criminal law 🔑829(9).

Refusing instruction on presumption of innocence *held* not prejudicial because instruction given, which correctly stated law, was involved with doctrine of reasonable doubt.

3. Criminal law 🔑409.

Where defendant's verbal admission is offered in evidence, although whole admission is admissible, part favorable to defendant need not be given as much consideration as unfavorable part (Code Civ. Proc. § 1854).

> In such case, all parts of the verbal admission are not equally worthy of credence, but the whole statement is to be considered for the purpose of determining the weight to be given to such portion of it as was admissible by reason of its own merit.

4. Criminal law 🔑406(1).

Admission against interest is admissible because of great probability that individual would not make untrue statement injurious to himself (Code Civ. Proc. § 1854).

5. Criminal law 🔑396(2).

If parts of conversation are admissible as against interest, entire conversation is admissible even though it may embrace self-serving declarations (Code Civ. Proc. § 1854).

6. Criminal law 🔑780(1).

Refusal to give cautionary instruction as to defendant's verbal admissions *held* not prejudicial (Code Civ. Proc. § 2061, subd. 4).

7. Criminal law 🔑757(7).

Instruction that witness false in part of testimony may be distrusted in other *held* not prejudicial as charge on question of fact.

> Regardless of whether such instruction was charge on question of fact, it was a mere commonplace that an intelligent juror would be apt to know about and act upon in the absence of such instruction, and hence was not harmful.

8. Criminal law 🔑763, 764(6).

Instruction that flight after commission of offense was insufficient to establish guilt, but was, if proved, fact for jury's consideration, *held* not charge on evidence.

9. Criminal law 🔑829(9, 18).

Where court gave instructions regarding presumption of innocence, reasonable doubt, and burden of proof, refusing instructions covering same question in different way *held* no error.

10. Criminal law 🔑761(8, 11).

Instruction that prosecution need not show that pistol used by one perpetrating robbery was loaded, and that question whether given instrument is dangerous weapon depends upon circumstances, *held* not erroneous as assuming robbery, and that pistol was used.

> Facts disclosed that the complained of instructions immediately followed two other instructions defining first and second degree robbery, telling jurors it would be their duty to determine degree thereof if a verdict of guilty were found, and informing them that where two or more persons acting in concert perpetrated robbery, one of whom is armed with dangerous or deadly weapon, as defined in instructions, such robbery is in the first degree as to all persons concerned. Under the circumstances the complained of instruction, simply furnished the needed definition of dangerous or deadly weapon.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Verner Hansen and another were convicted of robbery, and defendant named appeals.

Affirmed.

Halverson & Halverson and Orbison & Irwin, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Alberta Belford, Deputy Atty. Gen., for the People.

ARCHBALD, Justice pro tem.

Defendant was charged with robbery, the jury returning a verdict of guilty. From an order denying his motion for a new trial and from the judgment entered on said verdict he has appealed. No question is raised as to the sufficiency of the evidence to sustain the verdict and judgment, but appellant urges that the court erred in giving certain instructions and in refusing to give others requested by him.

The arrest grew out of the robbery of a drug store in Los Angeles on the evening of July 19, 1932. According to the testimony for the plaintiff, three men entered the store. Two of them, with guns, forced the occupants to face the wall in the back room, while the third took money out of the cash register. Appellant was not identified as being one of the three inside the store, but was identified as being on the outside, and, in company with the three, as having ran to a car near by, with the driver, all of whom jumped into the car which was driven away. Evidently the witnesses, although they identified the appellant, failed to identify a man who pleaded guilty to being one of the three in the store.

[1, 2] Appellant requested an instruction on the presumption of innocence, which was refused by the court "except as covered by instructions given." Appellant admits that the instruction as given by the court correctly stated the law, but apparently complains because the court gave all of the fifteen instructions requested by plaintiff and refused all but one of the eighteen offered by him; and also because the instruction given was involved with the doctrine of reasonable doubt. We see no error in the instruction given or any prejudice to appellant that could possibly have resulted therefrom.

[3-5] Appellant offered an instruction which in effect charged that where the verbal admission of a person charged with crime is offered in evidence the whole of the admission must be taken together, as well that part which is favorable to the accused as that which is against him, and that if the favorable part is not disproved, or is improbable or untrue when considered with all the other evidence, such part is "entitled to as much consideration from the jury as any other part of the statement." We see no error in the court's refusal to give such instruction. An admission against interest is admissible because of the great probability that an individual would not make a statement tending to injure himself unless the same were true. If there are parts of a conversation which are so admissible as against interest, the entire conversation is admissible "even though it may embrace * * * self-serving declarations." Section 1854, Code Civ. Proc.; Hinton v. Welch, 179 Cal. 463, 466, 177 P. 282, 283. Such evidence is not admissible because of its own weight and sufficiency, but because by reason of its intimate connection with the self-serving statement it may rebut, qualify, or explain it. Granite Gold Mining Co. v. Maginness, 118 Cal. 131, 50 P. 269. This is clearly shown by Algernon Sidney, who says that the publisher of the Bible might be subjected to a criminal charge for printing the phrase, "The fool hath said in his heart there is no God." The last four words, "there is no God," might be selected and the publisher indicted for blasphemy, and yet with the context their use could not be said to be criminal. In our opinion all parts of such a statement are not to be regarded as equally worthy of credit, but the whole statement is to be considered by the jury for the purpose of determining the weight to be given to such portion of it as was admissible by reason of its own merit. The proposed instruction was not a correct statement of the law.

[6] The court also refused to give a cautionary instruction as to verbal admissions. Such an instruction seems to be justified by section 2061, subdivision 4, of the Code of Civil Procedure. But it is well settled that such an instruction, "if not in violation of the constitutional injunction against charging juries on matters of fact, is one that may properly be refused as a 'mere commonplace.' In short, a judgment will not be reversed either for the giving or the refusing" thereof. People v. Raber, 168 Cal. 316, 320, 143 P. 317, 318.

[7] At plaintiff's request the usual instruction, that a witness false in one part of his testimony is to be distrusted in other, etc., was given. In the case of People v. Kelly, 146 Cal. 119, 123, 79 P. 846, 848, the court said of a substantially similar instruction that the effect of it is "simply that the jury must reject the testimony of the witness referred to unless they shall be convinced of its truth, which is to leave the credibility of the witness to the jury." Regardless of whether or not such an instruction is a charge by the court on questions of fact, as urged by appellant, it is most certainly "a mere commonplace that an intelligent juror would be apt to know about and act upon in the absence of the instruction [and], is not regarded as harmful, or as constituting a proper ground for reversal." People v. Tibbs, 143 Cal. 100, 103, 76 P. 904, 905; People v. Hower, 151 Cal. 638, 646, 91 P. 507.

[8] The court instructed the jury that: "The flight of a person immediately after the commission of a crime, or after he is accused of a crime that has been committed, is not sufficient in itself to establish his guilt, but is a fact which, if proved, the jury may consider in deciding his guilt or innocence. The weight to which such circumstance is entitled is a matter for the jury to determine." Such instruction "neither assumes the guilt nor flight of the defendant" (People v. Forsythe, 65 Cal. 101, 104, 3 P. 402, 404), and we fail to see how it is a charge on the evidence in any respect.

[9] The court very properly instructed the jury as to the presumption of innocence, reasonable doubt, and the burden of proof, and we see no error in refusing the three instructions requested by appellant covering such questions in a different way.

[10] The court instructed the jury that: "It is not incumbent upon the prosecution to show that a pistol used by a person in the perpetration of a robbery is actually loaded at the time of the commission of the robbery. The question as to whether a given instrument is a dangerous or deadly weapon depends for its solution primarily upon the attendant circumstances, as well as upon the use which has been made or is proposed to be made of the particular instrument." Ap-

pellant argues that such instruction assumes (1) that there was a robbery and (2) that a pistol was used in perpetrating it. The language used makes no such assumption. As a matter of fact, it follows two instructions, one of which defined first and second degree robbery and told the jurors it would be their duty to determine the degree thereof if a verdict of guilty was found, and the other of which informed them that where two or more persons, acting in concert, perpetrated a robbery, "one of whom is armed with a dangerous or deadly weapon" as defined in the instructions, such robbery is of the first degree as to all persons concerned in its commission. Following these came the instruction complained of, which simply furnished the needed definition of "dangerous or deadly weapon."

Judgment and order affirmed.

We concur: CRAIG, Acting P. J.; STEPHENS, J.

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130 Cal.App. 70

MOORE v. GOSBEY, Judge.

Civ. 8846.

District Court of Appeal, First District, Division 2, California.

Feb. 27, 1933.

1. Divorce 🔑243.

That court, after hearing, filed document entitled "Interlocutory Judgment of Divorce" making no mention of alimony, did not invalidate provision for alimony in another document, filed on same day, entitled "Order" (Civ. Code, § 3528).

The two documents filed in the action on the day of the trial, in conformity with the decision as expressed in the minute order, were in substance and effect but one judgment.

2. Divorce 🔑243.

Where alimony award was made pursuant to agreement of parties after hearing, court's jurisdiction to make award could not be attacked because court filed two documents, one providing for divorce and other for alimony.

3. Divorce 🔑222.

Court could award divorced wife attorney's fee to enable her to resist divorced husband's motion to revoke order awarding alimony.

Petition by Harry L. Moore for writ of prohibition prayed to be directed to P. F. Gosbey, Judge of the Superior Court of Santa Clara County, to restrain further proceedings in a certain divorce action.

Writ denied.

Norman A. Eisner, of San Francisco, and W. L. A. Calder, of Los Angeles, for petitioner.

Louis Oneal, of San Jose, for respondent.

SPENCE, Acting Presiding Justice.

Petitioner seeks a writ of prohibition to restrain the respondent court from further proceedings in a certain divorce action entitled, Frances H. Moore v. Harry L. Moore, being action numbered 28817, in the files of the respondent court.

In 1922, Frances H. Moore commenced said divorce action against petitioner herein. In the complaint it was alleged that the parties had entered into an agreement settling their property rights by which petitioner agreed to pay to plaintiff the sum of $175 per month for a specified period and thereafter the sum of $50 per month during plaintiff's lifetime or until she remarried. The prayer of the complaint asked, among other things, that the petitioner be required to pay the specific sums agreed upon by the parties. Petitioner filed his answer in said action denying generally the allegations of extreme cruelty but admitting, by failure to deny the same, the above-mentioned allegations relating to the agreement of the parties. On December 15, 1922, the day upon which the answer was filed, a hearing was had pursuant to stipulation. No appearance on behalf of petitioner was made at said hearing. At the conclusion thereof a minute order was made, which, after certain recitals, provided: "That plaintiff herein be and she is hereby granted an interlocutory judgment of divorce from defendant. It is further ordered that the court adopt the agreement entered into between the parties herein." Immediately following the hearing and on the same day, two documents were signed by the trial court and filed. One document was entitled, "Interlocutory Judgment of Divorce," which, after certain recitals, read, "Now, therefore, it is ordered, adjudged and decreed that plaintiff, Frances H. Moore, is entitled to a divorce from defendant, Harry L. Moore." The other document was entitled, "Order." It recited the making and filing of the interlocutory decree and ordered in conformity with the agreement of the parties that: "Defendant pay to Plaintiff as and for the maintenance and support of Plaintiff the sum of $175 per month commencing with March 10th, 1921, and continuing on the 10th day of each and every month thereafter until the aggregate sum of $6,000 is paid, and thereafter commencing with March 10th, 1924, said Defendant shall pay to Plaintiff the sum of $50 per month on the 10th of each and every month during Plaintiff's lifetime, or until said Plaintiff shall have remarried."

Petitioner made the required payments for some years, but subsequently left the state of California while in arrears in said payments. Thereafter the trial court ordered execution to issue and certain money due to petitioner from the Southern Pacific Company, his employer, was collected. In May, 1932, petitioner served and filed a notice of motion to set aside and revoke the order of the trial court made on December 15, 1922, whereby petitioner was ordered to pay said sums. Thereupon, the plaintiff made a motion for an order requiring petitioner to pay to plaintiff the sum of $100 as counsel fees for the purpose of resisting petitioner's motion. The motion for counsel fees was granted on May 23, 1932, and the trial court ordered petitioner to pay said sum of $100 to plaintiff before the hearing of petitioner's motion to vacate and set aside the order of December 15, 1922. In August, 1932, the trial court made a further order directing execution to issue for sums due under the orders of December 15, 1922, and May 23, 1932. Execution was issued and further money was collected from the Southern Pacific Company.

[1, 2] Challenging the validity of the order for the payment of alimony made on December 15, 1922, upon which the court has acted and threatens to act unless restrained, petitioner contends "that the court having made its interlocutory judgment of divorce without any provision for alimony and without reservation, it was without jurisdiction thereafter to make an ex parte order for alimony." Under the facts in the present case we find no merit in this contention. While numerous authorities are cited bearing upon the general principle set forth, we find none of them in point. In the present case there was but one trial or hearing at which all of the issues were heard and determined. The decision of the court was announced at the conclusion of said hearing as shown by the minute order. That decision was in substance that plaintiff was entitled to an interlocutory decree together with alimony as provided in the agreement of the parties. We need not discuss respondent's contention that the entry in the minutes of the decision of the court constituted the judgment (Azadian v. Superior Court, 88 Cal. App. 296, 263 P. 298, and cases cited), for assuming that it was necessary that a document be signed and filed, the two documents, filed in the action on the day of the trial in conformity with the decision as expressed in the minute order, were in substance and effect but one judgment. It is a fundamental maxim in the jurisprudence of this state that "the law respects form less than substance." Civ. Code, § 3528. Unlike the authorities cited by petitioner, this was not a case where an interlocutory decree was entered without provision for alimony and without reservation and where later an order was made awarding alimony following a subsequent hearing. Nor was the order for alimony in the present case made ex parte. The hearing here was had by stipulation of the parties and the award of alimony was made pursuant to their agreement. At said hearing the trial court had jurisdiction of the subject-matter and of the parties. If the order for alimony had been embodied in the document entitled, "Interlocutory Judgment of Divorce," which was filed with the document entitled "Order," the jurisdiction of the trial court to make such order for alimony would have been beyond question, and although the trial court adopted the unusual procedure of signing and filing two documents rather than one, we do not believe that petitioner may successfully attack the jurisdiction of the court to make the order upon that ground.

[3] Petitioner further contends that the trial court "was without authority to allow plaintiff an attorney fee in the sum of $100 to enable her to resist defendant's motion made on the 23d day of May, 1932. She was no longer defendant's wife." This contention is without merit. Lamborn v. Lamborn, 190 Cal. 794, 214 P. 862.

The alternative writ is discharged, and the petition is denied.

We concur: STURTEVANT, J.; GOODELL, Justice pro tem.

130 Cal.App. 278

NELSON v. SCHUMACHER.

Civ. 7524.

District Court of Appeal, Second District, Division 2, California.

March 8, 1933.

Rehearing Denied April 6, 1933.

Hearing Denied by Supreme Court May 4, 1933.

1. Appeal and error ⚷1011(1).

Appellate court *held* bound by decision based on conflicting evidence.

2. Bills and notes ⚷63.

Where payee of note kept tin box in bank, president, by placing his note in tin box and telling payee what he had done, *held* to have shown intention to deliver note in lieu of money taken, and payee by taking box out of bank, accepted and perfected delivery of note.

3. Trial ⚷395(1).

Finding that none of affirmative allegations of answer was true *held* sufficient finding on material issues.

4. **Bills and notes** 🔑516.

Plaintiff's production of note *held* prima facie evidence of delivery, nonpayment, and consideration.

5. **Bills and notes** 🔑539.

Finding that it was not true that there was no consideration for note *held* equivalent of affirmative finding of consideration.

Appeal from Superior Court, Los Angeles County; Fletcher Bowron, Judge.

Action by Valborg M. Nelson, also known as Mrs. F. O. Nelson, against M. H. Schumacher. From a judgment in favor of plaintiff, defendant appeals.

Affirmed.

Davis & Thorne, of Los Angeles, for appellant.

Edward K. Sheahan, of Los Angeles, for respondent.

ARCHBALD, Justice pro tem.

Plaintiff, as assignee of her husband, F. O. Nelson, sued defendant on a promissory note executed by him. From a judgment in favor of plaintiff defendant has appealed.

Appellant urges: (1) That there was no delivery of the note; (2) that no definite finding was made by the trial court on appellant's affirmative defense; and (3) that the findings are not supported by the evidence.

The note was dated February 9, 1924, and was payable thirty days after date. Plaintiff testified that her husband assigned the instrument to her on March 9, 1924, and that the principal was her money, invested for her by her husband. F. O. Nelson testified that he placed some securities belonging to his wife in an unlocked tin box belonging to himself, which he kept in the vault of a bank of which defendant was president, that while he (Nelson) was on a trip to Montana the bank collected the sum of approximately $1,000 on one of the securities, and that defendant told him later that he (defendant) "had used the money that came into the bank on a collection and had placed the note in my cash box in lieu of it." The evidence of the defense is the same as that of plaintiff, so far as the collection, use of the money, and the execution of the note are concerned, and is also to the effect that Nelson handed defendant the securities, and told him to hold them as security for signing a bond for the release of plaintiff, and that Nelson told Schumacher to "go ahead and use whatever money comes in on collections for yourself or for any other obligation in order to protect the bank." Nelson testified that defendant took the money without his knowledge. Defendant's evidence is also to the effect that the securities were placed by him in a safety deposit box in defendant's name, and not in Nelson's box, and that the tin box belonging to Nelson was always kept locked.

[1, 2] It will be seen at once that there is a sharp conflict in the evidence as to delivery. The court accepted as a fact the story told by plaintiff's assignor, and in view of the conflict we are bound by the decision. By placing the note in the tin box belonging to Nelson and telling the latter of what he had done, defendant showed a clear intention to deliver the note to him in lieu of the money taken; and, when Nelson later took the box out of the bank, with the note and securities in it, he accepted defendant's delivery and perfected it, as he had a right to do under the state of facts shown by plaintiff's evidence.

[3] The answer set up three defenses. The first is a denial of all the allegations of the complaint except the execution of the note, which is admitted. The next two are affirmative defenses, the first being that there was no consideration for the execution of the note, and the second, in substance, that prior to the execution of the note F. O. Nelson deposited certain bonds and securities with defendant to secure the latter for signing and executing a bond for the benefit of Nelson, who told defendant to use any collections thereon for his (defendant's) benefit; that the latter collected and used the sum of $1,009, and as a memorandum of indebtedness executed his note in said sum and placed the same with such securities; that defendant did not notify Nelson thereof nor deliver the note to him; that thereafter Nelson became obligated to the bank of which defendant was president in the sum of $1,000, and that defendant used the money so borrowed by him to pay such obligation for the benefit of Nelson; that thereafter, and without the knowledge of defendant, Nelson entered defendant's box and withdrew his securities and such note from the bank; that there was no consideration for the note and no delivery; and that by reason of the facts so affirmatively alleged "this defendant is not now obligated" on the same. The court found "that none of the affirmative allegations of the answer of the defendant M. H. Schumacher is true." It is urged that such is an insufficient finding on material issues. The cases cited do not support this contention. In all of them blanket findings were made, but they were substantially to the effect "that all material allegations" of the complaint or answer were true or untrue. The authorities hold that the use of the word "material" is the vice of a blanket finding, as it makes it uncertain and impossible to determine which of numerous allegations are material. Turner v. Turner, 187 Cal. 632, 635, 203 P. 109. No such uncertainty exists in a finding like the one criticized here. Its meaning is clear, and it is equivalent to a determination that each allegation

of the affirmative defenses is not true—"a form of finding which has always been held sufficient." Fritz v. Mills, 170 Cal. 449, 459, 150 P. 375, 379.

[4, 5] We see no merit in the last contention urged by appellant that the evidence fails to sustain the findings and judgment. The production of the note by plaintiff is prima facie evidence, not only of delivery and nonpayment, but of consideration as well, and would have made a conflict in the absence of other evidence by plaintiff's witnesses. The finding "that it is not true that there was no consideration given the defendant for the execution and delivery of said note," while somewhat awkward in its phraseology, is the equivalent of an affirmative finding of consideration.

Judgment affirmed.

We concur: WORKS, P. J.; STEPHENS, J.

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130 Cal.App. 403

SCHOLFIELD v. SECURITY-FIRST NAT. BANK OF LOS ANGELES.

Civ. 7295.

District Court of Appeal, Second District, Division 2, California.

March 16, 1933.

1. Banks and banking 🔑116(4).

Where transaction was outside bank manager's employment, any knowledge he obtained thereby could not be charged to bank.

2. Banks and banking 🔑228.

Evidence that bank, holding security for loans made to certain borrower by itself and by individuals, collected on securities which were given for loans by individuals and applied proceeds on indebtedness to bank *held* sufficient to require decision on merits, rendering nonsuit improper.

Appeal from Superior Court, Los Angeles County; Frank Lamberson, Judge.

Action by Herbert Scholfield against the Security-First National Bank of Los Angeles. From an order granting a nonsuit, plaintiff appeals.

Reversed.

D. Z. Gardner, of Los Angeles, for appellant.

O'Melveny, Tuller & Myers and Marshall Taylor, all of Los Angeles, for respondent.

ARCHBALD, Justice pro tem.

In 1928 one George T. Porter was apparently secretary of the Universal Sales Corporation, which conducted a plumbing business in Los Angeles, and was a depositor in a branch bank in Hollywood conducted by defendant's assignor, Los Angeles-First National Trust & Savings Bank, hereinafter referred to as "bank." The manager of said branch bank at the times in question here was one C. L. Lamping. Said sales corporation becoming involved, applied to said Lamping for assistance. Plaintiff and his assignor, Dwight Lanning, advanced $1,500 each to said sales corporation, through said Lamping, and such sales corporation gave to each its note payable on demand, for such sums. No interest was specified in the notes, but said Lamping was to be paid the sum of $200 per month, as salary, by said sales corporation, which was to be divided between those so advancing money. The first contributors apparently were plaintiff's assignor, one Van Dam, and said Lamping. The last named contributed the sum of $1,000. Afterwards plaintiff came into the pool. Said sales corporation was to place in the hand of said Lamping as collateral security, to the contributors to said pool, notes and accounts due it. Said bank also advanced the sales corporation approximately $4,000 and was given notes and accounts to secure the same. It was the contention of plaintiff that certain of said securities, belonging to the individual creditors and in an amount in excess of their claims, were collected by the bank and applied on its own indebtedness. Plaintiff brought suit on his own claim and the assigned claim of Lanning, against defendant as successor of said bank, succeeding to its assets and liabilities. From an order granting a nonsuit, made on motion of defendant at the close of plaintiff's case, the latter has appealed.

It is apparent from the evidence that a question had arisen between the bank and the individual creditors as to the ownership of certain of the collateral that had been deposited by the sales corporation, either with the bank or Lamping, its manager. A meeting was finally arranged at which Mr. Myers, assistant manager of the bank, the plaintiff, Lanning, William Scholfield and Mr. Porter of the sales corporation were present. Mr. William Scholfield, a brother of plaintiff, testified that he had a conversation with Mr. Myers and that he was "told to come to the bank and be in a meeting with Mr. Porter with regard to his account and collaterals that were to secure notes held by Mr. Scholfield, Mr. Lanning and Mr. Lamping, as I understood, and Mr. Van Dam." The plaintiff himself was asked on cross-examination if such meeting "wasn't an accommodation meeting whereby Mr. Porter was to be present and explain the amounts and balances due," to which the witness replied: "No, it came about through my going to see Mr. Hartcort of the bank, and Mr. Hartcort didn't want to listen to us at first; we made an appointment with him and he said he was very busy, and we took the matter up with Mr. Hartcort and Mr. Hartcort said he would have this matter straightened up, and that is how this thing happened." William Scholfield testified that at the meeting "Mr. Myers sat at the head of the table and said, 'Excuse me, boys, I will get the papers,' and he went down and got the papers out of a little file in the front part of the bank, brought them back, and he said, 'we will list them'; * * * and he had the stack before him * * * and asked me to look at my list and see if they agreed. He said, 'Now we will number them, and you put these numbers on your papers and we will see if they agree.' And he went to No. 1, and the amount of that was * * * $937.50, with a balance of $418.75, * * * and Mr. Porter gave us who those collaterals belonged to. Mr. Myers asked the question and Mr. Porter immediately said, 'That goes to secure Mr. Scholfield and Mr. Lamping and Mr. Van Dam.' * * * Mr. Myers finished that item and put it on a pile to one side." From the testimony it appears that two piles were made, one composed of the collaterals that were designated by Porter as belonging to "the men," and the other as belonging to the bank, which latter were designated "1B," etc., and were so checked by William Scholfield on his list, which, as testified, was made by Porter. Among those put on the pile designated as belonging to plaintiff and his associates was an order by the "English Plumbing Co., endorsed by Paul Shapiro," which was No. 5, with a balance of apparently $1,750 due, and another, numbered 6, "on F. E. Miner" for $1,960 due. Plaintiff testified that Mr. Myers told him Shapiro had paid $1,025 to the bank. With regard to No. 6, which involved property on Stanley avenue in Los Angeles, it was testified that this was paid by a check to the bank for $1,838.38. There was no collateral of Shapiro or Miner designated "1B," etc., on the list. The list so made and checked was not put in evidence, but was testified to by the two Scholfields and Dwight Lanning. William Scholfield testified that after the making of the list he checked it with the one Mr. Myers made, at the latter's request, and that they corresponded, and that thereafter, at the instruction of Lamping, he investigated the properties covered by the collaterals and frequently saw the collaterals. He said that Lamping had "one list of securities of the bank's and one that belonged to these men. * * * He kept them in a metal file back of one of the teller's counters, and he had a rubber band around each of them, separately." On cross-examination Myers testified that he was assistant branch manager and had charge of the notes due the bank, and that there were securities pledged with those notes. There is testimony from which one could conclude that the securities after being separated were kept in two places, the ones the bank claimed being attached to and kept with the notes of the bank, and those belonging to the individuals being kept in Mr. Lamping's desk. There is a conflict in the evidence as to whether the one described by the witnesses as No. 6, relating to the Stanley avenue property, and which was for the sum of $1,960, was in the list attached to the notes of the bank, or in the list on Lamping's desk. Plaintiff testified, however, that he saw the list in Lamping's desk several times, and that on one occasion Lamping told him to take them and collect them. However, he told Lamping that was his, Lamping's, job. Among the securities he was shown, according to the witness' testimony, he saw No. 6, but could not state definitely about the others.

[1, 2] There is evidence that some of the securities in the possession of Myers at the time of the meeting had been deposited with Lamping to secure the loans made by plaintiff and his assignor, and there seems to be no question about that fact. The receipts given them by Lamping show that the latter was to hold all securities deposited with him for plaintiff, Lanning and Van Dam "as their interests may appear." This transaction was clearly outside of Lamping's employment; but regardless of that, any securities so held by him, which came into the possession of the bank and of which the bank had knowledge, could not be retained by it. Respondent urges that Porter's statements as to whom the collateral belonged are mere conclusions, and that Myers said nothing to bind the bank as to the division made. Any knowledge Lamping may have had could not be charged to the bank, as the transaction was outside of the course of his employment and one in which the bank had no interest. Lothian v. Wood, 55 Cal. 159, 162; Casco National Bank v. Clark, 139 N. Y. 307, 34 N. E. 908, 36 Am. St. Rep. 705. But Lamping did not testify and we do not know what his knowledge was. Mr. Myers, however, was the officer of the bank having custody of its notes and their collateral, and he certainly knew what securities, if any, the bank claimed as collateral to its notes. He was present at the meeting called by someone in the bank. Mr. Porter, who seemed to be the only one appearing in the transactions of the Universal Sales Corporation with any of the parties involved here, designated each security named by Myers as belonging to either the bank or plaintiff and his associates, and Mr. Myers made two piles, one designated as the bank's and the others as plaintiff's and his associates'. Those designated as belonging to the bank were later attached to the notes of the bank and the others were kept in Lamping's desk. It is true that Myers said nothing. But knowing,

as he must have, whether any of them were attached to the notes of the bank, it is inconceivable that he would have sat silent if Mr. Porter had said any of such belonged to plaintiff. While ordinarily a statement that a certain security "belonged to" the bank, or to plaintiff and his associates, would be a conclusion, we are of the opinion that in the connection and under the circumstances under which they were made here they were in effect the same as though Porter had given in detail the conversations had when he deposited the various items as security. It was his conclusion, having particular knowledge, that all present wanted, and we think the court might well draw the conclusion that the actions of Mr. Myers, both at the meeting and afterwards, as shown by the testimony favorable to plaintiff, amounted to a segregation of the securities by the bank, and that the evidence produced by plaintiff, with the aid of all legitimate inferences favorable to him and ignoring conflicts and inconsistencies, would support a judgment for him for the two-thirds of the two payments which such evidence shows were made to the bank. We anticipate defendant's evidence will give rise to other and possibly more serious conflicts, but such should be settled by a decision on the merits, which, in our opinion, should have been made.

Order granting motion for nonsuit reversed.

We concur: CRAIG, Acting P. J.; STEPHENS, J.

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130 Cal.App. 246

PEOPLE v. BURDETTE et al.

Cr. 2289.

District Court of Appeal, Second District, Division 1, California.

March 4, 1933.

1. Criminal law ⚿1159(2).

Appellate tribunal is not empowered to weigh evidence; determination of guilt or innocence being solely within province of jury, aided and instructed by judge.

2. Criminal law ⚿1159(2).

If evidence is wholly insufficient to support conviction, appellate tribunal is empowered so to declare and thereupon to reverse judgment.

Appeal from Superior Court, Los Angeles County; B. Rey Schauer, Judge.

Albert Burdette, Tommy Lemons, and another were convicted of violating St. 1923, p. 564, § 146, as amended by St. 1931, p. 2133, relating to driving an automobile without the consent of the owner, and they appeal; the last-named defendant appealing also from an order denying probation.

Affirmed.

Willedd Andrews and Theodore Robinson, both of Los Angeles, for appellants.

U. S. Webb, Atty. Gen., and Alberta Belford, Deputy Atty. Gen., for the People.

HOUSER, Justice.

Defendants were convicted of the crime of violating section 146 of the California Vehicle Act (as amended by St. 1931, p. 2133), to wit, driving an automobile without the consent of its owner so to do, etc. From the ensuing judgment, as well as from the order by which the motion for a new trial was denied, defendants have appealed to this court. In addition thereto, defendant Lemons has appealed "from an order denying said defendant probation."

[1, 2] The only specific point presented as a reason for the reversal of the judgment is "that the verdict of the jury is contrary to the evidence." It appears to be conceded by appellants that, standing by itself, the evidence adduced by the prosecution was legally sufficient to support the respective verdicts and the judgments rendered thereon. But it is contended that, since each of the defendants introduced considerable evidence by which it was made to appear that at the time when, and at the place where, the criminal offense was committed the defendants were "not only not present, but that they were miles away from the scene of the crime"—the judgment and the orders from which the appeal is taken should be reversed. It may thus be noticed that by their appeal, for the purpose of determining the question of the guilt of defendants, appellants seek to place upon this court the burden of weighing the evidence which was adduced in the trial court. That such a course is without and beyond the power of an appellate tribunal has been so universally decided that to cite authorities to that effect would be superfluous. It is solely the province of the trial jury, aided and instructed by the trial judge, to make a determination as to the guilt or the innocence of the defendant. Of course, if the evidence upon which a conviction has been had is wholly insufficient to support the verdict, an appellate tribunal to which an appeal from the ensuing judgment has been taken is fully authorized to so indicate and thereupon to reverse such judgment. No such situation is here presented. Appellants admit the sufficiency of the evidence, but in effect say that the evidence of their "alibi" was so great that it should have outweighed the evidence presented by the prosecution, at least to the

extent that a reasonable doubt of the guilt of defendants should have been created, and thus have resulted in their acquittal of the charge preferred against them. But, as hereinbefore has been stated (excepting in certain circumstances not even suggested as having been present on the trial of the action), the power of weighing the evidence and determining the truth relating to the charge against the defendants lies exclusively with the jury; and its verdict, by which the guilt of the defendants is indicated, when based upon sufficient evidence, is conclusive upon this court. People v. Yeoman, 115 Cal. App. 518, 1 P.(2d) 993.

The judgment and each of the orders from which the appeal is taken are affirmed.

We concur: CONREY, P. J.; YORK, J.

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130 Cal.App. 248

PEOPLE of State of California, Plaintiff and Respondent, v. Albert BURDETTE and Elmer Draper, Defendants and Appellants.

Cr. 2276.

District Court of Appeal, Second District, Division 1, California.

March 4, 1933.

Appeal from Superior Court of Los Angeles County; B. Rey Schauer, Judge.

Willedd Andrews and Theodore Robinson, both of Los Angeles, for appellants.

U. S. Webb, Atty. Gen., and Alberta Belford, Deputy Atty. Gen., for the People.

HOUSER, Justice.

In the instant appeal it appears that each of the defendants was convicted of the crime of robbery. From the ensuing judgment, as well as from the order by which their motion for a new trial was denied, the defendants have appealed to this court.

It also appears that in a separate action, one Lemons and each of the defendants herein was convicted of the offense of driving an automobile without the consent of the owner so to do, etc.; and in that action all the defendants also appealed from the judgment rendered against them. By stipulation of the several parties to the respective appeals, but one brief was filed in the two appeals—which brief dealt with the single contention on the part of all the appellants "that the verdict of the jury is contrary to the evidence." However, it is conceded that the evidence adduced by the prosecution on the trial of the action was sufficient to sustain the verdict and the judgment.

In the determination of the appeal wherein all the defendants were appellants, the reasons assigned by this court are applicable to the instant appeal. See (Cal. App.) 19 P.(2d) 1000.

It is ordered that the judgment and the order by which the motion for a new trial was denied be and they are affirmed.

We concur: CONREY, P. J.; YORK, J.

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130 Cal.App. 341

MORRIS v. CRAIG.

Civ. 8755.

District Court of Appeal, Second District, Division 1, California.

March 13, 1933.

Appeal and error 🔑773(2).

Appeal was dismissed where notice of motion to dismiss was given November 30 and no excuse shown for not filing brief until January 21 (Rule 1, § 4, and Rule 5, § 1, of Rules of Practice of District Court of Appeal).

Appeal from Superior Court, Los Angeles County; Thomas E. Gould, Judge.

Action by Raymond Morris against Gavin W. Craig. From the judgment, defendant appeals. On motion to dismiss appeal.

Appeal dismissed.

W. T. Kendrick, Jr., and Walter L. Bowers, both of Los Angeles, for appellant.

Bernard D. Lane, of Los Angeles, for respondent.

PER CURIAM.

On petition for rehearing after order dismissing appeal.

The order as entered in the minutes reads as follows: "Motion is granted and appeal is dismissed." The court had prepared the following memorandum which by inadvertence was not entered in full in the minutes: "By the Court: On Motion for dismissal of appeal on account of failure of appellant to file brief within the time allowed by section 4 of Rule I, and section 1 of Rule V of the Rules of Practice of this court. It appearing from the record that no brief was served or filed within the time provided; and that no application for extension of time was made or granted; and that no sufficient excuse for failure to serve and file brief has been shown; motion is granted and the appeal is dismissed. (Bourne v. Root, 117 Cal. App. 618, bottom of p. 620, 4 P.(2d) 264.)"

In the case of Bourne v. Root, supra, the court said: "Under rule 5 of the rules governing this court, if the brief is on file at the time the notice of motion to dismiss the appeal is given, that fact alone is sufficient to defeat the motion. If the brief is not filed until after notice of motion to dismiss has been given, unless a reasonable excuse for delay is shown, the appeal will be dismissed. The sufficiency of such showing is a question to be determined by the court. Carter v. Paige, 77 Cal. 64, 19 P. 2. Where no sufficient excuse is shown, an appeal may be dismissed, even though the brief is filed two days after service of the notice of motion. Coats v. Coats, 146 Cal. 443, 80 P. 694."

In this case the transcript on appeal was filed October 18, 1932. On November 30th notice was given of motion to dismiss,—motion to be presented December 27th. On December 27th hearing was continued to January 23, 1933. The brief was not offered for filing until January 21st. The court was of the opinion that sufficient excuse for the delay had not been shown, and that under the rule as above stated in Bourne v. Root the appeal should be dismissed.

There appears no sufficient reason for change in the decision. For this reason, the petition for rehearing is denied.

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130 Cal.App. 343

COFFMAN v. CALIFORNIA STATE BOARD OF ARCHITECTURAL EXAMINERS, NORTHERN CALIFORNIA.

Civ. 4866.

District Court of Appeal, Third District, California.

March 13, 1933.

1. Certiorari 🔑64(1).

On certiorari, reviewing court only inspects record and determines whether inferior board or court exceeded jurisdiction.

2. Licenses 🔑38.

Architectural examining board is not bound by same formalities as courts as regards evidence and procedure, but complaint must support findings and findings support judgment (St. 1901, p. 641, § 8, as added by St. 1929, p. 138, and amended by St. 1931, p. 703).

3. Licenses 🔑38.

Architectural examining board's order temporarily suspending architect for dishonest practice *held* unsupported by findings which failed to show that changes and substitutions were without owner's consent (St. 1901, p. 641, § 8, as added by St. 1929, p. 138, and amended by St. 1931, p. 703).

4. Licenses 🔑38.

Where architectural examining board suspends architect for dishonest practice, dishonest acts should be found with certainty, making dishonesty apparent to all (St. 1901, p. 641, § 8, as added by St. 1929, p. 138, and amended by St. 1931, p. 703).

Petition by William E. Coffman for a writ of review of a judgment or order of the State Board of Architectural Examiners of the Northern District suspending petitioner from practicing as an architect for thirty days because of dishonest practice as charged in a complaint filed by Nelle U. Branch.

Order annulled.

Robt. H. Schwab, of Sacramento, for petitioner.

Frank Barry, of Los Angeles, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This proceeding arises upon a petition to review a judgment of the state board of architectural examiners of the Northern district, suspending petitioner herein from practicing as an architect for a period of thirty days, for alleged dishonest practice.

The complaint, which was filed by Nelle U. Branch, for whom petitioner had designed a residence, charged that he was guilty of dishonest practice in connection with the plans for such residence and specified certain acts and omissions as evidence thereof, as follows:

"Substitutions were made in practically every phase of work on the house. The work was so slighted throughout as to cheapen the building materially. There is a question as to the actual safety of the structure.

"The house vibrates in the wind, and the floors shake under ordinary tread. A substitution of wooden underpinnings was made in place of concrete foundation, as specified.

"The exterior woodwork and interior trim are Oregon pine, instead of Redwood.

"This is warping and shrinking badly.

"2x6 floor joists were substituted for 2x8.

"With sufficient underpinning, floor girders were smaller than specified.

"Ceiling rafters are 2x4 instead of 2x6, with long spans, and are insufficient to support the ceiling. Roof rafters are light 2x4 size and surface 35" center, instead of 24 as specified.

"The sheathings under the shingles are 1x4 —4½" space. This is very light.

"Local gravel was used instead of crushed rock, as specified.

"Gutters and downspouts are insufficient, and drains were not provided as specified.

"Stucco is in very bad condition, and is not weatherproof, due to the fact that it was not surfaced with two coats of Government whitewash as specified.

"The owner charges that no architectural supervision was given by Mr. Coffman, who has accepted his fee as supervising architect.

"Mr. Coffman did not give the owner a certificate of acceptance of the work of A. J. Fisher, who was legally the contractor.

"Mr. Coffman acted as contractor, throughout the erection of the building."

As to these specifications the board made the following findings:

"(1) It is true that substitutions were made in various phases of the work on the house, which materially cheapen the building.

"(2) It is true that there is in places considerable deflection, but there is no question as to the actual safety of the structure, although there is vibration of a portion of the floors under ordinary tread.

"(3) It is true that certain substitutions were made in the underpinning of the house.

"(4) It is true that the exterior woodwork and interior trim were changed from redwood to Oregon pine. It is not true that it is warping badly, but certain natural shrinkage is taking place.

"(5) It is true that 2"x6" floor joists were substituted for 2"x8" but with the knowledge of the complainant. However, the spans are greater than an alleged agreed limit.

"(6) It is true that the floor girders are smaller than those specified.

"(7) It is true that the ceiling "rafters" (joists) are 2"x4" instead of 2"x6", but are at present sufficient to support the ceiling since additional trusses were found necessary and installed after acceptance of the building.

"(8) It is true that the roof rafters are 2"x 4" spaced approximately at 32" centers, but the change was made with the owner's knowledge and consent.

"(9) It is true that the sheathing under the shingles and its spacing is standard for this class of work.

"(10) It is true that river gravel was used in the concrete but this was allowed as an alternate by the specifications.

"(11) It is true that gutters and downspouts as shown on the drawings, were omitted, but with the owner's knowledge.

"(12) It is not true that the stucco is in bad condition and it can be considered as waterproof as that specified. The surface has been given two coats of California stucco brush coat, in lieu of Government whitewash as specified.

"(13) It is not true that Mr. Coffman did not give supervising architectural service to the building. Mr. Coffman did act as architect throughout the erection of the building.

"(14) It is true that the building was accepted and the acceptance recorded.

"(15) It is not true that Mr. Coffman acted as contractor for the building but it is true that a contract was executed and carried out between the complainant and A. J. Fisher, as contractor."

Upon these findings the board rendered the following judgment:

"I. That the defendant caused to be drawn under his direction and permitted to be signed a contract which was subject to certain prior verbal agreements which would cheapen the building below the standard set forth by the contract documents—and to the disadvantage and without the knowledge of some of the interested parties. In so doing, the defendant was derelict in his duty as an architect and he is guilty of the charge of dishonest practice.

"II. William E. Coffman has been guilty of dishonest practice of architecture as said term is employed in section 8 of an act entitled, 'An Act to regulate the Practice of Architecture,' in the State of California, and by reason thereof the certificate heretofore issued to William E. Coffman by the California State Board of Architectural Examiners, should be, and the same is hereby, suspended from February 4, 1933, to March 6, 1933, inclusive."

[1] "The office of the writ of certiorari," as pointed out in Lanterman v. Anderson, 36 Cal. App. 472, 172 P. 625, 626, "is to determine only as to whether the inferior board or court has acted in excess of jurisdiction, and the investigation of the trial court will go no further than to inspect the record as it appears written and to determine from that whether there has been action taken unwarranted by the powers given to the board or court whose proceedings are under review."

[2] We need not cite authorities upon the proposition that the architectural board is not circumscribed by the same formality as to evidence and procedure as a court of law, but nevertheless the findings of the board must find support in the complaint, and the judgment must be based upon the findings.

The right of petitioner to practice his profession, once conferred, is a highly valuable right and he has the right to insist upon proof of the charges made before this right can be taken away.

[3] The findings allege that there were certain alterations and substitutions made in the structure from the plans and specifications as filed, but there is no finding as to whether or not these changes were made with

or without the consent of the complainant, and upon that question there is a conflict in the evidence. It does appear, both from the evidence and the findings, that in certain particulars the complainant did consent to certain changes, but, in the absence of a direct finding, however, this court cannot determine that other changes were made without the consent of the complainant.

The judgment holds that the defendant permitted to be signed a contract which had been modified by certain prior verbal agreements which would have the effect of cheapening the residence below the standard contract price, and to the disadvantage and without the knowledge of some of the interested parties, but it does not appear whether the prior verbal agreements were made with the knowledge and consent of the complainant herein, and who were the interested parties who suffered by the change in construction. We believe petitioner was entitled to know these facts.

We have examined the record, and no place do we find any complaint by any one, other than the complainant, as to the changes in the specifications, and if the changes were made with her consent she cannot, of course, be heard to object at this time. There is some testimony in the record that the persons financing the residence were being defrauded, but, whether the lender of the money is dissatisfied with his security, we cannot say from the record, nor can we assume that to be the fact.

It is to be noted that on June 13, 1931, and after the completion of the building, the complainant filed, and caused to be recorded in the office of the county recorder of Yolo county, a notice of completion, and the complaint herein was filed with the architectural board on November 25, 1932, some eighteen months after the acceptance of the structure. Practically all of the objections urged were known to complainant at the time of the filing of the notice of completion.

This hearing before the architectural board was held under the provisions of "an Act to regulate the practice of Architects" in the state of California (St. 1901, p. 641, as amended), section 8 thereof (as added by St. 1929, p. 138, and amended St. 1931, p. 703), which provides that the board may suspend for a period not exceeding one year, or revoke for dishonest practice, the certificate issued by the state board to an architect.

[4] The act does not attempt to define what constitutes dishonest practice, for the very good reason, perhaps, that such dishonest practice assumes such a wide range and variety of acts and misconduct that a definition could not embrace its many forms, but for that reason the acts complained of should be found with such definiteness and certainty that the vice of the acts complained of might be apparent to all. We fail to find such definiteness and certainty in the present proceeding.

The order complained of is annulled.

We concur: PLUMMER, J.; R. L. THOMPSON, J.

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130 Cal.App. 475

WOLFSEN v. WHEELER et al.

Civ. 4691.

District Court of Appeal, Third District, California.

March 21, 1933.

Rehearing Denied April 20, 1933.

1. **Animals 🔑44.**

Contributory negligence of owner of sheep killed by poisoned grain for rodents, placed in pasture leased by sheep owner, *held* for jury.

2. **Appeal and error 🔑996.**

Where different conclusion might be drawn from evidence by different minds, jury's finding thereon is conclusive on appellate court.

3. **Animals 🔑44.**

That defendants used most effective means in accomplishing intended purposes of poisoning rodents *held* no defense to charge of negligence in killing of sheep.

4. **Animals 🔑44.**

Conditions surrounding use of field, intended use thereof, and purposes for which field was adapted must be considered in determining whether distribution of rodent poison resulting in killing of sheep was negligence.

5. **Animals 🔑44.**

"Negligence" of defendants placing poison for rodents in pasture was determined by what men of prudence, knowing use of field, would ordinarily do and what precautions they would take in using deadly poison.

[Ed. Note.—For other definitions of "Negligence," see Words and Phrases.]

6. **Negligence 🔑1.**

"Negligence" is failure to observe, for protection of interests of another, that degree of care which circumstances justly demand, whereby such other suffers injury.

7. **Animals 🔑44.**

Degree of care in placing poison for rodents in field must be measured by deadly character of poison used, and likelihood that other animals might partake thereof.

8. Officers 🔑116.

Public officials are liable personally to third persons injured by their personal neglect.

9. Officers 🔑118.

Wherever public officer directs acts of subordinate to be performed in particular manner, which is negligent, public officer is liable.

10. Officers 🔑118.

Public officer may be liable for negligent act of subordinate by acquiescence therein, ratification, and co-operation.

11. Animals 🔑44.

That defendants had been accustomed to scatter poison grain for rodents in like manner in other fields, or that other persons had done so *held* not defense to charge of negligence in killing of sheep.

12. Negligence 🔑5.

Mere custom or usage cannot make due care out of conduct that is in fact negligence under circumstances.

13. Animals 🔑44.

Negligence of defendants, county officials, placing poisoned grain for rodents on ground in pasture, resulting in killing of sheep, *held* for jury.

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action by L. L. Wolfsen against Dooley P. Wheeler and another. From a judgment for plaintiff, defendants appeal.

Affirmed.

F. M. Ostrander and S. P. Galvin, both of Merced, for appellants.

C. Ray Robinson and James D. Garibaldi, both of Merced, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

The plaintiff in this action had judgment against the defendants for the sum of $660, for and on account of the death of 46 head of sheep, alleged to have been the result of the negligent spreading of poison in a certain pasturage field to which the plaintiff had a lease for pasturing sheep. Also, for the loss of the pasturage on the leased field.

The record shows that the plaintiff had leased a certain tract of land in Merced county for the purpose of pasturing sheep thereon; that prior to the time the plaintiff turned his sheep onto the leased field the defendants, for the purpose of killing rodents, had distributed a considerable quantity of thallium poison thereon. The defendant Wheeler, at all the times mentioned in the complaint, was the agricultural commissioner of the county of Merced, and the defendant Benton was a regularly appointed deputy acting under the direction and orders of the defendant Wheeler.

A number of specifications of error are set forth as grounds for reversal. However, it is only necessary to consider whether the defendants were negligent, whether the plaintiff was guilty of contributory negligence, and the amount of the damages. The determination of these questions answers the specifications of error as to whether the court erred in not granting a nonsuit, in not directing the verdict, and in refusing defendants' motion for a new trial.

It appears from the record that thallium is a virulent and deadly poison; that the manner of its use is to impregnate grain with the poison and place it in fields infested with rodents in such a manner that the infested fields will be rid of the pests. There is testimony in the record to the effect that the impregnated grain should be placed in the rodent holes. There is also testimony to the effect that the better way of poisoning rodents, and the manner followed in most instances, is to scatter the poisoned grain upon the surface of the ground and along the paths followed by the rodents. The record shows that in the instant case the grain was scattered on the surface of the ground along the paths used by the rodents, and in such a manner that sheep browsing on the premises ate the grain and died as a consequence thereof. The complaint alleges that the defendants were negligent in the manner in which the poison was scattered upon the field, the defendants' contention being that they were acting in their official capacity, and that they followed the usual custom pursued by them in the eradication of such pests.

[1] First, as to the alleged contributory negligence of the plaintiff: The testimony in the record is sufficient to justify the conclusion of the jury that the plaintiff did not know the manner in which the thallium poison had been distributed over the leased field. His testimony is that he did not know the "manner and style in which the poison was placed there. I did not know this before I put my sheep in the field." The following are excerpts from the plaintiff's testimony: "Q. After the field was poisoned, when did you first notice the thallium on the top of the ground? A. Well, when the sheep died at the house I went up and looked at the field, and that is when I noticed the thallium on the top of the ground."

The plaintiff further testified that he had a conversation with Mr. Benton in relation to the distribution of the poison and as to putting his sheep upon the field. His testimony is as follows: "Mr. Benton said after Monday they were going to start in poisoning on Mr. Haas' place and the sheep field that I had rented from Mr. Haas. I then said to him, 'If you are going to poison the field I have rented there you will have to put the poison down the holes as my sheep will eat it and do not put it on top of the ground.' Q. You state that you told him to put this poison down the holes, and not put it on top of the ground? A. Yes."

The plaintiff further testified that he and Benton had some argument as to where the grain should be placed, and that at that time the defendant Wheeler came along. They told him no good would come from putting the poisoning on top of the ground. The plaintiff told them it had to be put in the holes.

It is further contended that the plaintiff did not remove his sheep as soon as he should have done so, and thereby lost some of the sheep through his own negligence. His testimony is as follows:

"Q. Now when was it that you first discovered the sheep dead, or any one of them? A. I cannot say as to that date.

"Q. Well, approximately? A. Well, I would say along about the 1st of July, somewhere along there.

"Q. Along about the 1st of July, and it was then you went down to this field, and discovered that there was thallium poisoning on top of the ground? A. Yes, sir.

"Q. Now, when you first went down there the 1st of July, how many sheep did you find dead? A. Well, I would not say just how many; I don't remember."

The record further shows that the plaintiff was not familiar with the properties of thallium poison; took the matter up with Dr. Thomas, and upon learning from him that the cause of the sheep dying was the eating of the thallium poison, he immediately removed the sheep from the field. The sheep were taken out of the field on the 16th of July. The pasture was not used on account of the poisonous condition, and was lost to the plaintiff. The fact that the plaintiff did not know of the properties of thallium poison, and did not understand the cause of the death of his sheep until it was explained to him by Dr. Thomas, and that he immediately removed his sheep from the field, were all matters to be taken into consideration by the jury in determining whether the plaintiff was guilty of contributory negligence. The evidence on this question presented one of fact for the jury. Bellinger v. Hughes, 31 Cal. App. 464, 160 P. 838.

[2] We do not need to cite authorities to the effect that, where different conclusions might be drawn from the evidence by different minds, the finding of the jury thereon is conclusive upon the court.

There was also corroborating testimony to the effect that the plaintiff had told Benton to put the poison in the holes and not on top of the ground, and that he was going to place his sheep upon the leased premises.

The witness Messerschmidt testified that he scattered the poison on the top of the ground under the direction of Mr. Benton. The defendant Benton, among other things, testified as follows:

"Q. Have you had occasion to poison a field belonging to Mr. Haas of some 110 acres? A. Yes, sir.

"Q. And under whose direction? A. Under my direction and supervision they started to work.

"Q. Just what did you do when you went out there? A. Well, I took the grain out there and put the men to work and showed them how much grain to put out and worked with them about an hour or an hour and a half.

"Q. Where was the poison placed? A. It was placed on the outside, back from the hole on a bare place."

Mr. Brown, an expert, testified that thallium was a deadly poison; that it was the usual practice in cases where livestock are going about in the field that the poison is put in the holes.

Mr. Favier testified as follows: "Q. Have you ever had experience with thallium poison? A. Yes, sir. Q. What experience has that been? A. Oh, it is deadly poison; anything that gets hold of it, it has got to go, that's all."

The witness Keyes, leader of the rodent control for the United States Biological Survey, testified as follows:

"Q. Now, how do you instruct your men that thallium is a dangerous poison? A. We do instruct the men individually that exceptional care must be taken as to their duties.

"Q. So far as the standard of care required in a case of thallium or strychnine, what do you instruct your men as to that? A. The standard of care is to use more precaution in putting out thallium than we do with strychnine.

"Q. Because of the virulence which thallium contains you instruct them naturally, that they use much more care? A. Yes, that is to the operators in the use of thallium.

"Q. Is it not a fact that the United States Department of Agriculture has recommended that no thallium poison be given to any inexperienced people? A. Exactly."

The record shows that the defendant Wheeler testified that the quantity of thallium used was excessive. The defendant Wheeler, among other things, testified as follows:

"Q. Your name is Dooley P. Wheeler? A. Dooley P. Wheeler.

"Q. And you are one of the defendants in this action? A. Yes, sir.

"Q. What is your position, Mr. Wheeler? A. Agricultural Commissioner.

"Q. Of Merced County? A. Yes, sir.

"Q. And does Mr. Benton work under you? A. Yes, sir.

"Q. In what capacity? A. As Agricultural Inspector.

"Q. He is a regular county government appointee, isn't he? A. Yes, sir.

"Q. Under one of the laws of the county government act? A. Yes, sir.

"Q. And operating out of your office? A. Yes, sir.

"Q. And working under your direction? A. Yes, sir.

"Q. And under your orders? A. Yes, sir, largely.

"Q. What do you mean by 'largely'? A. Well, they are not under our direction in every act they perform, no, but they are responsible in a measure for their success or failure.

"Q. In connection with the problem which was carried on in the Sandy Mush section, he was working with you in conjunction with that? A. Yes, sir.

"Q. And that work was being done under your supervision, was it not? A. Yes, sir.

"Q. And this particular poison in question was done under your supervision, was it not? A. Not this particular place in question, but in the general poisoning in that area that I had knowledge of, he was supervising it.

"Q. And the Haas property in that connection was the same as the rest? A. Yes, sir.

"Q. And so far as anything that was done down there was concerned, it was satisfactory to you, was it not? A. Yes, sir.

"Q. And at this time it is still satisfactory with you, is it not? A. The particular work under Mr. Benton, yes.

"Q. Mr. Benton is still in your employ, is he not? A. Yes, sir.

"Q. You have had full knowledge and information in connection with this situation, have you not? A. What particular situation?

"Q. The Haas and Wolfsen sheep poisoning controversy? A. I think I have.

"Q. That was reported to you very fully? A. It has been since, but not at the time, no.

"Q. You made a personal check on it, did you not? A. Since, I have."

We do not deem it necessary to set forth the testimony showing that the damages allowed are not excessive. It is sufficient to state that the reading of the testimony leads to the conclusion that the jury was justified in making its award.

[3-5] The real contention advanced by the appellants in this case is that being public officials, they cannot be charged with negligence because of the manner in which the thallium poison was distributed, and that they pursued the usual custom of distributing the thallium so as to accomplish the intended purpose, to wit, the ridding of the fields from rodents. The fact that the appellants used the most effective means in accomplishing their intended purposes is no answer to the charge of negligence in the use of the poison. The conditions surrounding the use of the field, the intended use of the field, and the purposes for which the field was adapted must all be taken into consideration in determining whether the distribution of the thallium was in fact negligence. The effectiveness of the distribution is, of course, clearly established by the poisoning of the sheep as well as the rodents. The question arises—knowing that the field was to be used for pasturage purposes, what would men of prudence ordinarily do, and what precautions would they take in using a deadly poison? Would it be placed where the browsing animals as well as the rodents might readily partake thereof, or would it be placed where only the rodents would be likely to consume the poisoned grain? These questions seem to us to answer themselves.

[6] Many definitions of negligence have been cited by counsel, but the following found in 19 California Jurisprudence 548 appears to us applicable: "The failure to observe, for the protection of the interests of another person, that degree of care, protection and vigilance which the circumstances justly demand, whereby such other person suffers injury."

[7] We do not need to cite authorities to support the statement that the degree of care must be measured by the deadly character of the substance being used, and the likelihood that other animals than those intended to be poisoned might partake thereof. In the present situation the poisoned grain was scattered in such a manner that any animal browsing thereon might be destroyed, whereas, had the poisoned grain been placed in the holes, no danger of browsing animals would have been attendant upon the use of the poison. We think that common prudence would dictate the proper place for distributing the poisoned grain.

[8-10] Appellants advance the further contention that the defendant Wheeler is not liable for any acts performed by the defendant Benton. The testimony in the record shows that the defendant Wheeler not only had knowledge of the uses intended by the lessee of the field of pasture, but also understood and approved the manner of distributing the poison and had given directions concerning the same. Public officers are not ordinarily liable for the acts of subordinate officers, but wherever they participate in, or direct certain acts to be done or co-operated in the acts of negligence, they become liable. This is clearly set forth in 22 Ruling Case

Law 487, as follows: "Public officers and agents of the government are not liable for the acts or defaults, negligence or omission of subordinate officials in the public service, whether appointed by them or not, unless they direct the act complained of to be done or personally cooperated in the negligence from which the injury results." Stated conversely, public officers are liable personally to third persons who are injured by their personal neglect. Wherever a public officer directs the acts of a subordinate to be performed in a particular manner, and that manner is negligent, the public officer is liable. He may also be liable by acquiescence therein, ratification, and co-operation. Dowler v. Johnson, 225 N. Y. 39, 121 N. E. 487, 3 A. L. R. 146; see, also, 46 C. J., p. 1045.

[11-13] Nor is the contention of the appellants that they had been accustomed to scatter poisoned grain in like manner in other fields, or that other persons had scattered poisoned grain in like manner, a defense to a charge of negligence. (The record contains evidence that a proper and perfectly safe manner of poisoning rodents is to put the thallium impregnated grain in the holes.)

The case of Webber v. Bank of Tracy, 66 Cal. App. 29, 225 P. 41, involved a question of contract, and the court there held that where the parties contracted for the performance of an act according to the usual custom, it was intended by the parties that the usual custom should be followed, and therefore negligence could not be predicated thereon. The language quoted from the opinion in that case is not a full or accurate statement of the law as applied to the circumstances disclosed by the record before us. No element of contract is here presented; it is simply a question of negligence.

In Rudd v. Byrnes, 156 Cal. 636, 105 P. 957, 960, 26 L. R. A. (N. S.) 134, 20 Ann. Cas. 124, the court states the rule as follows: "The standard of care required of persons under given circumstances is not to be established by proof that others have been in the habit of acting in a certain manner." This language is used in considering a question of negligence.

In County of Alameda v. Tieslau, 44 Cal. App. 332, 186 P. 398, 401, custom, as the defense of negligence, is disposed of in this language: "The question was improper because no custom regarding the use of warning lights was shown, and a custom involving negligence could not excuse it."

In Phœnix Assurance Co. v. Texas Holding Co., 81 Cal. App. 61, 252 P. 1082, 1087, this court had presented for its consideration elaborate briefs urging custom as a defense to the alleged negligence. After a thorough consideration of the subject, we there said: "That a mere custom or usage cannot make due care out of conduct that is, in fact, negligence, under the circumstances disclosed by the evidence, has been stated a number of times by the courts of this state, as well as of other states. Likewise, that the standard of care required is not to be established by proof that others have been in the habit of acting in the same manner, and, as cited with approval in the case of Rudd v. Byrnes, 156 Cal. 636, 20 Ann. Cas. 124, 26 L. R. A. (N. S.) 134, 105 P. 957: 'Not even a general custom can be deemed a relevant fact, in an action for negligence respecting any noncontractual duty which is not performed under fixed conditions.' And, as stated in a citation from Utah, hereinafter set forth [Jenkins v. Hooper Irrigation Co., 13 Utah, 100, 44 P. 829]: 'Local customs, when reasonable, uninterrupted, and uniform, in a locality or district, and not contrary to public policy, may affect the interpretation of contracts made in their locality, by raising a presumption that such contracts were made with respect to them; but such custom cannot change the law of negligence.' And, further, as said in one of the Texas cases herein cited [Gulf, C. & S. F. Ry. Co. v. Evansich, 61 Tex. 3]: 'While it is true that an established custom may be looked to, in many cases, for the purpose of determining what parties really intended by a given contract, and what acts in the performance of it will satisfy it, it may well be questioned whether in any case in which, in the absence of contract express or implied, negligence as an element, is the foundation of a right, custom may be set up for the purpose of showing that negligence does or does not exist.' Without analyzing the various cases, it is sufficient to state that the following authorities all hold that where no contractual relations exist, and, further, where there is no assumption of risk, as is the case where the relation of master and servant is concerned, the specific practice of others cannot be admitted in testimony as an excuse for the alleged negligent act of the defendant." (Citing a long list of authorities to which reference is hereby made.)

We think the facts disclosed by the record show not merely an error of judgment, but a negligent use of a highly destructive poison, where common prudence required a high degree of care, a care commensurate with the known virulence of thallium poison, which care the record shows was not used.

The judgment is affirmed.

We concur: R. L. THOMPSON, J.; PULLEN, P. J.

130 Cal.App. 302

ROSE v. GARDNER et al.

Civ. 7573.

District Court of Appeal, Second District, Division 1, California.

March 9, 1933.

Rehearing Denied April 7, 1933.

Hearing Denied by Supreme Court May 8, 1933.

1. Appeal and error 🔑544(1).

Defendants sued for broker's commission could not contend that cancellation of property exchange contract canceled broker's contract contained therein for commissions, where appeal was on judgment roll alone which failed to disclose cancellation.

2. Brokers 🔑58.

Unenforceability of exchange agreement would not leave agreement to pay broker's commissions contained therein without consideration, where commissions were to be paid on execution of exchange agreement, and exchange agreement provided that error rendering it void would not affect agreement regarding commissions.

Appeal from Superior Court, Los Angeles County; Samuel R. Blake, Judge.

Action by Lou Rose against C. C. Gardner and C. D. W. Hagerman. From a judgment for plaintiff, C. D. W. Hagerman appeals.

Affirmed.

Fogel & Beman, of Los Angeles, for appellant.

Kemper Campbell and Charles L. Nichols, both of Los Angeles, for respondent.

HOUSER, Justice.

Defendant Hagerman appeals from a judgment which was rendered against him in an action to recover an amount due plaintiff for services performed by him as a broker on the exchange of real property between defendants and third persons.

[1, 2] Appellant presents two points, namely:

"1. The cancellation by the parties of a contract of exchange cancels the broker's contract for commissions contained therein.

"2. The contract of exchange was unenforceable, and hence the agreement to pay a commission was without consideration."

If for no other reasons, neither of the positions assumed by appellant is tenable; because, first, the appeal is presented on the judgment roll only, and an inspection thereof fails to disclose that the contract for the exchange of the properties in question, upon the sale price of which the commission claimed by plaintiff is based, was ever canceled; secondly, by the terms of the exchange agreement (which is the only instrument by which an agreement to pay a commission is evidenced), the defendant not only agreed to pay to plaintiff the commission on the execution of the said exchange agreement, but also agreed that, "in the event any error cannot be corrected, this agreement shall be null and void, except as to the payment of commissions, unless the title to the property affected is accepted subject thereto."

The judgment is affirmed.

We concur: CONREY, P. J.; YORK, J.

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130 Cal.App. 433

LYNCH v. MARKET ST. RY. CO. et al.

Civ. 8442.

District Court of Appeal, First District, Division 1, California.

March 17, 1933.

Hearing Denied by Supreme Court May 15, 1933.

1. Carriers 🔑321(21).

Instruction on res ipsa loquitur *held* justified in action against street railroad company for injuries, where plaintiff's evidence indicated that car started suddenly when plaintiff was attempting to board it.

> Plaintiff testified that while street car was stationary he grasped center stanchion at right entrance and placed his left foot on the lower step and was about to ascend second step when the car suddenly started. As a result, he was thrown toward the rear end of the car, his foot left the steps, and he was dragged for some ten or fifteen yards. Defendant's evidence tended to show that the street car was in motion when plaintiff attempted to board it.

2. Negligence 🔑121(2).

That evidence is conflicting does not prevent application of res ipsa loquitur rule.

3. Carriers 🔑321(23).

Instruction, in action for injuries sustained in boarding street car, that plaintiff need not prove freedom from contributory negligence, *held* justified under conflicting evidence.

4. Appeal and error 🔑1066.

Instruction referring to ordinance not introduced in evidence *held* harmless in action for injuries.

5. Carriers 🔑321(21).

Instruction on burden of street railroad company to prove freedom from negligence where passenger was injured without fault on steps of stationary car *held* not erroneous as requiring carrier to negative negligence by preponderance of evidence.

6. Trial ⚷260(8).

Requested instruction on presumption of ordinary care of defendant's servants *held* sufficiently covered by charge that happening of accident raised no presumption of negligence.

7. Trial ⚷260(1).

Refusal of requested instructions *held* not error where substance thereof was covered by instructions given.

Appeal from Superior Court, City and County of San Francisco; Edmund P. Mogan, Judge.

Action by Dennis Lynch against the Market Street Railway Company and others. Judgment for plaintiff, and defendants appeal.

Affirmed.

Wm. M. Abbott, K. W. Cannon, Cyril Appel, and Ivores R. Dains, all of San Francisco, for appellants.

Vincent W. Hallinan and Emmett Burns, both of San Francisco, for respondent.

PER CURIAM.

An action to recover for personal injuries alleged to have been caused by the negligence of defendants.

A jury returned a verdict for the plaintiff, and defendants have appealed. The grounds for the appeal are that the verdict is unsupported, that plaintiff's counsel was guilty of prejudicial misconduct, and that the trial court erred in its charge to the jury, in refusing certain instructions requested by defendants, and in denying a motion for a new trial.

The injuries occurred near the intersection of Twenty-Ninth and Mission streets in San Francisco at about 1:30 o'clock a. m. of March 25, 1929. Plaintiff resided on Cortland avenue, and on the morning in question was returning to his home on a car operated by defendant company. This car turned south on Mission street, and thence ran westerly on Twenty-Ninth street, where it stopped and plaintiff alighted; it being his intention to transfer to a Cortland avenue car, also operated by defendant company. He alleged "that when said street car approached the place where plaintiff was standing the same was brought to a stop for the purpose of permitting plaintiff to board the same; that plaintiff thereupon proceeded to board the said street car and had attained a position on the step of said street car, but while he was in said position and before he could gain a position of safety upon the platform of said street car and while he was partly on, the same was suddenly started forward and thereafter driven forward at increasing speed; that by reason thereof plaintiff was thrown from said step to the pavement and dragged for some distance; that plaintiff was so thrown almost immediately after the starting up of said street car and by reason of the sudden starting and acceleration of the speed of said car."

Plaintiff testified that after alighting he proceeded to a safety zone on the corner of Twenty-Ninth and Mission streets; there a Cortland avenue car stopped, and while the same was stationary he grasped the center stanchion at the rear entrance with his right hand and placed his left foot on the lower step, and was about to ascend the second step when the car suddenly started. As a result he was thrown toward the rear end of the car, his foot left the steps, and he was dragged for some ten or fifteen yards, finally losing his hold upon the stanchion and falling to the pavement. His version of the affair was corroborated by several witnesses.

As against this, others testified that the car was almost past the intersection and in motion when plaintiff ran and attempted to board it.

Defendants insist that the testimony in support of plaintiff's case was contrary to the physical facts shown and inherently improbable.

When such is the case the evidence must be disregarded (Zibbell v. Southern Pacific Co., 160 Cal. 237, 116 P. 513); but after reading all the testimony we cannot say that the account given by plaintiff and his witnesses was lacking in probability, or that the jury was not justified in believing it.

Defendants complain of remarks by plaintiff's counsel made during the course of the trial and in the argument to the jury. The first had to do largely with questions as to the admissibility of evidence and the proper examination of the witnesses; and the second involved statements of matters which it is claimed were not in evidence, and references to the alleged conduct of defendant company's employees and counsel. Much of that of which defendants complain, while objectionable, was not sufficiently material to justify the conclusion that the jury was thereby swayed in its deliberations, nor do we think that the conduct of counsel in any of the particulars pointed out can, in view of the fact that the jury was duly admonished, be said to have been prejudicial to a degree which would warrant a reversal on that ground.

[1, 2] With respect to the alleged erroneous instructions the first charged that "proof of an injury to a passenger on the car of a common carrier caused by the operation of the car" casts upon the common carrier the burden of proving that the injury was occasioned by unavoidable casualty or some other cause which human care and foresight could

not prevent, or by the contributory negligence of the passenger, unless these facts be shown by evidence adduced by the plaintiff. Defendant claims that under the evidence the only reasonable conclusion was that the injury was caused by plaintiff attempting to board the car while the same was in motion, and that consequently the res ipsa loquitur doctrine cannot apply. As stated, we are satisfied that there was sufficient evidence to support the conclusion that the sole cause of the injury was the negligent operation of the car. The fact that the evidence is conflicting (Roher v. Leonard & Holt, 97 Cal. App. 720, 276 P. 357), or leaves it doubtful whether the ultimate cause of the injury was the negligence of the defendant (Michener v. Hutton, 203 Cal. 604, 265 P. 238, 59 A. L. R. 480; Brown v. Davis, 84 Cal. App. 180, 257 P. 877; Ireland v. Marsden, 108 Cal. App. 632, 291 P. 912) does not affect the application of the rule; and the jury was told in effect that proof that the injury was caused by the operation of the car was necessary to the application of the doctrine, and that contributory negligence would bar a recovery.

In support of their contention that the instructions were improper, defendants cite Graff v. United Railroads, 178 Cal. 171, 172 P. 603, 605. There, however, the instruction was that "the proof of an injury to a passenger on the car of a common carrier casts upon the common carrier the burden of proving that the injury was occasioned by inevitable casualty or some other cause which human care and foresight could not prevent, or by the contributory negligence of the passenger." The plaintiff in that case was injured while standing at the open door of the car; and the instruction was held to be erroneous in that it charged the jury that as a matter of law, notwithstanding the place of added peril which the plaintiff had voluntarily assumed, a legal presumption of negligence arose against the defendant by virtue of the fact that he sustained the injury. The court there states that the true rule on the subject is declared in Steele v. Pacific Elec. Ry. Co., 168 Cal. 375, 143 P. 718, 719, which in turn cites Wyatt v. Pacific Elec. Ry. Co., 156 Cal. 170, 103 P. 892. In the Steele Case the portion of the instruction attacked read: "* * * The proof of injury of plaintiff on a car of the defendant casts upon the defendant the burden of proving that the injury was occasioned by inevitable casualty, or some other cause which human care and foresight could not prevent, or by the contributory negligence of the plaintiff." This was held to be erroneous. The three cases last cited state the rule as follows: No presumption of negligence arises from the mere fact that a passenger is injured. It must first be shown that the injury came from the movement of the car by those in charge of it or from something connected therewith or in the control of the defendant. When this is done the law presumes prima facie that the particular thing thus shown to have caused the injury was due to the defendant's negligence, and the burden is thrown upon the defendant of meeting the prima facie case thus made. It is obvious that the wording of the instruction complained of is different, and meets the objections made in the above cases. Moreover, instructions substantially the same as that in question were approved in the following cases: Rystinki v. Central Cal. Traction Co., 175 Cal. 336, 165 P. 952; Murray v. United Railroads, 49 Cal. App. 462, 193 P. 596.

Nor is there merit in the claim that the complaint contained no allegation of general negligence, thus rendering the doctrine inapplicable, as was the case in Starkey v. Market Street Ry. Co., 90 Cal. App. 249, 265 P. 839; and Marovich v. Central Cal. Traction Co., 191 Cal. 295, 216 P. 595. In Ginochio v. City and County of San Francisco, 57 Cal. App. 150, 206 P. 763, cited by defendants, it was held that the only conclusion supported by the evidence was that decedent had attempted to board the car while the same was in motion and at a point other than its regular stopping place, and that consequently the doctrine did not apply. Here the complaint alleged negligence generally. It was analogous in form to pleadings considered in the following decisions which were held sufficient to permit the plaintiff to rely upon the doctrine: Champagne v. Hamburger & Sons, 169 Cal. 683, 147 P. 954; Roberts v. Sierra Ry. Co., 14 Cal. App. 180, 111 P. 519, 527; Bourguignon v. Peninsular Ry. Co., 40 Cal. App. 689, 181 P. 669; Carnahan v. Motor Transit Co., 65 Cal. App. 402, 224 P. 143; Atkinson v. United Railroads, 71 Cal App. 82, 234 P. 863; Seney v. Pickwick Stages, 82 Cal. App. 226, 255 P. 279; Jianou v. Pickwick Stages, 111 Cal. App. 754, 296 P. 108.

[3] The jury was instructed that the burden of proving all the affirmative allegations of the complaint rested on the plaintiff throughout the entire case; that he must prove the same by a preponderance of the whole evidence; and that if the evidence was equally balanced in weight and quality the verdict must be for the defendants. The court in its charge defined contributory negligence, and stated further: "Unless it is shown by or may be inferred from the evidence offered by plaintiff such negligence is a matter of defense to be proved affirmatively by defendants. It is not incumbent upon plaintiff to prove that he was free from contributory negligence."

The defendants claim that in view of the evidence, which they assert supports but one conclusion, namely, that plaintiff attempted to board a moving car, the last sentence of the instruction was erroneous; but, as stated, the evidence on this question was conflicting. The instruction stated the general rule

(45 Cor. Jur., Negligence, § 741, p. 1152; Evers v. Stratton, 71 Cal. App. 448, 235 P. 656) without telling the jury that under the evidence contributory negligence could not be inferred. In Sullivan v. Market Street Railway, 136 Cal. 479, 69 P. 143, cited by defendants, the court charged that "under the case and proofs as here made, no presumption of negligence arises against the defendant from the mere fact that an accident has occurred." It was, of course, held that the charge was as to matters of fact, and consequently improper.

Exception is taken to an instruction as to what facts plaintiff was required to prove in order to make out a prima facie case. It is urged that the testimony established contributory negligence, and that the instruction should have stated that a finding against such negligence was necessary as a condition to recovery.

As before stated, the evidence on the question was conflicting, and the burden rested upon the defendants.

[4] The instruction also stated that plaintiff must show that he was a passenger on one of the cars of defendant company, without distinguishing between the car he boarded before the accident and the one from which he transferred. There is no reasonable ground for the claim that this instruction misled the jury. The court instructed that if the jury found from the evidence that defendants had "violated the provisions of section 18 of ordinance 581 aforesaid," then such violation constituted negligence; and if they believed from the evidence that solely and proximately by reason of such violation plaintiff sustained injuries, and was himself free from fault, they should return a verdict against defendants.

It is admitted that the ordinance referred to was not introduced in evidence, and its provisions are not disclosed by the record. It appears to be conceded, however, that it provided in substance that passengers should be afforded a reasonable time to board cars. Plaintiff alleged that the car suddenly started while he was in the act of boarding and that defendants thus failed to give him sufficient time to reach a place of safety. If the jury was familiar with the ordinance (which is doubtful), and it contained such a provision, then we think the instruction in view of the pleadings and evidence was not improper. In any case, the error was not prejudicial to a degree which would justify a reversal.

Exception is taken to several other instructions. These objections are predicated upon the claim that the evidence shows conclusively that plaintiff attempted to board a moving car, but this contention, as heretofore pointed out cannot be sustained.

[5] The court further charged that it was the duty of defendant company to afford a reasonable time for passengers to board its car at the place where the car stops for that purpose; and that if a passenger is injured without his fault while on the steps of a car, stopped for the purpose of enabling passengers to board, by reason of the sudden starting of the car, the burden is placed on the company to show that the injury was not the result of its negligence. That the duty of the company was as stated is not questioned (Jones v. United Railroads, 54 Cal. App. 744, 202 P. 919); but defendants claim that the company was thereby required to negative negligence on its part by a preponderance of the evidence, citing Seitzman v. Srere Corporation, 116 Cal. App. 674, 3 P.(2d) 58. In that case the jury was expressly told that the defendant must negative the plaintiffs' prima facie case by a preponderance of the evidence, and this was held to be erroneous. Such was not the instruction here; and, as heretofore stated, the jury was fully instructed on the question of burden of proof, i. e., that plaintiff's case must be established by a preponderance of the whole evidence, and if the evidence was equally balanced defendants must prevail.

Defendants object to another similar instruction, but this objection, like others referred to, is based upon the assumed fact that plaintiff attempted to board a moving car.

[6] Several instructions requested by defendants were refused. The first was that the law presumes that the motorman and conductor were using ordinary care in the operation of the car, and that the presumption must be overcome by evidence. While the instruction was not improper, it was, we think, sufficiently covered by the charge that the mere happening of the accident, or that injuries were sustained, raised no presumption of negligence.

[7] The second stated that defendants were not required to affirmatively prove contributory negligence if such negligence was proved by plaintiff's testimony. The jury was repeatedly told in substance by other instructions that where contributory negligence may be inferred from the evidence offered by plaintiff it is not incumbent upon the defendants to prove the same. This was sufficient.

The court also refused an instruction that the evidence established the fact that the car was a "low platform car," and that the testimony of any witness who appeared to have testified falsely to the contrary should be regarded with distrust. Several instructions respecting matters to be considered in determining the credibility of witnesses, and how the presumption that a witness speaks the truth might be repelled, were given. These covered the point, and the refusal was not prejudicial.

After an examination of the entire record including the evidence, we are satisfied that the conclusions of the jury were fairly sustained, and that no error or misconduct has been shown which would warrant a reversal of the judgment.

The judgment is affirmed.

130 Cal.App. 239

MANUFACTURERS' FINANCE CORPORATION v. PACIFIC WHOLESALE RADIO, Inc. (two cases).

Civ. 8505.

District Court of Appeal, First District,
Division 1, California.
March 4, 1933.

Hearing Denied by Supreme Court May 1, 1933.

1. **Appeal and error** 🔑933(4).
Where order granting new trial fails to specify insufficiency of evidence as ground therefor, appellate court cannot consider sufficiency of evidence to sustain verdict, unless insufficient in law.

2. **Appeal and error** 🔑533(1), 717.
Trial court's opinion is not part of record on appeal and can be used only as aid in discovering processes by which judgment was reached.

3. **New trial** 🔑1.
New trial may be granted only on grounds enumerated in statute (Code Civ. Proc. § 657).

4. **Appeal and error** 🔑1015(1).
Order granting new trial cannot be sustained on ground that evidence was insufficient as matter of law, where there was some evidence tending to support verdict.

5. **Set-off and counterclaim** 🔑49(1).
Defendant's demand against transferor of book account cannot be made basis for affirmative liability of transferee suing for unpaid balance.

6. **New trial** 🔑66.
Verdict contrary to court's correct instructions is verdict against law and may be set aside on motion for new trial.

7. **Evidence** 🔑94.
Disputable presumption shifts burden of introducing evidence, but not burden of proof generally, which rests on party having affirmative of issue.

8. **Evidence** 🔑596(1).
To meet prima facie case, created by disputable presumption or other evidence, defendant need not prove that fact thus sought to be established by plaintiff is untrue; contrary evidence of sufficient weight to balance plaintiff's evidence equally being sufficient.

9. **Trial** 🔑234(7).
Instruction, that trade acceptances sued on are presumed to have been accepted by defendant for valuable consideration and taken by plaintiff in usual course of business before maturity for value until contrary is shown by clear and convincing evidence entirely dispelling such presumptions, *held* erroneous as requiring too high degree of proof to overcome presumptions (Civ. Code, § 3140).

10. **Assignments** 🔑138.
Whether plaintiff was transferee for value of book account sued on *held* for jury.

11. **Bills and notes** 🔑538(4).
Defendant's requested instruction that there was no consideration for transfer to plaintiff of trade acceptances sued on and that plaintiff was not holder thereof for value, if book account, also sued on, was sold to plaintiff for cash, *held* proper.

12. **Action** 🔑59.
Fact question arising in one of two consolidated actions could have been submitted to jury as calling for single verdict.

13. **Appeal and error** 🔑882(12).
Error in instructing jury to return separate verdicts in consolidated action after defendant requested such instruction was invited by defendant, who cannot complain thereof on appeal.

14. **Appeal and error** 🔑978(1).
Where case is complicated, so that error in instructions may confuse jury and prejudice parties, much is committed to trial court's discretion on motion for trial, and abuse thereof must clearly appear before order granting new trial will be disturbed.

Appeals from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Actions, consolidated for trial, by the Manufacturers' Finance Corporation against the Pacific Wholesale Radio, Incorporated, which filed set-offs or counterclaims. Verdicts and judgments for plaintiff in one action and defendant in the other, and from orders granting new trials, both parties appeal.

Affirmed.

For prior opinion, see 16 P.(2d) 758.

Dinkelspiel & Dinkelspiel and Donald K. Lener, all of San Francisco, for Manufacturers' Finance Corporation.

Willard P. Smith and William L. Southwell, both of San Francisco, for Pacific Wholesale Radio, Inc.

PER CURIAM.

Plaintiff filed two separate actions against defendant. The first was upon two drafts negotiable in form, called trade acceptances, each for $20,000, which were accepted by defendant. The drafts were made payable to Fried-Eisemann Radio Corporation, a corporation, and transferred by it to plaintiff. The second action was for the recovery of $14,363.50, the unpaid balance of an open book acount for goods, wares and merchandise sold and delivered to defendant by Fried-Eisemann Radio Corporation and by it assigned to the plaintiff. It was alleged that the transfers were for value and, as respects the acceptances, made before maturity. Defendant admitted the acceptance of the drafts but denied that the same were transferred to plaintiff before maturity or for value. The material allegations of the complaint in the second action were denied.

As defenses to each action defendant alleged identical set-offs or counterclaims as against the transferrer aggregating the sum of $34,871.59. The actions arose out of the same transaction between the same parties, and by stipulation they were consolidated for trial. A jury returned a verdict in the first action in favor of plaintiff for $40,000 and in the second a verdict for the defendant against plaintiff for $14,363.50. Separate judgments were entered in accordance with the verdicts.

In the first action defendant filed a notice of its intention to move for a new trial, and a similar notice by plaintiff was filed in the second action. Each specified all the grounds provided by the statute, and following motions by the respective parties a new trial was granted in each case.

Plaintiff appealed from the order entered in the first action, and defendant from that entered in the second.

[1] The orders were in general terms, and neither contained a specification that the same was granted on the ground of the insufficiency of the evidence.

Where the order fails to so specify it must be presumed on appeal that it was not granted on that ground, and an appellate court is precluded from considering the question whether or not the evidence was sufficient to sustain the verdict unless it was insufficient in law. Yoakam v. Hogan, 198 Cal. 16, 243 P. 21.

[2-4] The trial court after making the orders filed a written opinion stating his belief that the jury intended to deduct from plaintiff's claims the counterclaims mentioned, but became confused, and as a result failed to do so.

An opinion by the trial court is not part of the record on appeal (2 Cal. Jur., Appeal and Error, § 235, p. 488), and can only be used as an aid in discovering the processes by which the judgment was reached. In re Estate of Felton, 176 Cal. 663, 169 P. 392. While formerly a new trial might have been granted by the court on its own motion when there was such a plain disregard by the jury of the instructions or the evidence as to satisfy the court that the verdict was rendered under a misapprehension of such instructions or under the influence of passion or prejudice (Townley v. Adams, 118 Cal. 382, 50 P. 550), the power is now limited to the grounds enumerated in section 657 of the Code of Civil Procedure. Diamond v. Superior Court, 189 Cal. 732, 210 P. 36. Here there was some evidence tending to support the verdict in the first action, and the order granting a new trial in that case cannot be sustained on the ground that the evidence was insufficient as a matter of law.

[5, 6] In the second action, however, defendant's demands against the transferrer could not be made the basis for an affirmative liability on the part of the plaintiff (23 Cal. Jur., Set-off and Counterclaim, § 38, p. 266), and the verdict in that respect was contrary to the instructions of the court. Consequently it was a verdict against law, and might be set aside on a motion for a new trial. 20 Cal. Jur., New Trial, § 82, p. 130.

As to the first action there remains the question whether the order can be sustained on the ground that errors of law were committed during the course of the trial. In this connection the parties discuss certain instructions given and refused, it being plaintiff's claim that all instructions given at its request were proper. This is denied by defendant, which further contends that the court erroneously refused certain of its proposed instructions, and that the errors justified the trial court in granting a new trial in the first action.

[7-9] Two instructions given at plaintiff's request are discussed in the brief. The first defined the rights of holders of negotiable paper and concluded with the following paragraph: "You are instructed that there are certain legal presumptions indulged in favor of negotiable trade acceptances to facilitate their use and negotiation: That they are presumed to have been accepted by defendant for a valuable consideration, and to have been purchased and indorsed to plaintiff for a valuable consideration, and that plaintiff took such trade acceptances in the usual course of business before maturity and for value, until the contrary is shown by defendant by clear and convincing evidence and such weight as to entirely dispel such presumption."

Every holder of a negotiable instrument is deemed prima facie to be a holder in due course (Civ. Code, § 3140); but it is contended that the portion of the instruction stating that the presumptions mentioned are indulged "until the contrary is shown by defendant by clear and convincing evidence and such weight as to entirely dispel such presumption" was erroneous, in that it required the defendant in order to overcome the prima facie case made by the presumption to adduce a higher degree of proof than the law demands. As urged by defendant, a disputable presumption operates to shift the burden of introducing evidence and not the burden of proof generally, which rests upon the party having the affirmative of the issue and who must prove his case by a preponderance of the evidence. 10 Cal. Jur., Evidence, § 90, p. 785. To meet the prima facie case created either by a disputable presumption or other evidence it is not necessary for a defendant to prove that the fact alleged and thus sought to be established by plaintiff is untrue, it being sufficient in order to entitle him to the decision that his evidence to the contrary be of sufficient weight to equally balance that of his adversary (10 R. C. L., Evidence, § 45, p. 897; Valente v. Sierra R. Co., 158 Cal. 412, 111 P. 95; People v. Miller, 171 Cal. 649, 154 P. 468; Scarborough v. Urgo, 191 Cal. 341, 216 P. 584); that is to say, that he has by his evidence to this extent impaired the prima facie quality of the case against him. 22 Cor. Jur., Evidence, §§ 21, 22, pp. 76, 80; Cohasset v. Moors, 204 Mass. 173, 90 N. E. 978. In this respect the first instruction was erroneous; but as to the second upon which error is also predicated, we find nothing therein prejudicial to the defendant.

[10, 11] With respect to the instructions offered by the defendant and refused, plaintiff alleged the transfer to it of the acceptances for value before maturity, and also a sale to it for value of the balance unpaid on the book account sued upon in the second action. To these defendant sought to offset counterclaims which it had against the transferrer. It requested an instruction in effect that if there was a sale of the book account for an amount in cash, as claimed by plaintiff, and this transaction took place before the transfer of the trade acceptances mentioned, then there was no consideration for the latter transfer, and that plaintiff as to the acceptances was not a holder for value.

Although evidence was introduced in support of plaintiff's allegations, and it was alleged that the acceptances were received by the original holder as part payment on the book account, nevertheless the question whether plaintiff was a transferee of the latter instruments for value was one for the jury, and the offered instruction might properly have been given.

Defendant's offered instructions Nos. 14 and 16 were properly refused and a discussion thereof would serve no useful purpose. The same is true of a fourth instruction numbered 20 which it proposed.

Numerous instructions were offered by both parties, some of which were given as requested; others were modified by the court and still others refused. All of these we have examined and find nothing upon which error can be predicated.

[12-14] As stated, the cases were consolidated, and it would have been proper to have submitted the matter to the jury as one calling for a single verdict. Union Lumber Co. v. Simon, 150 Cal. 751, 89 P. 1077, 1081; Stanton v. Superior Court, 202 Cal. 478, 261 P. 1001; East Bay Municipal Utility Dist. v. Kieffer, 99 Cal. App. 240, 278 P. 476, 279 P. 178. Had this been done, it is probable that the apparent confusion in the minds of the jurors would have been obviated. Nevertheless the defendant requested an instruction that the jury return separate verdicts. This being true, and such an instruction having been given, the error in this respect, if any, was invited by defendant, and it is not in a position to complain. 2 Cal. Jur., Appeal and Error, § 496, p. 846. Moreover, it has been held that where no objection to the form of a verdict in such cases is made at the trial it cannot be taken subsequently. Hicks v. Coleman, 25 Cal. 122, 85 Am. Dec. 103; Joerger v. Pacific Gas & Elec. Co., 207 Cal. 8, 276 P. 1017. While not conclusive on the question, the fact that the verdict returned by the jury in the second case against the plaintiff was for the exact amount claimed as the balance unpaid on the book account, namely, $14,363.50, indicates, as the trial court said, that their minds were confused as to the evidence and law of the case. As shown by the voluminous record, the case was complicated, and it would not be surprising if either a court or jury should in the haste of a trial find difficulty in clearly understanding the facts. Under such circumstances any error in the instructions might readily have led to confusion and be prejudicial in its effect. Where such appears to have been the case, much is committed to the discretion of the trial court, and an abuse of such discretion must clearly appear before an order granting a new trial will be disturbed. Sheets v. Southern Pacific Co., 212 Cal. 509, 299 P. 71. In the present case we feel satisfied that the conclusions of the trial court are fully sustained and that its orders corrected a probable miscarriage of justice.

The orders are affirmed.

130 Cal.App. 421

POTAPOFF v. MATTES et al.

DOBRINEN v. MATTES.

Civ. 4766, 4767.

District Court of Appeal, Third District, California.

March 16, 1933.

1. Automobiles 🔑171(10).

At view-obstructed intersection, each automobile driver was bound to have car under such control as to prevent injury to other cars (St. 1923, p. 553, § 113 (a, b), as amended by St. 1931, p. 2120, § 34).

Thus, if jury was convinced by testimony that either driver entered intersection at such speed as to endanger life, limb, or property of any other person, jury would be justified in finding such driver guilty of negligence as matter of fact, regardless of whether driver observed specified statutory speed limit for such intersections.

2. Appeal and error 🔑1002.

Jury's determination of fact question on conflicting evidence *held* binding on appeal.

3. Constitutional law 🔑191.

Legislature may modify or repeal rules of evidence and make changes applicable to accrued or pending actions.

4. Automobiles 🔑6.
Constitutional law 🔑311.

Statute placing burden of proving motorist's negligence on adversary, though definite speed limit specified in same section has been exceeded, *held* not to deprive adversary of due process (St. 1923, p. 553, § 113 (d), as added by St. 1931, p. 2120, § 34).

5. Trial 🔑108.

Number of attorneys to address jury on either side is within court's discretion (Code Civ. Proc. § 607, subd. 4).

6. Trial 🔑103.

Where plaintiff's counsel waived opening argument, and defendant's counsel argued at length, permitting more than one counsel for plaintiff to argue after defendant's counsel had concluded *held* not abuse of discretion or prejudicial error; defendants having been offered privilege of replying (Code Civ. Proc. § 607, subd. 4).

Appeals from Superior Court, San Joaquin County; M. G. Woodward, Judge.

Action by John Potapoff against E. L. Mattes, wherein a cross-complaint was filed by E. L. Mattes and Dorothy Mattes, and action by John Dobrinen against E. L. Mattes, which actions were tried together. From judgments in favor of plaintiffs against defendant E. L. Mattes, such defendant appeals, and from judgment in favor of cross-defendant, cross-complainants appeal.

Affirmed.

Foltz, Rendon & Wallace, of Stockton, for appellants.

Gumpert & Mazzera and Langdon & Tope, all of Stockton, and Ford & Johnson, and D. W. Brobst, all of Oakland, for respondents.

Mr. Justice PLUMMER delivered the opinion of the court.

The above-entitled cases were tried together, both arising out of the same automobile accident, and are presented to us for consideration upon one transcript and one set of briefs. The plaintiff Potapoff was awarded $2,000 damages, and the plaintiff Dobrinen was awarded $5,000 damages; judgment for damages running only against the defendant E. L. Mattes.

The record shows that about 7 a. m. on the morning of October 14, 1931, the plaintiff Potapoff was driving a Ford truck south on a certain highway in the county of San Joaquin known as and called "Union Highway." The plaintiff John Dobrinen was riding with him in the truck. At the same time the defendant E. L. Mattes was driving a Pontiac automobile easterly on a certain other highway in San Joaquin county known as "Louise Highway." With him was riding the defendant Dorothy Mattes. These highways intersect each other.

The record shows that the intersection of the two highways was obstructed by rows of trees. In driving southerly, the plaintiff's view of the intersection was obstructed by a thick row of olive trees on the west side of Union highway. In driving easterly on Louise highway the defendant's view of the intersection was obstructed by a like thick row of olive trees on the north side of the highway, and also by a row of cypress trees on the south side thereof. The collision took place at a point a trifle south of the center of the intersection. The defendants filed cross-complaints, upon which judgment went in favor of the plaintiffs.

[1-4] No question is raised as to the amount of the damages being excessive, nor is it contended that the evidence is not sufficient to support the verdict. Upon this appeal reliance is placed upon the alleged error of the court in reading to the jury all of section 113 of the California Vehicle Act and in allowing more than one attorney for the plaintiffs to address the jury in closing arguments.

In support of the first assignment of error the argument is advanced that subdivision (d) of section 113 of the California Vehicle Act, as added to the section by the Legislature in 1931 (St. 1931, p. 2120, § 34), is unconstitutional in that it deprived the defendants of due process of law in the trial of the cases, the specific objection being that the subdivision is arbitrary and illogical and inconsistent with the other subdivisions of the section, for the reason that after providing a lawful speed limit for different conditions, the burden is placed upon the party alleging negligence to prove negligent driving as a matter of fact, even though the specified speed has been exceeded; that in criminal cases where one was charged with having exceeded the speed limit, a prima facie case is made out, whereas in civil cases exceeding the speed limit is not to be deemed negligence as a matter of law.

In view of the fact that there was a sharp conflict in the evidence as to both the speed of the Ford truck and Pontiac car, it is difficult to perceive how the giving of the entire section as an instruction to the jury, resulted in prejudicial error. Irrespective of all that portion of section 113 of the California Vehicle Act following subdivision (a), the conditions surrounding the scene of the accident rendered subdivision (a) of the section applicable. It reads: "Any person driving a vehicle on the public highways of this state shall drive the same at a careful and prudent speed not greater than is reasonable and proper, having due regard to the traffic, surface and width of the highway, and no person shall drive any vehicle upon a public highway at such a speed as to endanger the life, limb or property of any person." Being an obstructed highway, it was the duty of the driver of both automobiles to drive at such a limited speed as not to endanger the life, limb, or property of any other person approaching the same intersection. In other words, it was the duty of each driver entering such an intersection to have his car under such control as not to admit of its inflicting injury upon any other car using the same intersection. Thus, if the jury was convinced by the testimony that either of the drivers entered the intersection at such a rate of speed as to endanger the life, limb, or property of any other person, irrespective of the rate of speed at which such intersection was entered, then and in that case the jury would be justified in finding such driver guilty of negligence as a matter of fact. The conflicting evidence in this case would support a conclusion that both drivers entered the intersection at a negligent rate of speed, but being resolved in favor of the plaintiffs, we are bound by the determination of the jury.

As shown in the text in 45 C. J. 720, there has always been a conflict between different courts as to whether a violation of a speed law constitutes negligence per se, the majority rule being that a violation of an ordinance or statute fixing a speed limit is per se negligence, the minority rule being that it is only a circumstance to be presented to the jury in determining the question of the alleged negligence. In all jurisdictions it is really held to be a matter of proof, and not of substantive law. Where it is held to be negligence per se, proof must be made that the speed limit has been exceeded. Likewise, where it is simply a fact to be submitted to the jury, testimony must be introduced tending to show violation of the statute or ordinance. Being a rule of evidence, the text as found in 12 C. J. 982, is applicable. It is there said: "No vested right can be gained in rules of evidence, and such rules may accordingly be modified or repealed at the pleasure of the legislature, even though the changes are made applicable to accrued or pending actions, and may incidentally affect the rights of the parties. Thus, a statute is valid which authorizes the admission of copies of documents where under the previous law only originals were admissible, which permits proof of wills destroyed in a public calamity, or which authorizes the admission of unstamped documents. The legislature cannot, however, under the pretense of making or changing a rule of evidence, deprive a party of a vested right in property." This statement of the law is supported by a number of cases cited in the footnotes.

Again, as stated in 5 California Jurisprudence 636: "The constitutional power and authority to enact a statute appearing, the question of its mere reasonableness or unreasonableness is for the legislature alone." Thus, even though subdivision (d) of section 113 of the California Vehicle Act does eliminate all of the other portions of the section found under subdivision (b), and may seem to be unreasonable, nothing has been called to our attention justifying the conclusion that the Legislature was without power to limit the effect of the first, second, third, fourth, fifth, sixth, and seventh paragraphs of subdivision (b) of the section in so far as a violation of either one of those sections should be held, as a matter of proof, to establish negligence per se. We perceive no valid reason why the Legislature should not leave it to the jury to determine in all cases whether subdivision (a) of section 113, supra, quoted herein, should not be made applicable, and the question left to the jury to determine whether, under the particular conditions, a party charged with negligence has in fact been negligent in the operation of a motor vehicle.

The subdivisions which we have referred to by numbers in no wise limit or suspend the force and effect of subdivision (a) of the section. Thus, the alleged inconsistency, or at least unreasonableness of subdivision (d) is more apparent than real.

Other cases might be cited to support the rule that the Legislature has full power to change the rules of evidence, but the cases cited in C. J. supra, we deem sufficient. Nor do we deem it necessary to enter into a discussion as to what constitutes negligence, further than to say that proof of one entering an intersection, where his view is obstructed, without exercising due care and caution, and in such a manner as to endanger the life, limb, or property of another, is sufficient to support the charge of negligence. We confine this definition to the circumstances presented by this case. Although the testimony is conflicting, there is sufficient evidence in the record to support the conclusion of the jury as to the negligence of the driver of the Pontiac car.

[5, 6] The second ground relied upon for reversal is the alleged error of the trial court in permitting more than one counsel for the plaintiffs to make an argument after counsel for the defendants had concluded his argument. It appears from the record that the plaintiffs waived the opening argument; that counsel for the defendants then argued the cause to the jury somewhat at length. No limitation was placed upon the time that might be used by counsel in addressing the jury. After counsel for the defendants had concluded his argument, the court permitted more than one counsel for the plaintiffs to address the jury. In doing so the court used the following language: "The counsel for the plaintiffs waived the opening argument, and counsel for the defendants evidently concluded that there would be one final argument, and he therefore made his argument of some two hours and fifteen minutes on that assumption. Counsel for the plaintiffs apparently have decided to divide the present argument among three counsel—they may do so—and after the argument of the second counsel, the counsel for the defendants will be permitted to reply and the plaintiffs may then close the case; or if you confine your arguments to two counsel, the counsel for the defendants may reply at this time." It thus appears that the defendants were given an opportunity to reply after counsel for the plaintiffs had presented their arguments.

Subdivision 4 of section 607 of the Code of Civil Procedure reads: "When the evidence is concluded, unless the case is submitted to the jury on either side or on both sides without argument, the plaintiff must commence and may conclude the argument." There is nothing in this language which limits the power of the court to permit more than one counsel to address the jury. In the case at bar it appears that counsel for the plaintiffs divided their arguments so that the different counsel argued a different phase of the questions presented. The defendants were granted the privilege of replying, but it does not appear that the defendants availed themselves of the permission granted by the trial court. The authorities are practically unanimous in holding that the conduct of a trial, is so largely in the discretion of the trial court that there must be made to appear an abuse of that discretion before an appellate court will interfere.

In 38 Cyc. 1473, we find the following which we think is a correct statement of the law and of the discretion vested in the trial court, to wit: "The number of attorneys who may address the jury on either side is within the discretion of the trial court. Where there are several counsel on a side, the court may require that objections for each party may be made by but one counsel at a time, but the court may permit more than one attorney for a party to address the jury." This text is supported by numerous cases cited in the footnotes.

To the same effect is the text found in 2 California Jurisprudence 902.

In view of the fact that counsel for the defendants argued their cause at length, and were offered the privilege of reargument, we cannot very well hold that the trial court abused its discretion, or that the defendants, without any further showing, suffered any prejudicial error.

The judgments are affirmed.

We concur: **PULLEN, P. J.; THOMPSON, J.**

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130 Cal.App. 45

SMITH v. FIDELITY & DEPOSIT CO. OF MARYLAND et al.

Civ. 4809.

District Court of Appeal, Third District, California.

Feb. 25, 1933.

Rehearing Denied March 27, 1933.

Hearing Denied by Supreme Court April 25, 1933.

1. Guardian and ward ⚿144.

Account of deceased guardian cannot be had by equitable action since enactment of statute giving probate court jurisdiction of such proceedings (Code Civ. Proc. § 1014).

2. Guardian and ward ⚿179.

Accounting between guardian and ward is condition precedent to action upon guardian's bond (Probate Code, §§ 554, 1555, 1606).

3. Guardian and ward ⚿180.

Sureties on guardian's bond given notice of and appearing at hearing settling guardian's account are bound by adjudication settling such account (Probate Code, §§ 554, 1555).

4. Executors and administrators ⚿535.

Settlement of administrator's account is binding upon his sureties (Probate Code, §§ 554, 1555, 1606).

5. Executors and administrators 🔑513(3).

Notice of proceedings to settle administrator's account can be impeached only for fraud or mistake (Probate Code, §§ 554, 1555).

6. Guardian and ward 🔑144.

Probate court has full power to settle guardian's account (Probate Code, §§ 1555, 1606).

7. Guardian and ward 🔑173.

Surety on guardian's bond is obligated to pay upon guardian's default of payment (Probate Code, § 554).

8. Courts 🔑475(2, 3).

Probate court has exclusive jurisdiction of accounts of deceased guardians by compelling administrator of estate of deceased guardian to render guardian's account (Probate Code, §§ 1555, 1606).

9. Guardian and ward 🔑164.

Ward may dispute correctness of guardian's account, or guardian's settlement with ward, at any time during year following account (Probate Code, §§ 1400, 1606).

10. Guardian and ward 🔑142.

Minor ward's release of guardian before settlement of guardian, not approved by probate court having jurisdiction, and annulled within year after its execution, *held* not binding on ward (Probate Code, §§ 554, 1400, 1555, 1606).

11. Guardian and ward 🔑142.

Release obtained by guardian from ward placed upon guardian burden of proving release was based on correct settlement and upon adequate consideration (Probate Code, § 1400).

12. Guardian and ward 🔑177.

Waiver by guardian's surety of payment of $500 premium *held* inadequate consideration for ward's release of guardian and surety from payment of $26,094.53 (Probate Code, § 554; Code Civ. Proc. § 1963, subd. 19).

13. Pleading 🔑121(4).

In action against deceased guardian's administrator and surety on guardian's bond, denial for lack of information and belief of plaintiff's allegation that probate court settled account of guardian *held* insufficient to raise issue (Probate Code, §§ 554, 1606).

14. Pleading 🔑121(4).

When existence of fact may be ascertained from inspection of public record, its existence cannot be put in issue by denial based solely upon information and belief.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by Evalyn Alice Smith (formerly Evalyn Alice Swan, a minor) against the Fidelity & Deposit Company of Maryland and another. From the judgment for plaintiff, named defendant appeals.

Affirmed.

Butler, Van Dyke, Desmond & Harris, of Sacramento, for appellant.

Otis D. Babcock, of Sacramento, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

The plaintiff in this action had judgment against the Fidelity & Deposit Company of Maryland, a corporation, and Charles A. Smith, as administrator of the estate of Robert T. Swan, deceased, in the sum of $26,094.53, based upon a directed verdict. From this judgment the Fidelity & Deposit Company of Maryland, a corporation, appeals.

The complaint in this action alleges that Robert T. Swan died in the county of Sacramento on or about the 6th day of April, 1931, and at the time of his death was a resident of the county of Sacramento, leaving estate therein; that thereafter, and on or about the 7th day of May, 1931, Charles A. Smith was duly and regularly appointed, and thereupon qualified as, the administrator of the estate of Robert T. Swan, deceased; that on or about the 18th day of October, 1927, Robert T. Swan was duly and regularly appointed guardian of the person and estate of Evalyn Alice Swan, a minor, thereupon qualified as such, and continued to be the qualified and acting guardian of the estate of said minor until his death; that after his appointment as guardian of the estate and person of Evalyn Alice Swan, a minor, to wit, on the 11th day of June, 1928, the said Robert T. Swan executed a bond in favor of Evalyn Alice Swan, a minor, according to law, conditioned in the penal sum of $31,000, this bond being executed by Robert T. Swan, as principal, and the Fidelity & Deposit Company of Maryland, a corporation, as surety; that thereafter said Robert T. Swan, as guardian of the estate of said Evalyn Alice Swan, a minor, returned an inventory and appraisement of the estate of said minor showing the value thereof to be in excess of $33,000; that Robert T. Swan, as guardian of the estate of said minor, did not render a final account or report of his administration of his guardianship, nor administration of the estate of said minor; that, as hereinbefore stated, said Robert T. Swan died on the 6th day of April, 1931; that on the 20th day of May, 1931, said Charles A. Smith, as administrator of the estate of Robert T. Swan, deceased, was directed and ordered by the court having jurisdiction of the estate of said minor to report a full and correct account of the administration of the estate of said Evalyn Alice Swan, a minor, by the said Robert T. Swan as guardian as aforesaid; that thereafter, and or or about the 7th day of January, 1932, the said Charles A. Smith, as administrator of the estate of Robert T. Swan, deceased, presented and filed an account of the administration of the estate of Evalyn Alice Swan, a minor, by the said Robert T. Swan, as guardian thereof, and on or about the 1st day of February, 1932, after due and legal proceedings taken and had therefor, the court, having jurisdiction of said accounting, made its order approving and settling the account and report so made and rendered, adjudicating and decreeing that the said Robert T. Swan, as guardian of the estate of Evalyn Alice Swan, a minor, came into control of moneys and properties belonging to the estate of Evalyn Alice Swan, a minor, in the sum of $22,155.35, which sum was wholly unaccounted for by the said Robert T. Swan, as such guardian, and said sum was charged against said guardian, together with interest thereon at the rate of 7 per cent. per annum, compounded annually until the 1st day of January, 1932, in the further sum of $3,939.18, and that on the 1st day of January, 1932, there was due and unpaid from the said Robert T. Swan, as guardian of the estate of said Evalyn Alice Swan, a minor, the sum heretofore mentioned of $26,094.53. In this action judgment was asked against the defendants in that sum.

The answer of the appellant admits the allegations of paragraphs 1, 2, 3, 4, 5, and 6 of the complaint, but denies upon information and belief the entry of the judgment and order of the court settling the account of Robert T. Swan, deceased, as guardian of the estate of Evalyn Alice Swan, a minor, as presented by the administrator of the estate of Robert T. Swan, deceased, and, in addition to such denial, pleaded in defense a certain instrument in writing bearing date the 25th day of October, 1930, entitled "A release," signed by the plaintiff in this action, the substantive portion of which is in the following words: "Now, Therefore, Evalyn Alice Swan, does hereby acknowledge that the principal has faithfully and satisfactorily managed said estate according to law, and fully accounted for, and paid over the assets thereof, and in consideration of the premises and the sum of $1.00, the receipt whereof is hereby acknowledged, does hereby release, acquit, exonerate and forever discharge the surety of and from any and all liability whatsoever under said bond or bonds, and any and all other bonds executed by the surety on behalf of the principal in such fiduciary capacity, and of and from any and all manner of actions, debts, dues and demands whatsoever which could or might possibly be brought, exhibited or prosecuted against the surety, for, or by reason, or in consequence of its having executed said bond or bonds, or any other bonds as aforesaid."

Upon the trial of this action the plaintiff introduced testimony to the effect that no money had been paid over to her since the rendering and settling of the account finding an indebtedness in her favor in the sum hereinbefore mentioned. The account as rendered by the administrator of Robert T. Swan, deceased, as and for Robert T. Swan, deceased, as guardian of the estate of Evalyn Alice Swan, a minor, was admitted in evidence. Among the papers and exhibits introduced in evidence was contained the release, the substantive portion of which we have hereinbefore set forth, being a part of the record in an action prosecuted by the plaintiff for the purposes of having the release canceled and set aside, in which judgment was entered in favor of the plaintiff as against the defendants herein, as to which a new trial was granted as to the appellants under the provisions of section 953e, Code of Civil Procedure. No testimony was introduced on the part of appellants, other than that which fixed the date of the death of Robert T. Swan, deceased, and the relationship of the plaintiff in this action as being the adopted daughter of the said Robert T. Swan, deceased.

No question was made as to the correctness of the account rendered showing the amount of moneys unaccounted for by the guardian of the estate of the plaintiff. No question of fraud or mistake therein was tendered by the pleadings.

Upon this appeal it is contended that the court had no authority to direct a verdict in favor of the plaintiff; that there was no evidence introduced tending to show any indebtedness of the appellant to the plaintiff; that there was no evidence showing the presentation of a claim against the administrator of the estate of Robert T. Swan, deceased, the chief contention being that the appellant has never had its day in court.

Section 1639, Code of Civil Procedure, as amended in 1905 (St. 1905, p. 216), formerly provided for the rendering of a deceased guardian's account, by his administrator. Section 1555 of the Probate Code provides for such procedure as follows: "The termination of the relation of guardian and ward by the death of either guardian or ward or by the ward attaining his majority or being restored to capacity shall not cause the court to lose jurisdiction of the proceeding for the purpose of settling the accounts of the guardian. The account of a deceased guardian shall be presented by his executor or administrator."

Section 1606 of the Probate Code, based upon section of the Code of Civil Procedure providing therefor, now reads as follows: "When not otherwise prescribed in this division, practice and procedure and the making and entry of orders under this division shall be governed by the provisions of division III of this code, so far as they are applicable."

Section 1400 of the Probate Code, based upon previous sections of the Code of Civil Procedure, reads in part as follows: "The relation of guardian and ward is confidential, and is subject to the provisions of law relating to trusts."

Section 554 of the Probate Code reads: "The liability of principal and sureties upon the bond of an executor, administrator, or guardian, is in all cases to pay in the kind of money or currency in which the principal is legally liable, * * *" etc. The character of the proceeding establishing the account of the deceased guardian in this state is well stated in 11 California Jurisprudence, 236, as follows: "Probate proceedings and judgments rendered therein are in the nature of proceedings in rem—or at least proceedings quasi in rem—whether testate or intestate. In other words, such judgments are founded in proceedings, not against persons as such, but against or upon the thing or subject matter itself, whose status or condition is to be determined, and the judgment, when rendered, is a solemn declaration of the status of the thing, and ipso facto renders it what it declared it to be. All the world are parties to probate proceedings and are bound thereby where they have been regularly pursued."

And in relation to the subject of notice, the following language found on page 244 of the same volume is pertinent here: "The proceedings in the administration of an estate are in rem, and if the notice required by the statute has been given, the decrees of the court therein are binding upon the whole world, other than persons expressly excepted by statute, whether they have actual knowledge or not, for the whole world is called before the court by the notice. Constructive notice given in the way provided by the statute has always been regarded as sufficient," etc.

In 13 California Jurisprudence, 960, we find the following classification as to guardianship matters, to wit: "Guardianship proceedings are a part of what are generally denominated 'probate proceedings.' The court acts in such proceedings not as an equitable tribunal in the exercise of general equity powers, but as in a special proceeding and by virtue of power conferred on it by statute. The proceedings must therefore be had in accordance with a procedure outlined by the code." And on page 200 of the same volume, the following: "The notice of proceedings for the settlement of an account by a guardian is the same as that required upon the settlement of accounts of an executor or administrator." On page 203 of the same volume the law is further stated as follows: "The sureties on a guardian's bond are bound by whatever binds the guardian."

No issue is raised upon this proceeding that proper notices were not given of the date of hearing and settlement of the account of Robert T. Swan, deceased, as guardian of the estate of Evalyn Alice Swan, a minor, as presented by the administrator of the estate of Robert T. Swan, deceased. No appearance, as required by section 1014, Code of Civil Procedure, was made by the appellant in this action, although the order settling the final account of the guardian of the estate of Evalyn Alice Swan, a minor, recited that the counsel for the appellant were present in court and participated at and in the hearing of the account.

[1, 2] Prior to the amendment of section 1639, Code of Civil Procedure, in 1905, the account of a deceased guardian could only be had by an equitable action. Since the amendment of that section giving the probate court jurisdiction, no such equitable action will lie. As we have shown, and will further show, whatever binds a guardian binds his sureties. In this particular an action will not lie either against a guardian or his sureties until after an accounting has been had between the guardian and ward. The probate court has exclusive jurisdiction of such determination, and such determination is a condition precedent to the maintenance of an action upon the bond. Allen v. Tiffany, 53 Cal. 16; Graff v. Mesmer, 52 Cal. 636. The holding in these cases has never been modified. See, also, 28 Cal. Jur. 1304.

[3] By the great weight of authority the settlement of a guardian's account is held to be conclusive against his sureties, and, where such settlement is not held to be conclusive, it is adjudged to be prima facie evidence of the facts set forth in the order of settlement. As stated in 28 California Jurisprudence, 1294: "In the absence of fraud or mistake, and in the absence of an appeal or a reversal or modification on appeal, a final judicial settlement by a guardian is in most States conclusive on the sureties as to the existence and amount of the guardian's liability to the ward, even where the sureties were not made parties to the proceedings, or notified thereof, or where they did not participate therein. At any rate, a decree rendered on the final accounting is at least prima facie evidence against the sureties. A few courts hold generally that it is only prima facie and not conclusive evidence, while other courts hold this to be the rule where the sureties were not parties to the suit for accounting. Where notice was given the sureties, they are bound by the adjudication, especially where they appeared at the hearing."

[4, 5] In the case of Brodrib v. Brodrib, 56 Cal. 563, the question which we are considering was before the court, and it was there held that whatever bound the guardian bound the sureties, the language of the court there

used being: "In the absence of such a suggestion [incompetency of guardian], the Court rightfully exercised its jurisdiction over the person of the guardian, and the judgment which it rendered against him was conclusive; for the settlement and allowance of the final account was a matter vested exclusively by the Constitution and laws in the Court (art. VI, Constitution of 1862; § 97, Code Civ. Proc.; Allen v. Tiffany, 53 Cal. 16); and its judgment could not be successfully resisted until reversed or modified by some proceedings directly impeaching it. It was conclusive, not only against the guardian himself, but also against the sureties upon his official bond. Whatever binds and concludes the guardian, equally binds and concludes his sureties." At the time of the rendition of these decisions, the probate court had and exercised the same power now conferred upon it to compel accountings by the guardian of the estate of minors and incompetents, and, as now amended, the probate court has the further power to compel the administrator of a deceased guardian to render such an account. The cases are numerous and need not be further cited to the effect that the settlement of an administrator's or executor's account is binding upon their sureties, and the sections of the Code which we have cited show that jurisdiction is acquired in the settlement of guardians' accounts in the same manner that jurisdiction is acquired in the settlement of accounts of administrators and executors. The notice which is given being a proceeding in rem is binding upon all the world and can be impeached only for fraud or mistake.

Under a somewhat similar section of the Code of Civil Procedure of New York state, empowering the compelling of an administrator of the estate of a deceased guardian to render an account of the guardianship, it is held that the settlement of the account binds the sureties. In Martin v. Hann, 32 App. Div. 602, 53 N. Y. S., quoting from the syllabus, page 186, the decision is as follows: "Under Code Civ. Proc. §§ 2606, 2607, empowering the surrogate's court to compel the executor or administrator of a deceased guardian to account to the same extent as decedent, if alive, the decree entered on the accounting by the executrix of a general guardian is conclusive against his sureties, unless impeached for fraud."

In the case of Douglass v. Ferris, 138 N. Y. 192, 33 N. E. pages 1041, 1044, 34 Am. St. Rep. 435, the Court of Appeals of New York having before it the question of liability of sureties, supported the rule stated in the foregoing cases. We quote from the opinion as follows: "Upon principle and authority there cannot * * * be any doubt that if the guardian had accounted before the surrogate in the usual way, and a decree had been entered, free from fraud, adjudging that he owed the plaintiff a designated sum, that decree would have bound the sureties. This is upon the principle that by their contract they are privy to the proceedings against their principal, and, when he is concluded, they, in the absence of fraud or collusion, are concluded also. Douglass v. Howland, 24 Wend. 35; Jackson v. Griswold, 4 Hill, 522; Annett v. Terry, 35 N. Y. 256; Baggott v. Boulger, 2 Duer. [9 N. Y. Super. Ct.] 160; Rockfeller v. Donnelly, 8 Cow. 637; Girvin v. Hickman, 21 Hun, 316; Casoni v. Jerome, 58 N. Y. 315; Harrison v. Clark, 87 N. Y. 575; Thayer v. Clark, 48 Barb. 243."

In Ryan v. People, 165 Ill. 143, 46 N. E. 206, the Supreme Court of Illinois held as follows: "An order of probate court made on presentation of a guardian's final account, showing the amount due the ward, is conclusive against the guardian and his sureties in a suit on the bond."

In Botkin v. Kleinschmidt, 21 Mont. 1, 52 P. 563, 564, 69 Am. St. Rep. 641, in an action involving the liability of sureties upon a guardian's bond, the question was there raised, as here, as to the want of personal notice given to the sureties of the settlement of the guardian's accounts, the contention being that, as the sureties were not parties to the account, they were not bound by the decision of the probate court in finding that the guardian was indebted to the ward. The court disposed of such questions as follows: "'It is the undertaking of the surety on a guardian's bond that his principal shall discharge all his official duties; and, since one of the duties of the guardian is to pay the amount found to be due by him to the ward by a court having jurisdiction for such purpose, it follows that the judgment to that effect must be binding upon the surety, unless obtained by fraud or mistake. Hence, it is held to be a well-settled principle that the sureties in a guardian's bond are prima facie bound by a recovery against their principal, although they were not parties to the suit, and that they can relieve themselves only by showing that the amount recovered was in excess of the amount to which plaintiff was entitled, or that he was not entitled to recover at all.' [Citing Woerner, Guardianship, p. 149; 2 Brandt, Sur. sec. 580; Chaquette v. Ortet, 60 Cal. 594; Biggins v. Raisch, 107 Cal. 210, 40 P. 333; Brodrib v. Brodrib, 56 Cal. 563; Deobold v. Oppermann, 111 N. Y. 684, 19 N. E. 94.] We think by the great weight of authority the sureties in this case are bound by the judgment against their principal, notwithstanding they were not parties to the suit."

In the case of Ætna Accident & Liability Co. v. Langley, 68 Okl. 283, 174 P. 1046, 1050, we find the following: "There is no charge by the surety that there was fraud or collusion in the settlement of the final account, and although the surety had no notice and did not participate in the settlement, the order is, for the purpose of this action, conclusive upon it also and not subject to attack by it on the grounds stated. Greer v. McNeal, 11 Okl. 526, 69 P. 893; Southern Surety Co. v. Burney, 34 Okl. 552, 126 P. 748, 43 L. R. A. (N. S.) 308; Title Guaranty & Surety Co. v. Slinker, 35 Okl. 128, 128 P. 696; Henry v. Melton, 46 Okl. 278, 148 P. 730; Boudinot v. Locust [55 Okl. 662] 151 P. 579 [155 P. 698]; Cabell v. McLish [61 Okl. 224], 160 P. 592; Southwestern Security Ins. Co. v. Richard [62 Okl. 122], 162 P. 468; State ex rel. Weaver v. Weaver, 92 Mo. 673, 4 S. W. 697; In re Appeal of Schlee, 65 Mich. 362, 32 N. W. 717."

[6-8] It is the fact of the indebtedness of the guardian to the estate of the ward that is established by the decree of the probate court, and it is this indebtedness which the surety, by reason of its contract, covenants and agrees to pay. Under the authorities which we have cited, the probate court has full authority to settle the account of guardians and determine the amount of a guardian's indebtedness to the estate of his ward. Whatever that indebtedness may be, the surety, by reason of the bond given to answer for the faithful discharge of his duties by the guardian, is obligated to pay in default of payment by the guardian. Being a proceeding in rem, a notice given of the settlement of the guardian's account is notice to all the world. The law is well settled in this state that probate notices are binding upon all parties, save and except where personal notice is required by the codes to be given. The law is well settled also that, since the amendment of section 1639, Code of Civil Procedure, in 1905, the probate court has exclusive jurisdiction of the accounts of deceased guardians by compelling the administrator of the estate of the deceased guardian to render such an account. King v. Chase, 159 Cal. 420, 115 P. 207; In re Philbrook, 47 Cal. App. 678, 191 P. 77, and cases there cited; Estate of Randall, 188 Cal. 329, 205 P. 118. The cases just cited also lay down the rule that no claim need be filed in behalf of the ward against the estate of the deceased guardian.

[9, 10] The appellant further contends that, under the provisions of section 25 of the Civil Code (St. 1927, p. 1119) as it read at the time of the execution of the exhibit set forth in the appellant's answer, the plaintiff was no longer a minor, and is therefore bound by the terms of the alleged release. The section was again amended in 1931 (St. 1931, p. 1941), covering the subject of estates. However, we do not deem it important to inquire into the intent of the Legislature in making the amendment or to determine whether the power to execute a release in relation to estates did or did not exist in a married woman over eighteen, and under twenty-one years of age, prior to the amendment. The record shows in this case that the instrument called a "release" was executed a short time after the marriage of the plaintiff; that it was not approved by the probate court having jurisdiction of the estate, and that it was disaffirmed within a year after its execution by the institution of an action to have the instrument annulled and set aside, on the grounds of fraud, undue influence, etc.

As stated in the opinion of the trial court: "The release was made a few months after the marriage of the ward, and before her guardian's account with her had been settled. Under such circumstances, after the guardian agreed with her and arrived at a settlement, it is inchoate and inconclusive until a year has passed, during which time the ward may dispute the correctness of the account or the settlement she has made with her guardian. * * * It appears that she was the man's ward. * * * It would seem that the agreement came within the terms of the statute, which says that all transactions between a trustee and his beneficiary during the existence of a trust are presumed to be entered into by the latter without sufficient consideration and under undue influence. While in this case the guardianship (as to the person of the ward) may have terminated with the ward's marriage, the guardian remained the trustee of those funds until a settlement had been effected."

[11] We agree further with the opinion of the trial court that an instrument executed while the trust relationship existed placed upon the appellant the burden of showing that it was just and fair. We do not need to cite authorities to the effect that a release obtained by a guardian from his ward places upon the guardian the burden of proving its genuineness and binding effect, and likewise that it is based upon a true and correct settlement and upon adequate consideration.

[12] The instrument relied upon as a release by the appellant shows no consideration for the execution thereof. It does recite the waiving of paying a further premium, presumably out of the funds of the estate of the ward. But the record shows that those funds had already been dissipated by the guardian, and that the ward was therefore simply giving up all possibility of redress for the wrong committed by her guardian, and allowing the surety to go free without making any adequate compensation.

The original premium recited in the release is the sum of $500. It cannot very well be held that the waiving of the payment of $500 is an adequate consideration for the execution of a release of a party bound for the payment of $26,094.53. In the face of these figures we are unable to perceive that subdivision 19 of section 1963, Code of Civil Procedure, in any way supports the contentions of the appellant.

[13] There is another ground upon which the action of the trial court may be supported. Paragraph 7 of the plaintiff's complaint sets forth the action of the probate court in settling the account of the guardian, as we have stated, fixing the amount of his liability to the estate of the ward, and the entry of the decree by the probate court, all of which constitutes the public record of the probate court of the county of Sacramento. The answer of the appellant denies the existence of this public record in the following language: "This defendant has no information or belief sufficient to enable it to answer the allegations of paragraph 7 of said complaint, and therefore, basing its denial upon such lack of information and belief, denies generally and specifically each and all of the allegations of paragraph 7 of said complaint." This form of denial has frequently been held insufficient to raise an issue, and constitutes an admission on the part of the appellant as to the facts therein stated, and that the release upon which it relies is shown to have been given without any adequate consideration.

[14] In the case of Curtin v. Salomon, 80 Cal. App. 470, 251 P. 237, 239, this court had before it an answer denying a public record upon information and belief. We there said: "The denials in the answer that the plaintiff and the plaintiff's assignors had not complied with section 2466, Civil Code, could not be made upon information and belief. In this case the denial is not even upon information and belief, but simply setting forth that the defendant has not sufficient information upon which to deny the allegations in the complaint, and basing his denial upon the lack thereof, denies, etc. The law is well settled, as stated in Art Metal Const. Co. v. A. F. Anderson Co., 182 Cal. 29, 186 P. 776, that: 'When the existence of an alleged fact may be ascertained from an inspection of a public record its existence cannot be put in issue by a denial based solely upon information and belief.' See, also, Lincoln County Bank v. Fetterman, 170 Cal. 357, 149 P. 811; Mulcahy v. Buckley, 100 Cal. 484, 35 P. 144; Montgomery v. Fidelity & Deposit Co., 69 Cal. App. 251, 230 P. 993; Yokohama Specie Bank v. Trans-Oceanic Co., 54 Cal. App. 533, 202 P. 346."

The cases relied upon by the appellant having all been superseded by the amendment of section 1639, Code of Civil Procedure, in 1905, review thereof would serve no useful purpose.

No tenable defense having been presented by the appellant, it is unnecessary to consider the assignment of error as to the admission of testimony.

A directed verdict was proper, and the judgment is affirmed.

We concur: PULLEN, P. J.; R. L. THOMPSON, J.

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130 Cal.App. 335

LIEN v. MORRILL.

Civ. 8716.

District Court of Appeal, First District, Division 2, California.

March 13, 1933.

Hearing Denied by Supreme Court May 11, 1933.

1. **Appeal and error** ⚿1024(5).

On appeal from order denying relief from default in not timely serving bill of exceptions, facts in prevailing party's affidavits must be accepted.

2. **Appeal and error** ⚿985.

Order denying relief from default in not timely serving bill of exceptions will not be disturbed except for abuse of discretion (Code Civ. Proc. § 650).

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by G. Lien against Elmer F. Morrill. From an order denying defendant's motion for relief from his default in failing to serve a proposed bill of exceptions within the prescribed time, defendant appeals.

Affirmed.

Fred W. Lake, of Los Angeles, for appellant.

C. Leonard Rosenberg, of Oakland, for respondent.

SPENCE, Acting Presiding Justice.

This is an appeal from an order denying appellant's motion for relief from his default in failing to serve his proposed bill of exceptions within the time prescribed by law.

[1] The order denying appellant's motion for new trial was entered on January 26, 1932, and notice thereof was given on the same day. Appellant therefore had ten days within which to serve his proposed bill of exceptions. Code Civ. Proc. § 650. No proposed bill was served within the time allowed. During said ten days counsel for appellant had a conversation with counsel for respondent in which he said: "He believed he would file an appeal." Although the affidavits are conflicting, those offered by respondent showed that no oral stipulation was given extending appellant's time. On this appeal the facts set forth in the affidavits offered by respondent must be taken as true. Boland v. All Persons, 160 Cal. 486, 117 P. 547, Doak v. Bruson, 152 Cal. 17, 91 P. 1001. Assuming that no oral stipulation was given, no excuse whatever was shown for appellant's failure to obtain an extension of time within the ten-day period either by stipulation of counsel or by order of court. It is conceded that on February 9, 1932, counsel for respondent refused to sign a stipulation, and the motion

for relief was thereafter filed on February 18, 1932.

[2] In our opinion the trial court's ruling denying the motion may not be disturbed. In Hole v. Takekawa, 165 Cal. 372, the court said at page 377, 132 P. 445, 447: "It is well settled that the trial court is invested with a large discretion in the matter of such applications as this, and that its action will not be disturbed on appeal unless it is clearly made to appear that such discretion has been abused. This is true whether the application be granted or refused." See, also, Blumer v. Mayhew, 17 Cal. App. 223, 119 P. 202; Utah-Nevada Co. v. De Lamar, 9 Cal. App. 759, 100 P. 884.

We find no abuse of discretion in the present case. The order appealed from is affirmed.

We concur: STURTEVANT, J.; GOODELL, Justice pro tem.

JACKSON v. DEAUVILLE HOLDING CO. et al.*

Civ. 8660.

District Court of Appeal, First District, Division 2, California.

March 13, 1933.

Hearing Granted by Supreme Court May 11, 1933.

1. Fraud 🔑9.

Purchasers of club memberships on false representations, affecting value thereof, as to buildings and facilities to be provided, could recover damages for fraud.

2. Fraud 🔑59(2).

Measure of damages for false representations affecting value of club memberships sold is difference between actual value thereof and their value as represented.

3. Assignments 🔑24(3).

Right to sue for fraud, unconnected with property or thing having independent legal existence and value, is not assignable.

4. Assignments 🔑24(3).

Assignments of sums due as damages for fraud in sale of club memberships *held* insufficient to warrant action by assignee for fraud.

Appeal from Superior Court, Los Angeles County; Raglan Tuttle, Judge.

Action by W. R. Jackson against the Deauville Holding Company, a corporation, and others. Judgment for plaintiff, and defendants appeal.

Reversed.

Julius V. Patrosso, of Los Angeles, for appellants.

Marion P. Betty and Thorwald Siegfried, both of Los Angeles, for respondent.

NOURSE, Presiding Justice.

This is an action for fraud. The cause was tried before the court sitting without a jury. Plaintiff had judgment against the corporate defendant for $5,929.60, from which they appeal upon typewritten transcripts.

Plaintiff is the assignee of fifty-one individuals who purchased memberships in the Deauville Beach Company through the instrumentality of the Deauville Holding Company. The beach company was a nonprofit corporation organized under the laws of this state. The holding company was a corporation organized in Nevada and authorized to do business in this state. The incorporators planned to construct a beach clubhouse in Santa Monica upon land to be purchased by the Nevada corporation, and club memberships were sold by agents of the holding company through means of a prospectus giving elaborate details regarding the type of building and the facilities to be offered club members.

[1, 2] The plaintiff pleaded three causes of action and had judgment upon the second cause only. This cause is a simple action in tort for fraudulent misrepresentations which the trial court found were the inducements which led plaintiff's assignors to part with certain sums of money and which the court found caused damage in the precise amounts so paid. It would serve no useful purpose to detail the misrepresentations of facts upon which the plaintiff relied—it is sufficient to refer to one relating to the type of structure to be erected. It was alleged and found that defendant's agents represented to the purchasers that two buildings would be erected for the use of club members, one to be twelve stories in height and to contain five hundred sleeping rooms; that a gymnasium, outdoor plunge, nursery, and special auto parking facilities would be provided. But the court found that but one building was constructed and that no sleeping rooms and none of the other promised facilities were included. It was alleged in the complaint that the failure to fulfill these promises depreciated the value of the memberships.

The sale having been made upon representations affecting the value of the thing sold, the vendees were entitled to recover damages for the fraud practiced upon them. The measure of such damages would be the difference between the actual value of the property purchased and the value it would

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*For subsequent opinion see 27 P.2d 643.

have had if the representations had been true. Spreckels v. Gorrill, 152 Cal. 383, 92 P. 1011, Hines v. Brode, 168 Cal. 507, 143 P. 729. In its judgment herein the trial court awarded damages in the exact sums paid in by the purchasers after finding that the property purchased had no value to the plaintiff at the time of the trial.

In his first cause of action plaintiff sued for "money had and received" under the theory that the contracts were all void "ab initio," because they were executed before the corporation had legal authority to contract. In his second cause the plaintiff elected to affirm the contracts and to sue for damages for the fraud. The inconsistency of the two positions is apparent, but the trial court expressly denied recovery upon the first cause and limited its judgment to the second. The third cause was in equity to impress a trust; but, upon this, judgment went for the defendants.

[3] We are thus faced with the pertinent question whether an action in tort of this character is capable of assignment. Archer v. Freeman, 124 Cal. 528, 532, 57 P. 474, and Jones v. Manning, 35 Cal. App. 321, 323, 169 P. 912, are cited by appellant. The respondent relies on Kemp v. Enemark, 194 Cal. 748, 756, 230 P. 441, and Harris v. Miller, 196 Cal. 8, 18, 235 P. 981. These cases are not in conflict. They all follow the general rule that "a naked right to bring an action for fraud unconnected with any property or thing which had itself a legal existence and value independent of the right to sue for fraud" is not assignable. In the cases cited by respondent the action involved the title to specific property and the fraud was merely incidental to the cause of action assigned. In the cases cited by the appellants the causes of action assigned were simple claims for damages from fraud and deceit "unconnected with any injury to property."

[4] As we have said, the judgment here is based upon the second cause of action alone. This is a simple action in tort for fraud and deceit. The assignments transferred to the respondent the right to sue for this tort alone. They did not, as was done in the Kemp and Harris Cases, transfer the contract or the property rights under the contract, but the assignors retained in themselves all right of property in the membership in the beach club, which was the only property or "thing" sold. The assignments simply covered "all sums of money and claims now due or owing to me from Deauville Holding Company" and others. In his second cause of action the plaintiff alleged that these sums were "due" as damages because of defendants' fraud and deceit. Herein the case is like Meldrim v. Doyle (Cal. App.) 12 P.(2d) 997, where a plain assignment "unaccompanied by any transfer of interest in the property" was held incapable of supporting a cause of action.

The application of this rule to the instant case must be apparent. Whatever damage was suffered by the individual assignors was personal to them. They had purchased memberships in a beach club which became a going concern, "affording the usual club facilities to its members." Such membership may be of great value to one who was interested in such facilities while to others it may become boresome. The suit was commenced over two years after the memberships were sold. Many of the assignors had been using the club facilities in the meantime. Some may have become dissatisfied irrespective of the representations complained of. All have retained the right to continue to use the club. Suing for damages for the damage suffered by each it would be necessary to measure the "value" of the membership to each assignor. Hence, when the "claim" or right to sue was assigned to plaintiff and the assignors retained in themselves all the proprietary rights in their certificates of membership in the club, they transferred to the plaintiff the "pure, naked right to bring an action for fraud" unconnected with any right of property or thing which itself "had legal existence and value." Under the rule of Sanborn v. Doe, 92 Cal. 152, 28 P. 105, 27 Am. St. Rep. 101; Emmons v. Barton, 109 Cal. 662, 42 P. 303, and Archer v. Freeman, 124 Cal. 528, 532, 57 P. 474, the assignments are insufficient to support the second cause of action, and, as the judgment is based upon that cause alone, we may not consider their availability to the first and third causes.

The judgment is reversed.

We concur: STURTEVANT, J.; SPENCE, J.

130 Cal.App. 395

Ex parte ANDERSON.

Cr. 2337.

District Court of Appeal, Second District, Division 1, California.

March 15, 1933.

1. **Municipal corporations** 🔑663(1).

Abutting owner may have title to fee of land to middle of street, subject to easement permitting public travel.

2. **Municipal corporations** 🔑720.

Ordinance establishing public market three days weekly from 7 a. m. until noon, in portion of public streets adjoining city property, *held* reasonable and valid.

Application by Lloyd Larsen Anderson for a writ of habeas corpus against the Chief of Police of the City of Long Beach.

Writ discharged, and petitioner remanded to custody.

Fred Miller, of Long Beach, for petitioner.

John K. Hull, City Prosecutor, and Charles C. Stratton, Deputy City Prosecutor, both of Long Beach, for respondent.

PER CURIAM.

The application herein for a writ of habeas corpus was preceded by a similar application made to the Superior Court of Los Angeles county. In ruling upon the right of petitioner to the writ for which he prayed, by a decision in an opinion prepared by Judge Walter J. Desmond of said court, the application of petitioner was denied. With the omission therefrom of the last paragraph of said opinion as filed in the Superior Court, and with the addition thereto of words now included within the parenthesis in the paragraph thereof commencing with the words "In California the abutting property owner has title," etc., this court is satisfied with the declarations of the law therein contained. As thus modified, and as hereinafter appears, the said opinion is adopted as the opinion of this court, to wit:

"The question involved in this case is whether the setting aside by the city of Long Beach of a portion of two public highways (Broadway and Cedar avenue) for exclusive use as a public market from 7 a. m. till noon on Tuesday, Thursday, and Saturday of each week, is a reasonable regulation of a municipal affair.

"It is contended by the petitioner, who has been fined for parking his automobile after 7 a. m. in the reserved area without a vendor's permit on Tuesday morning, December 6, 1932, that Ordinance B417, as amended by Ordinance C668, under which the market operates, is unconstitutional and void for various reasons, and particularly because the establishment and maintenance of the public market as in said ordinance provided denies to the public all right of travel or passage over the reserved area within the hours mentioned and during a clean-up period of one-half to one hour immediately thereafter. The petitioner also alleges that Ordinance B417 is unconstitutional and void because it is ultra vires and beyond any power or authority fixed in the city of Long Beach.

"At the time Ordinance B417 was adopted Long Beach was operating under a commission form of government by virtue of a charter approved by the state Legislature in 1915. This instrument empowered the commissioners as the legislative body of the city 'to establish, license and regulate markets and market houses' (article X, § 5, cl. 7, of said charter); also 'to pass ordinances upon any subject of municipal control or to carry into force or effect any other powers of the municipality' (article X, § 5, cl. 33). The charter now in force, adopted in 1921, and amended at various times since then, gives the city power to regulate and license any business carried on within the city. Article IV, § 33. It is provided also that the city council shall have power to regulate street speakings or street gatherings * * * to regulate or prohibit traffic or sales in the streets and public places. Article V, § 44, cl. 30. And the council is empowered to establish, license, and regulate public markets and market houses. Article V, § 44, cl. 7.

"'The Director of public service is given, as one of his duties, the management of public markets and market houses.' Article XIX, § 212. 'The city has "the right and power to make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in this charter,"' etc. Article IV, § 2.

"In Bank v. Bell, 62 Cal. App. 320, 217 P. 538, the right of the city of Berkeley to establish and maintain a public market was sustained in an exhaustive opinion written by Judge St. Sure, now on the federal bench, on the ground that such action related to a municipal affair, over which the city had exclusive and complete power under the terms of its charter. The reasoning and language of that decision seem altogether applicable to the situation in Long Beach, so far as the right of the city to establish and maintain a public market is concerned, but the right of the city to maintain such a market in a public street under the conditions here involved was not before the court.

"A public market has been conducted under the control of the city of Long Beach in streets next to Lincoln Park from a time antedating Ordinance B417 by five or six years. So we have to do here with an institu-

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tion of a public nature that has operated continuously for approximately twenty years, and it is to be noted that there is no complaint now before the court by an abutting property owner that the market is a nuisance to him or detrimental or offensive to the conduct of his business. In fact, we could have in this particular case no objecting abutting property owner, for at the point where petitioner parked his car on the morning of December 6, 1932, the land on both sides of the street is owned by the city of Long Beach.

[1, 2] "In California the abutting property owner has (or may have) title to the fee of the land to the middle of the street, subject to the easement permitting the public to travel over it. The courts everywhere have been vigilant to protect this easement belonging to the public, although agreeing that the landowner may make any use of the fee not inconsistent with the public right. Although the city of Long Beach owns the fee of the entire street known as Broadway at this point, no attempt has been made to close this highway to travel, a space considerably less than one-half the width of the roadway being set apart for the public stalls, permitting the movement of vehicles at all times in both directions over the balance of the thoroughfare. The same condition obtains on Cedar avenue, where the city, owning Lincoln Park, owns to the center of the street, subject to public easement. While the traffic undoubtedly is slowed down in these areas at the market hours, it is by no means prohibited. Considering the great convenience afforded the public, both producer and consumer, in carrying on this traffic in the restricted area set apart by the city, immediately adjoining city property; also considering the fact that the city has fixed its permit fees according to a schedule that precludes any idea of profit being derived from the market, it seems to this court that Ordinance B417 as amended is a reasonable and valid regulation of a municipal affair by proper municipal authority acting under adequate charter powers.

"An interesting case that has come to our attention is Commonwealth v. Morrison, 197 Mass. 199, 83 N. E. 415, 14 L. R. A. (N. S.) 194, extensively annotated in 125 Am. St. Rep. 338. In this case the proprietor of a lunch stand, stationed during certain hours of the night, in the public highway, failed to secure a reversal of his conviction. In the interesting discussion of highways, Justice Rugg, author of the opinion, and now Chief Justice of the Supreme Judicial Court of Massachusetts, has this to say:

" 'The public acquire by the location of a highway an easement of passage, with all the powers and privileges, which are necessarily implied as incidental to the exercise of this right. The easement is coextensive with the limits of the highway. The fee of the land remains in the landowner, who may make any use of it not inconsistent with the paramount right acquired by the public. The easement which the public acquires includes every reasonable means of transportation for persons, and commodities, and of transmission of intelligence which the advance of civilization may render suitable for a highway. Under this description of the character of rights acquired by the public, gas and water pipes, sewer, telephone, telegraph, electric light and power poles, wires and conduits, electric and horse railways, the Boston subway and private railroads have been permitted. (Citing authorities.) But, notwithstanding these various instrumentalities, they are all manifestations in divers forms of the right of travel of persons, the transmission of intelligence and the transportation of commodities. The primary purpose of a highway is the passing and repassing of the public, which is entitled so far as needed to the full, unobstructed and uninterrupted enjoyment of the entire width of the layout for that purpose. Whenever the public does not have occasion to exercise its easement to its full extent, the owner of the fee may make any use not inconsistent with the easement of the public. Whatever interferes with the exercise of this easement is a nuisance. (Citing authorities.) The stands of hackney carriages may perhaps be justified as a phase of public travel (Com. v. Matthews, 122 Mass. 60), and the use of streets in connection with markets, in view of long-continued customs in Boston and perhaps elsewhere in this commonwealth, as incidental to the transportation of merchandise (Com. v. Brooks, 109 Mass. 355), and possibly also in connection with the establishment of a public market. (Spaulding v. Lowell, 23 Pick. [Mass.] 71; Kinney v. Robison, 49 Mich. 249, 13 N. W. 610.)'

"To one who observes the conduct of the municipal market in Long Beach it is at once apparent that the use of that reserved area of the streets is 'incidental to the transportation of merchandise' in large quantities, and, while the local street market is young indeed in comparison with the Eutaw St. Market in Baltimore, the Central Market in Washington, and Faneuil Hall Market in Boston, we think it may be said, having operated for approximately twenty years, to have attained the status of 'a long-continued custom.' We also feel that it was established and is maintained legally under Ordinance B417 as amended; therefore that the writ should be discharged and the petitioner remanded, and it is so ordered."

It is ordered that the writ hereinbefore issued be, and the same is, discharged, and the petitioner is remanded to custody.

130 Cal.App. 337

GREEN v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al.

Civ. 8815.

District Court of Appeal, First District, Division 2, California.

March 13, 1933.

Hearing Denied by Supreme Court May 11, 1933.

1. Master and servant 🔑387.

Assistant foreman directing work on oil tank *held* not "managing officer" within provision for additional compensation for serious and willful misconduct of "managing officer" (St. 1917, p. 834, § 6(b), as amended by St. 1929, p. 430).

[Ed. Note.—For other definitions of "Managing Officer," see Words and Phrases.]

2. Master and servant 🔑403.

Burden is on employee to show that claimed person was "managing officer" within provision for additional compensation for serious and willful misconduct of "managing officer" (St. 1917, p. 834, § 6(b), as amended by St. 1929, p. 430).

3. Master and servant 🔑387.

While mere titles are not conclusive as to status, they may be helpful in determining whether one is "managing officer" within provision for additional compensation for serious and willful misconduct of "managing officer" (St. 1917, p. 834, § 6(b), as amended by St. 1929, p. 430).

Proceeding under Workmen's Compensation Act by Andrew Green, claimant, opposed by Western Pipe & Steel Company of California, employer. To review an award by Industrial Accident Commission of the State of California granting claimant ordinary compensation but denying him additional compensation upon claim of serious and willful misconduct, claimant brings certiorari.

Affirmed.

George C. Faulkner, William T. Doyle, and Henry G. Sanford, all of San Francisco, for petitioner.

A. I. Townsend, of San Francisco, for respondents.

SPENCE, Acting Presiding Justice.

Petitioner seeks annulment of the award of the respondent commission granting him the ordinary compensation prescribed by the Workmen's Compensation, Insurance and Safety Act (St. 1917, p. 831 as amended), but denying him additional compensation upon his claim of serious and wilful misconduct.

Petitioner had been employed for many years as a boilermaker by respondent Western Pipe & Steel Company, a corporation. In 1929, the company was engaged in constructing a number of steel tanks for the storage of oil on a lease of the General Petroleum Company near Bakersfield. On December 5, 1929, petitioner was injured on that job when a hoisting derrick collapsed while being used to complete the construction of one of said steel tanks. H. B. Ritchie was the "foreman" on said job, while one Cordova was the "assistant foreman" directing the work on the particular tank when petitioner was injured. Petitioner was given medical treatment and was paid approximately $4,000 in compensation. A dispute apparently arose over an alleged loss of hearing resulting from the injuries and petitioner filed his application with the respondent commission on February 1, 1932. No claim of serious and willful misconduct had been made up to that time and none was made in said application. It was not until after a hearing on said application that petitioner on March 1, 1932, filed his claim with the respondent commission for additional compensation because of alleged serious and willful misconduct. On July 28, 1932, the commission made its findings and award and subsequently amended the same in the order granting a rehearing, which order was made solely for the purpose of making such amendment. The findings and award as amended showed petitioner to be entitled to total compensation in the sum of $6,450, but the respondent commission found that "the injury was not caused by serious and willful misconduct on the part of any executive, managing officer, or general superintendent of the defendant corporation." It further found and concluded that petitioner's application for additional compensation on that ground was barred by the limitation found in section 11(i) of the act (as added by St. 1931, p. 2372). We need not discuss the effect of said section 11(i), which was enacted after the date of petitioner's injury, for we believe that the above-mentioned finding was supported by the evidence and is determinative in this proceeding.

[1] Petitioner's claim of serious and willful misconduct related solely to the conduct of the "assistant foreman," Cordova. Under the terms of section 6(b) of the act (as amended by St. 1929, p. 430), a corporate employer is liable for additional compensation only when there is serious and willful misconduct "on the part of an executive or managing officer or general superintendent thereof." Petitioner therefore states the question involved as follows: "Was 'assistant foreman' Cordova the 'managing officer' of respondent employer sufficient to meet the requirements of section 6(b) of the act?" The respondent commission contends that Cordova was not "an executive or managing officer or general superintendent" of the respondent employer and in our opinion this contention must be sustained.

[2] The references by the parties to the evidence in the record bearing upon the status of Cordova are quite meager. Cordova designated his business as "boiler worker" and he was referred to in some of the testimony as the "assistant foreman." He was working with and directing two other men, including the petitioner, in erecting and operating the hoisting derrick. It appears that Ritchie, the foreman, was at one of the other tanks on the lease when the accident occurred and was not directly supervising the work of Cordova and the other two men at the time. In refuting a statement of the respondent commission to the effect that even Ritchie "the foreman also had a superior officer," we find several statements in petitioner's briefs as follows: "H. B. Ritchie was the 'foreman' in charge of the construction of these steel tanks." "There was no 'general superintendent' by title, there was no 'manager,' there was no other person having any title whatsoever superior to Ritchie in the construction of *all* of these tanks." "So far as the record shows, Ritchie was the supreme authority on that job." "Ritchie was in charge of the job of constructing a number of tanks on an oil lease near Bakersfield." "In actual fact, there was no one present who had any authority or control whatsoever except Cordova, the assistant foreman, the next man under Ritchie in charge of that construction job." "Ritchie was the 'Foreman,' so far as the record shows that there was nobody superior to him on that oil lease representing the Western Pipe and Steel in the construction of these steel tanks." With reference to the status of Cordova, the respondent commission stated: "The evidence shows that Cordova was supervising the construction of this 'A' frame and had under him for that purpose two men, including the applicant. Cordova was not the foreman on the job, however, neither was he the superintendent nor the general manager. At the place of operation Cordova was only in charge of his small portion of detail and there was *in active charge* an authority over him, the foreman, H. B. Ritchie." In further discussing Cordova's status, the respondent commission states that Cordova did not have the right "to hire or fire" any employees. Petitioner challenges this statement, but only on the ground that the record "*does not show* that Cordova could or could not hire or fire men working under him." Assuming that a showing of the existence of such right would have been helpful to petitioner in establishing the status of Cordova, the burden of proof in making that showing was upon the petitioner, but no such showing was made.

Petitioner has called our attention to several authorities where awards have been affirmed after the commission had determined that the persons guilty of the serious and willful misconduct were persons within the purview of said section 6(b). E. Clemens Horst Co. v. Industrial Accident Commission, 184 Cal. 180, 193 P. 105, 16 A. L. R. 611; Gordon v. Industrial Accident Commission, 199 Cal. 420, 249 P. 849, 58 A. L. R. 1374; Blue Diamond Plaster Company v. Industrial Accident Commission, 188 Cal. 403, 205 P. 678; Church of Jesus Christ of Latter Day Saints v. Industrial Accident Commission, 86 Cal. App. 182, 260 P. 578; First Nat. Pictures, Inc., v. Industrial Accident Commission, 87 Cal. App. 537, 262 P. 38. None of said authorities is directly in point. The history of this legislation is reviewed in E. Clemens Horst Co. v. Industrial Accident Commission, supra, and Gordon v. Industrial Accident Commission, supra, and while the terms of the section have been broadened with each amendment, the Legislature has refrained from making the employer liable for the misconduct of every person exercising authority on the employer's behalf. On the contrary, the class of persons whose misconduct will result in the imposition of such liability still remains limited. As we view the facts in the present case, it would do violence to the terms of the act to hold that Cordova was "an executive or managing officer or general superintendent" of the respondent employer.

[3] We agree with petitioner that mere titles are not altogether conclusive in determining the question but they may be helpful. From the record it appears that the highest title given to Cordova by any one was the title of assistant foreman, and we have found no authority where any one bearing a title below that of "foreman" has been held to fall within the class of persons described in said section. Aside from the title, it does not appear from the fragmentary evidence relating to Cordova's status, that he had any more authority than the ordinary "straw-boss," working under a "foreman." While under the authorities above cited, Ritchie, the foreman, may have had sufficient power and authority on this particular job to bring him within the class of persons described in said section, we are of the opinion that the respondent commission correctly concluded that Cordova did not.

The award is affirmed.

We concur: STURTEVANT, J.; GOODELL, Justice pro tem.

130 Cal.App. 447

MUSTAIN v. STATE INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 8901.

District Court of Appeal, Second District, Division 1, California.

March 17, 1933.

1. Master and servant 🔑419.

Where first rehearing was for new and further disability and petition for second rehearing alleged no new and further disability than that litigated on first rehearing, petition for writ of review should have been directed to order of first rehearing and was required to be filed within 30 days thereafter to give appellate court jurisdiction (St. 1917, p. 850, § 20(d); pp. 873–875, §§ 64, 65, 67).

2. Master and servant 🔑416.

Provisions of compensation act contemplate but one rehearing and thereafter any party affected by order, if aggrieved, must apply to appellate court (St. 1917, pp. 873–875, §§ 64, 65, 67).

Proceeding under the Workmen's Compensation Act by Bailey A. Mustain, claimant for injuries, opposed by Bullock's Department Store, employer, and the Lumbermen's Mutual Casualty Company, insurance carrier. To review an order of the Industrial Accident Commission denying a rehearing on an order which denied a petition for reopening the case after entry of an award adverse to claimant, claimant brings certiorari.

Writ denied.

Harold D. Kraft, of Los Angeles, for petitioner.

A. I. Townsend, of San Francisco, for respondents.

CONREY, Presiding Justice.

The petition filed herein on January 6, 1933, asks for a review "of that certain record and award made by the Industrial Accident Commission of the State of California, dated December 7, 1932, in favor of the defendant employer and its insurance carriers and against the applicant employee." In fact, there was no "award" made at that time, but the commission did, on that day, enter an order denying a petition which had been filed on November 5, 1932, wherein the claimant asked "for further rehearing and for a reopening of the case under section 20 (d)" of the Workmen's Compensation, Insurance, and Safety Act of 1917 (St. 1917, p. 850). Said petition of November 5th was directed to the prior proceedings which, on October 17, 1932, and after a rehearing once granted, had culminated in an award with which the petitioner was not satisfied.

Instead of giving us a convenient history of the case, counsel have left it for us to glean the dates and events from various portions of the pleadings.

The employer was Bullock's Department Store. The first injury to this employee occurred on August 10, 1929, at which time Lumbermen's Mutual Casualty Company was the insurance carrier. The second injury occurred on February 11, 1931, when California Casualty Indemnity Exchange was the insurance carrier. The claim for compensation was filed with the commission on February 16, 1931, and this resulted in an award of date April 16, 1932, in favor of the employee and against Lumbermen's Mutual Casualty Company as for a new and further disability arising out of the injury of August 10, 1929.

On May 6, 1932, the Lumbermen's Mutual Casualty Company filed petition for rehearing, which was granted. After further hearing the commission on October 17, 1932, decided that the injury which developed in the case of this employee on February 11, 1931, amounted to a new injury, and not to a new and further disability chargeable to the injury of August 10, 1929. Accordingly an award was made in favor of the employee and against California Casualty Indemnity Exchange, and the Lumbermen's Mutual Casualty Company was dismissed from liability.

[1, 2] It will be noted that the award of October 17, 1932, was made upon a rehearing of the cause, and that the issues involved in such rehearing arose out of a claim that new and further disability had occurred, and which called upon the commission to exercise the jurisdiction conferred upon it by section 20(d) of the compensation act. It does not appear here that the petition for rehearing filed November 5, 1932, alleged any other "new and further disability" than that which had been litigated in the previous rehearing. From this it would seem to follow that the petition to this court for a writ of review should have been directed to the order of October 17, 1932, and that in order to give jurisdiction of the proceeding in this court the petition must have been filed within thirty days after that day. It has been held, in at least two cases, that the provisions of sections 64, 65, 67 of the Workmen's Compensation Act (St. 1917, pp. 873–875), contemplate but one rehearing and that thereafter, if "any party affected" by the order feels aggrieved, he must apply to the appellate court. Crowe v. Industrial Accident Commission, 84 Cal. App. 287, 293, 258 P. 130; Harlan v. Industrial Accident Commission, 194 Cal. 352, 228 P. 654.

The commission in its answer has not claimed that the petition for a writ of review was filed too late. Possibly there is some er-

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ror in our understanding of the facts as related to this point. Therefore we have considered the petition on its merits. We find that although the evidence is conflicting, there is sufficient evidence to sustain the commission in finding that the disability of the employee which arose after February 11, 1931, was a new injury occurring at that date, and was not a new or further disability arising out of the injury of August 10, 1929.

For this reason the petition for writ of review is denied.

We concur: HOUSER, J.; YORK, J.

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130 Cal.App. 400

CAREY v. BOWIE et al.

Civ. 8501.

District Court of Appeal, First District, Division 2, California.

March 16, 1933.

1. Appeal and error ⚿907(3).

On appeal on judgment roll alone, appellate court must presume evidence sustained findings.

2. Trespass ⚿14.

Where building restrictions prohibited defendants from building within four feet of property line and defendants violated such restrictions, and building eaves overhung plaintiff's property more than a foot and findings showed maintenance of building would damage plaintiff in sum of $1,000, maxim de minimis *held* inapplicable.

In such case, there was no merit in contention that encroachment alleged was within maxim "de minimis non curat lex" and that trial court should have awarded only nominal damages and should not have ordered removal of building.

3. Trespass ⚿40(3).

Complaint for violation of building restrictions by defendants by building too near property line *held* not defective as failing to designate dominant tenement.

It was alleged in substance that plaintiff was owner of lot 8 and defendants owners of lot 7 as designated on amended map of named tract, and that land was part of such tract and acquired subject to certain reservations, covenants, conditions, and easements set forth in exhibit attached to complaint; and it appeared from complaint and exhibit that covenants provided that they should constitute covenants running with land and constitute easement appurtenant to every portion of tract, and that it should be lawful for any person becoming owner of any portion of such tract to maintain action for violation of covenants, thus showing that every part of tract, including plaintiff's lot, which was described in complaint, was dominant tenement with respect to restrictions to which defendants' land was subject.

Appeal from Superior Court, City and County of San Francisco; Michael J. Roche, Judge.

Action by Maurice R. Carey against Eileen M. Bowie and others. From a judgment in favor of plaintiff, defendants appeal.

Affirmed.

H. H. Pike, of San Francisco, for appellants.

Carey & Gorfinkel, of San Francisco, for respondent.

SPENCE, Justice.

This is an appeal upon the judgment roll alone from a judgment decreeing that defendants, within a specified time, remove to a point not less than four feet from the property line a certain addition to their dwelling house which encroached upon the land of plaintiff and awarding judgment in favor of plaintiff in the sum of $1,000, in the event that defendants failed to remove said addition within the time allowed.

Plaintiff and defendants were adjoining property owners in San Francisco; their lots being situated in a residential tract known as Ingleside Terraces. These lots were acquired subject to certain restrictions, among which was one providing that no building or structure should "at any time be erected or stand within less than four (4) feet of the northerly exterior side line of any lot." The addition which defendants caused to be erected not only came within four feet of the northerly exterior side line of their lot, but extended over that line between one and one and one-half inches. The eaves of said addition extended over plaintiff's property between one foot three and one-half inches and one foot four and one-half inches at a distance of approximately ten feet from the ground.

The complaint was in three counts. The first count alleged a violation of the above-mentioned restriction; the second count alleged the encroachment on plaintiff's lot; and the third count alleged the maintenance of a nuisance by reason of the overhanging of the eaves. The trial court found that the allegations of the complaint were true, and entered judgment as above indicated. Among other things, the court found that the total cost of the removal of said addition would not exceed $125, whereas the damage to plaintiff's property by reason of the maintenance thereof would be the sum of $1,000.

[1, 2] Appellants first contend that "the encroachment alleged is within the maxim de minimus," and argue that the trial court should have awarded only nominal damages and should not have ordered the removal. We find no merit in this contention. Appellants assume that the encroachment was one of only "a few inches or a foot," and that there was "no appreciable injury." While it is true that the eaves overhung respondent's property by only a little over one foot, appellants ignore their violation of the restriction prohibiting building a structure within four feet of the property line. Respondent had a right to insist that appellants' structure be not built within four feet of said line, and the invasion of that right amounted to several feet rather than a few inches. Furthermore, it cannot be said that there was "no appreciable injury." The findings show that the maintenance of said addition in violation of respondent's rights would result in damage to respondent in the sum of $1,000. Upon the record before us, which consists solely of the judgment roll, we must presume that the evidence sustained the findings and accept the findings as true (Shields v. Fee Title Company, 206 Cal. 789, 276 P. 350), and we must ignore appellants' bald statement that there was "no appreciable injury." We are therefore of the opinion that the maxim referred to by appellants has no application here, and that the authorities cited by appellants [Mertens v. Berendsen, 213 Cal. 111, 1 P.(2d) 440, and McKean v. Alliance Land Co., 200 Cal. 396, 253 P. 134] are not in point.

[3] Appellants further contend that the "complaint does not state facts sufficient to constitute a cause of action in respect of any reservation, covenant or condition." Under this heading appellants argue that: "In the complaint there is no description or designation of the land which is to be the dominant tenement in respect to the restricted provisions." In our opinion, this contention is likewise without merit. The allegations were lengthy, and need not be set forth in full. It was alleged in substance that respondent was the owner of lot 8, and that appellants were the owners of lot 7 as designated on the amended map of Ingleside Terraces; that said land was part of the tract known as Ingleside Terraces, and was acquired subject to certain reservations, covenants, conditions, and easements set forth in an exhibit attached to the complaint. It further appears from the allegations of the complaint, as well as the exhibit attached thereto, that it was provided in said covenants that the same "shall be and do constitute covenants real running with the land and each and every part thereof hereinbefore referred to as 'Ingleside Terraces' also constitute an easement appurtenant to each and every portion of said 'Ingleside Terraces'; and that it shall be lawful for any person who is or shall become the owner of any portion of said 'Ingleside Terraces' to maintain a suit or action for a violation of any of the covenants or conditions contained against such person as may be the owner of said 'Ingleside Terraces,' or any part thereof, when the violation of such covenant is committed, for such relief in equity as may be proper in the premises." In other words, it appears from the allegations of the complaint that every part of the tract known as Ingleside Terraces, including plaintiff's lot which was described in the complaint, was a dominant tenement with respect to the restrictions to which appellants' land was subject.

The judgment is affirmed.

We concur: NOURSE, P. J.; STURTEVANT, J.

CALIFORNIA REPORTER

IN VOLUME

20 PACIFIC REPORTER
SECOND SERIES

20

217 Cal. 545

WEIMER v. WEIMER et al.

L. A. 13865.

Supreme Court of California.
March 24, 1933.

Pleading 🔑218(4).

Dismissal of foreclosure suit after limitation period, instead of permitting amended complaint, alleging waiver of recourse against deceased mortgagor's estate, *held* erroneous (Probate Code, § 716).

In Bank.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by E. J. Weimer against Mabel A. Weimer, individually and as administratrix of the estate of E. L. Weimer, deceased, and others. From orders dismissing the cause, denying plaintiff's motion to set aside the dismissal, and refusing leave to amend his complaint, he appeals.

Reversed.

Daniel E. Farr and W. Torrence Stockman, both of Los Angeles, for appellant.

A. L. Hubbell, of Escondido, for respondents.

PRESTON, Justice.

Plaintiff, nineteen days prior to the running of the statute of limitations, filed a suit to foreclose a mortgage executed by Mabel A. Weimer and her husband, E. L. Weimer. The caption of the complaint named the wife individually and also as administratrix of the estate of her deceased husband. The complaint also mentioned his decease, but did not allege in appropriate language the appointment, and the regularity thereof, of an administratrix. The summons likewise issued to the wife in both capacities, and she was so served therewith.

A demurrer was interposed to the complaint upon the ground that it did not properly allege the appointment and qualification of the personal representative of the deceased husband, but, prior to the hearing thereon, the plaintiff amended his complaint in such a way as to allege, although imperfectly, the appointment and qualification of the wife as administratrix. The defendant wife, in both capacities, demurred to the amended complaint upon the further ground that plaintiff had not filed a claim against the estate, nor had he waived recourse against it as required by former section 1500, Code of Civil Procedure, section 716, Probate Code.

This demurrer, however, was overruled, and defendant, in both capacities, filed an answer setting up the statute of limitations, her appointment as administratrix, failure of plaintiff to file a claim against the estate, etc., whereupon plaintiff demurred to the answer, and in effect moved for judgment on the pleadings in his favor.

The court, however, took an opposing view of his cause, and entered an order overruling the demurrer to the answer, setting forth the failure to file a claim against the estate and to waive recourse against any other property thereof, and ended the order by dismissing the cause, not only as to the estate, but also as to the wife individually. Plaintiff thereupon moved the court to set aside the order of dismissal, and asked for permission to amend his complaint by alleging therein that he waived all recourse against all property of the estate other than said property described in said mortgage and to further amend his complaint by striking therefrom a request for $500 attorney's fees. This motion to set aside the order of dismissal and permit amendment of the complaint was denied. Plaintiff, therefore, has appealed from the order of dismissal and also from the order denying his motion to set aside the dismissal and from the order refusing him leave to amend his complaint in the respects above mentioned.

It seems too clear for controversy that the court dealt too harshly with plaintiff in this action. Under authority of Bank of Sonoma County v. Charles, 86 Cal. 322, 24 P. 1019, and Anglo-Californian Bank v. Field, 146 Cal. 644, 80 P. 1080, the court should not have given the order of dismissal, but, on the contrary, should have permitted amendment of the complaint in the manner sought. To dismiss the action now is to bar the claim entirely. It is our view that respondents' contentions have not enough substance to permit a bar of the statute, and appellant should prevail on this appeal.

The orders are reversed.

We concur: WASTE, C. J.; TYLER, Justice pro tem.; CURTIS, J.; LANGDON, J.; SHENK, J.; SEAWELL, J.

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217 Cal. 551

COLTON v. O'BRIEN.

L. A. 13870.

Supreme Court of California.

March 24, 1933.

Rehearing Denied April 21, 1933.

1. Brokers ⚷60.

Broker *held* not entitled to commission where acceptance of exchange offer was conditioned on procuring loan, and, though offeror agreed to such condition, loan was never procured or exchange consummated.

2. Brokers ⚷49(1).

Respecting broker's commission, conditional acceptance of exchange offer *held* in effect rejection of offer.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell and Marshall F. McComb, Judges.

Action by Leonard B. Colton against Mary T. O'Brien. Judgment for plaintiff, and defendant appeals.

Reversed.

Rehearing denied; SHENK and THOMPSON, JJ., dissenting.

Prior opinion, 12 P.(2d) 999.

Burke, Catlin & Burke, of Los Angeles, and Harmel L. Pratt, of Hollywood, for appellant.

Mott, Vallee & Grant, of Los Angeles, for respondent.

TYLER, Justice pro tem.

Action to recover a real estate broker's commission alleged to have been earned on an exchange of certain parcels of real property.

The complaint alleges that appellant employed respondent, a real estate broker, to exchange for her certain property, and executed and delivered to him a written agreement whereby she offered to exchange her equity, valued at $125,000, in real property owned by her in Portland, Or., for other property of a like value. The agreement among other things provided that the broker had the authority to act as agent for all parties and accept commissions therefrom. Upon an exchange being made, appellant, the owner, agreed to pay respondent the sum of $3,000 for his services, to become due on the execution of the agreement. The complaint then alleges that plaintiff secured from one Lewis E. Gumplo and his wife their acceptance in writing of the offer of exchange for certain property owned by them in Los Angeles, upon condition that a loan of $35,000 could be placed on the Portland property. Further allegations are to the effect that plaintiff submitted this proposal to appellant and that she accepted and approved the same upon all the terms and conditions set forth in the offer of exchange by indorsing thereon the words: "I hereby accept this deal. * * *" Judgment was accordingly prayed for.

Appellant demurred to the complaint on various grounds. The demurrer was overruled, and defendant answering alleged that the proviso contained in the acceptance by the Gumplos was never performed, and the deal never went into effect. In a second defense defendant pleaded that she never agreed to perform or assist in performing the condition relating to the loan; that the same had never been performed by plaintiff or the Gumplos, and, further, that the Gumplos had refused to exchange their property on account of failure on the part of plaintiff to obtain the loan provided for in the offer of exchange. Judgment went in favor of plaintiff. Motion for a new trial was made and denied. This is an appeal from the judgment and the order overruling the demurrer.

[1, 2] We are of the opinion that the judgment finds no support in the evidence. The exchange agreement provided that the brokerage commission for services rendered was to become due on the execution of the agreement by all parties. Had the parties secured by respondent broker made an exchange in conformity with appellant's offer, there can be no question that respondent would be entitled to the judgment he has obtained, for in that event he would have done everything he was employed to do, and his agreed commission would have been earned. But the case does not present such a situation. The Gumplos never accepted the offer as made by appellant. They wrote into the exchange agreement a new condition upon which they were willing to exchange their property for that owned by appellant. The effect of this conditional acceptance was a rejection of appellant's offer. Wristen v. Bowles, 82 Cal. 84, 87, 22 P. 1136. Appellant agreed to the new condition, but it was never fulfilled, owing to

the fact that the loan could not be procured under the terms required by the Gumplos. Plaintiff therefore never produced a party willing and able to consummate the agreement. It was not the duty of appellant to procure the loan. She made no agreement so to do. The procurement of the loan was a condition precedent to the exchange. As the exchange was never made, appellant's acceptance of the conditional offer was never fulfilled, and plaintiff was not, therefore, entitled to his commission.

A broker must bring about a completed transaction in accordance with his undertaking. He is never entitled to a commission for unsuccessful efforts. His commission comes only with success. Success is the very object of the contract. Unsuccessful efforts are of no benefit to the owner, and afford no ground of action. This conclusion renders unnecessary a discussion of the questions raised on demurrer.

The judgment is reversed.

We concur: WASTE, C. J.; LANGDON, J.; PRESTON, J.; SEAWELL, J.; CURTIS, J.; SHENK, J.

217 Cal. 554

COLTON v. GUMPLO.

L. A. 13871.

Supreme Court of California.
March 24, 1933.

Rehearing Denied April 21, 1933.

Brokers ⚷60.

Broker *held* not entitled to commission, where acceptance of exchange offer was conditioned on procurement of loan, and loan was never procured.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Leonard B. Colton against Lewis E. Gumplo. Judgment for plaintiff, and defendant appeals.

Reversed.

Rehearing denied; SHENK, J., dissenting.

Prior opinion, 12 P.(2d) 1001.

Woodruff, Musick & Hartke, of Los Angeles, and H. L. Pratt, of Hollywood, for appellant.

Mott, Vallee & Grant, of Los Angeles, for respondent.

TYLER, Justice pro tem.

Action to recover a broker's commission alleged to have been earned in negotiating an exchange of real property. The action arose out of the same transaction involved in Colton v. O'Brien (Cal. Sup.) 20 P.(2d) 43, this day decided. The facts, however, are different in some particulars.

Plaintiff, respondent herein, brought this action to recover the sum of $4,000 claimed to be due as a commission for procuring an agreement to exchange certain real property located in Portland, Or., belonging to Mary T. O'Brien, for property owned by defendant in Los Angeles. Respondent had on June 27, 1928, procured an exchange agreement from Mrs. O'Brien, and on the same day, upon showing the agreement to appellant, Gumplo, procured an exclusive listing from the latter of his Los Angeles property. Appellant and respondent talked over the O'Brien Portland property, and appellant Gumplo suggested that respondent check up its valuation and ascertain whether or not a $35,000 loan could be procured thereon. Respondent thereupon went to Portland, looked up the property, and there applied to a mortgage company for the requisite loan thereon. The application for the loan was signed by respondent, Colton. In the application for the loan the estimated rental was placed at $500 per month. Respondent then returned to Los Angeles, at which time Gumplo discussed with respondent broker the proposed exchange. Gumplo then suggested that respondent return to Portland and ascertain if the property could be disposed of on an outright sale; appellant paying the expenses of the trip. Respondent failed to receive a satisfactory bid, but informed appellant, Gumplo, that he had made definite arrangements for the loan, and recommended appellant's acceptance. Gumplo and his wife then signed their acceptance of the exchange agreement which provided for the payment of the agreed commission for services, to become due on the execution of the agreement of exchange by all parties. This acceptance of exchange, however, was dependent upon the condition that a loan of $35,000 be procured on the Portland property. Thereafter an escrow was opened with a bank; appellant's instructions providing for the placing of such loan. The day the escrow was opened, respondent exhibited to appellant the application he had signed at Portland for the loan. Appellant took exception to the representation contained therein as to the rental value of the property being $500 per month. He refused to sign until he had word from the mortgage company through which the loan was to be made that there was no misrepresentation upon this subject. He wired the mortgage company informing it that the income was but $40 a month, and inquired if the loan would be made. In reply thereto, he was informed that the loan would be made provided the building was reconditioned and rented. He thereupon wired the company that he would make no improvements. The mortgage company then informed him that the loan would not be made.

The improvements required by the mortgage company involved the expenditure of about $10,000. The commission agreement between the parties hereto provided that, in the event no trade was consummated between Gumplo and Mary T. O'Brien, appellant was under no obligation of any kind to respondent, Colton. The court found, among other things, that defendant, without cause, arbitrarily and capriciously, abandoned the proposed exchange, and declared his intention of proceeding no further therewith. Judgment followed in favor of plaintiff. A careful search of the record fails to reveal any support whatsoever for such a finding. The uncontradicted evidence shows that plaintiff did not procure the loan provided for in his agreement. The proposed loan, under which appellant would be bound to make the costly and extensive improvements before he obtained it did not fulfill the condition provided for in this respect. No sale ever having been consummated by reason of plaintiff's inability to procure the loan, he was not entitled to any commission. The procurement of the character of loan required was a condition precedent to the exchange. A broker is never entitled to a commission for unsuccessful efforts. Here plaintiff is attempting by these actions to recover $7,000 for services he never performed and which were of no benefit whatsoever to the parties.

The judgment is reversed.

We concur: WASTE, C. J.; LANGDON, J.; PRESTON, J.; SEAWELL, J.; CURTIS, J.; SHENK, J.

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217 Cal. 547

WILCOX et ux. v. CITY OF TORRANCE et al.

L. A. 13513.

Supreme Court of California.

March 24, 1933.

1. Municipal corporations 🔑18.

Regularly organized improvement district comprising part of municipal area cannot be declared void because of municipality's intention to operate the water system for gain of whole municipality, where statute authorizes use for sole benefit of district and not for profit (St. 1927, p. 1351).

2. Municipal corporations 🔑879.

Generally, municipal corporations may not make profit on capital furnished by only a part of owners of real property.

3. Municipal corporations 🔑18.

Where, in case involving validity of municipal improvement district, appellants expressly limited their protest to one ground, court will not go into special benefits, area benefited, and superiority of municipal over private utility, which are usually legislative matters not within control of court (St. 1927, p. 1351).

In Bank.

Appeal from Superior Court, Los Angeles County; Lester W. Roth, Judge.

Action by William Wilcox and wife against City of Torrance. From judgment for defendant, plaintiffs appeal.

Affirmed.

Gibson, Dunn & Crutcher, of Los Angeles, for appellants.

Perry G. Briney, of San Pedro, and O'Melveny, Tuller & Myers, James L. Beebe, and Pierce Works, all of Los Angeles, for respondents.

PRESTON, Justice.

The governmental authority of the city of Torrance, a municipal corporation of the sixth class, moved in strict conformity with the provisions of the Improvement Act of 1927 (Stats. 1927, chap. 731, p. 1351 et seq.) to create an improvement district thereunder, to be known as municipal improvement district No. 1 of the city of Torrance, comprising about one-fifth of the area but including from two-thirds to three-fourths of the value of the taxable real property of said city.

The object of the formation of the district was to authorize a bond issue of $400,000 to construct or otherwise acquire a public utility, to wit, a water system for said area, and to do so notwithstanding the existence of a privately owned and operated utility of that character in said city. A vote was taken, and the authority was granted by the requisite majority. No protest by property owners was made, and no claim is made now that any technical step required by the act was omitted.

Appellants, property owners then and now in said district, have sued to have all the said proceedings declared void, and particularly to restrain the city and its various officers from taking further steps to issue and sell said bonds or to proceed to acquire said improvement. They assert that said act, as applied to a revenue producing utility, is violative of constitutional guaranties of both the federal and state authorities. Fourteenth Amendment to the Constitution of the United

States; sections 14 and 21 of article 1 of the Constitution of the state of California. A demurrer to the complaint was sustained. Plaintiffs declined to amend; judgment passed for defendants; and this appeal resulted.

The act provides that the governing body of a municipal corporation may, on the petition of a certain percentage of the electors of the proposed improvement district, set in motion machinery, the result of which may be the creation of a district comprising all or part of such municipality and the voting of a bond issue to construct or otherwise acquire a public utility to serve the inhabitants of such district. The municipality may accept a mandate to administer the funds arising from the sale of such obligations so as to acquire and cause to be vested in itself the title to such utility. The municipality may also itself undertake the task of operating and maintaining it for the purpose for which it was formed. It may also at stated intervals impose an ad valorem tax on the real property in the district sufficient to pay the accruing interest on said bond indebtedness, together with the necessary contribution to the sinking fund for gradual discharge of same.

Appellants insist that such an exercise of authority, when applied to a water system, is the setting up by a municipality of a revenue producing public utility therein to be operated at a profit for the benefit of the whole city, using to obtain it a tax on the real property of only a portion thereof. Appellants themselves narrow the issues and state their position in the following language:

"For the purposes of decision herein, we are willing to concede that the proceedings in question would not be invalid on the ground urged by appellants if either (a) the entire City of Torrance had been included in the assessment district, on the same basis; or (b) the water system proposed to be constructed were one to be owned by and operated for the assessment district exclusively. In other words, succinctly stated, the appellants' sole objection is that the proceedings are avowedly directed and intended to acquire a water system which—while located wholly within the assessment district—is to be vested in the absolute ownership of the city as such, with unrestrained power, and admitted intention, to devote its revenues, in excess of bare operating expenses, to the use and benefit of the entire city, and not exclusively or especially of the assessment district; and yet the landowners of that limited district are burdened with the entire cost of constructing the system, including all cost of financing the same through the issuance of an interest-bearing bonded indebtedness payable over a period of many years."

[1] If the baneful factors claimed by appellants were really present in the act, appellants' argument would have force, but we are not able to discern their existence. The utility is for the sole benefit of the district, and no other inhabitants of the city or others may be served to the detriment of the users of the district. No authority is conferred by the act to serve any outside area. No authority can be found in the act authorizing the utility to be operated at a profit, nor is there any provision allowing a profit, if such should accrue, to go to the general fund of the city. We look in vain to the act for provisions allowing or disposing of profits from any such utility. Naturally, with the duty to maintain and operate it, there will be at times a surplus in the district fund. This will come from necessity and not from design to acquire a profit. We have no doubt that, if an undue profit is about to result, the district may either see that it does not come to pass or that it redounds to the benefit of the district alone.

[2] But, at any rate, the city generally may not make a profit on capital furnished by a part of the owners of real property therein. The motives or intentions of the city authorities to operate the utility for gain to the city, as alleged, do not constitute ground for relief where the statute does not permit a realization of such purpose. The law allows the formation of such districts because it can be seen that special benefits will result to inhabitants thereof not shared to that full extent by the remainder of the city or the public generally.

[3] Such questions as the existence of these special benefits, the area so benefited, and the superiority of this utility over a private one in the same territory are matters that are legislative in character, and in their ordinary manifestations are not in the control of the courts. Appellants' failure to protest on any of these grounds forbids our consideration of any of them.

The judgment is affirmed.

We concur: WASTE, C. J.; SHENK, J. SEAWELL, J.; CURTIS, J.; LANGDON, J. IRA F. THOMPSON, J.

217 Cal. 506

McCANN et al. v. JORDAN, Secretary of State.

S. F. 14586.

Supreme Court of California.

March 15, 1933.

1. Corporations 🔑19.

In absence of statute requiring prescribed fee for filing original articles of corporation having non-par stock, secretary of state *held* unauthorized to demand fee (St. 1931, p. 1762; Pol. Code, § 409, subd. 5, as amended by 1931, p. 445).

2. Corporations 🔑19.

Secretary of state has no discretion in exacting statutory fee for filing incorporation articles, and his duties are purely ministerial (St. 1931, p. 1762; Pol. Code, § 409, subd. 5, as amended by St. 1931, p. 445).

In Bank.

Application by Leo C. McCann and others, incorporators of the Lincoln Shares Corporation, for a writ of mandate against Frank C. Jordan, to compel respondent, as Secretary of State, to accept and file articles of incorporation of a corporation having a non-par stock structure on payment of fees as tendered by petitioners.

Alternative writ made peremptory.

Prior opinion, 13 P.(2d) 663.

Ellis, Lyman & Steindorf, of San Francisco, for petitioners.

U. S. Webb, Atty. Gen., and William F. Cleary, Deputy Atty. Gen., for respondent.

PER CURIAM.

At the earnest insistence of the Attorney General, a rehearing was granted in this case; but, after further consideration, we see no escape from the conclusion previously announced. Accordingly, we adopt the opinion heretofore rendered by Mr. Justice LANGDON as the opinion of this court. It reads as follows:

On February 5, 1932, petitioners, the incorporators and first directors of Lincoln Shares Corporation, presented duly executed and acknowledged articles of incorporation to respondent secretary of state for filing. At such time they tendered the necessary nominal fees for comparing documents, etc. Respondent refused to file the articles unless first paid the sum of $1,000 as a filing fee, based upon the provision in the articles for 1,000,000 shares of non-par stock. Thereupon petitioners sought a writ of mandate in this court.

[1] The controversy arises out of a strange legislative omission. Section 409, subdivision 5, of the Political Code, as amended by St. 1931, p. 445, states the fees required for filing articles of incorporation. These fees are graduated in accordance with the amount of "capital stock." Thus, where the amount is $25,000 or less, the fee is $15; if it is between $500,000 and $1,000,000, the fee is $100. No method is contained in said section whereby there may be computed the fee to be charged on non-par stock. Prior to 1931, section 290d of the Civil Code made express provision for this situation by declaring that for the purpose of fixing the fee prescribed by section 409 of the Political Code, in the case of non-par stock, the basis thereof should be an amount equal to the number of shares multiplied by $10. In other words, each share of non-par stock was given an arbitrary value of $10, and in the instant case the 1,000,000 shares would have been valued at $10,000,000, and a filing fee of $1,000 would have been proper. But in 1931, with the enactment of the General Corporation Law (St. 1931, p. 1762), section 290d was repealed. No provision remains in any of our statutes which sets a valuation upon non-par shares for purposes of filing original articles of incorporation. There is, however, a provision (Pol. Code, § 409, subd. 7) for the valuation of such shares upon the filing of amended articles abolishing par stock, and authorizing the issuance of non-par stock, or authorizing the issuance of additional shares of non-par stock.

The question presented by these facts may be simply stated: Is the secretary of state entitled to collect a fee which is not required by the statutes prescribing fees? Obviously the answer is no.

[2] Whatever may have been the purpose of the omission, and it seems clearly to have been inadvertent, its effect is to leave no method by which a filing fee for non-par stock may be computed where original articles are filed. The secretary of state has proceeded to apply the same rule which prevailed under the repealed Civil Code section. We see no warrant for such action. There is nothing discretionary in the exaction of a statutory filing fee of this sort, and his duties are purely ministerial.

Respondent argues that, since the statute makes payment of the prescribed filing fees a condition precedent to filing articles [Pacific Gas & Electric Co. v. State of California (Cal. Sup.) 6 P.(2d) 78], the duty to collect a fee remains, even though the standard of measurement has been eliminated; and that to exempt corporations with non-par stock from this requirement would result in an unconstitutional discrimination. Neither contention can justify the imposition of a fee which the statute does not require. The fact that the statute does provide for fees where articles are amended only indicates that the repeal of the provisions formerly contained in section 290d of the Civil Code was inadvertent. It is impossible by construction to make the subdivision on amended articles applicable to original articles.

It necessarily follows that respondent had no authority to demand a filing fee of $1,000, and that it is his duty to file said articles forthwith. The alternative writ heretofore issued should be made peremptory, and it is so ordered.

It may be observed that the legislative omission dealt with in this opinion has since been corrected by "urgency" legislation. Stats. of 1933, c. 20, amending Cal. Pol. Code, § 409, subd. 5.

217 Cal. 541

SMITH v. WOOD et al.

L. A. 12961.

Supreme Court of California.

March 24, 1933.

1. Judgment 🔑815.

In absence of extrinsic fraud or mistake, court cannot disregard foreign decree finally distributing estate and impose trust on interests decreed.

2. Wills 🔑601(1).

Testatrix' daughter received fee under will giving property to daughter and heirs, but making other disposition thereof if daughter died without issue.

3. Wills 🔑601(1).

Construction giving estate of inheritance to first devisee is favored, and such estate can be reduced to life estate only by unambiguous provisions.

In Bank.

Appeal from Superior Court, Orange County; G. K. Scovel, Judge.

Action by Anna J. Smith against Texanna Huston Wood and another. Judgment for defendants, and plaintiff appeals.

Affirmed.

S. S. Hahn, M. C. Spicer, and W. O. Graf, all of Los Angeles, for appellant.

Stearns, Luce & Forward and Albert J. Lee, all of San Diego, for respondents.

LANGDON, Justice.

This is an appeal by plaintiff from a judgment of the superior court of Orange county in favor of defendants in an action for an accounting and other equitable relief.

On March 2, 1885, at Warren county, Ill., Mary B. Huston made her will. She was apparently a widow. Among her near relatives were one child, defendant Texanna Huston Wood, then unmarried, a sister, Ellen A. Penny, now deceased, and the children of Ellen A. Penny. The testatrix died in June, 1908; defendant daughter, who was still single, being appointed executrix. In October, 1910, she married Allen D. Wood, and lived with him until his death on March 2, 1930. No children were born of said marriage.

The will of Mary B. Huston was admitted to probate in Warren county on July 6, 1908. By it the deceased gave real and personal property in Illinois to her daughter, defendant Texanna Huston. On October 18, 1909, the court made and entered an order reciting that the final account had been filed, due notice given, and no objections made thereto; that Texanna Huston had tendered her receipt for all of the property as legatee and devisee, and concluded as follows: "* * * It is therefore ordered that this her final report be approved and that she be discharged as Executrix of the Last Will and Testament of Mary B. Huston, deceased, and that the administration of said estate be closed." No appeal or other contest of said order was made until this action was commenced.

Upon her marriage to Allen D. Wood, defendant Texanna B. Huston transferred to him all the real and personal property distributed to her under said will. By his will, he devised and bequeathed it to defendant bank, in trust for his wife and son, issue of a prior marriage, and provided that upon his wife's death a fund of $11,000 should be retained in the trust and the net income therefrom paid to his son for life. It was further provided in said will that upon termination of the trust the corpus should be distributed to various relatives of the testator and his wife, including plaintiff.

The claim of plaintiff is that the will of Mary B. Huston gave her daughter, defendant Texanna Huston Wood, only a life estate in the property, and that she held the same in trust for the heirs of Ellen C. Penny, of whom plaintiff seems to be the sole survivor. It would follow from this that Allen D. Wood had no power to dispose of the property by will, and the court is asked to set the transfer aside, decree a life estate in defendant Texanna Huston Wood, and further decree that, in the event of her death without issue, plaintiff is entitled to share in the estate. The lower court sustained a general demurrer to the complaint, and thereafter rendered judgment for the defendants. We are of the opinion that this judgment must be sustained upon either of two grounds.

[1, 2] First, the county court of Illinois, by the order referred to above, obviously in-

tended to and did make final distribution of the estate, and, having fully distributed the same to Texanna Huston, without limitation, the courts of this state have no power to disregard the decree and impose a trust upon the interests decreed, in the absence of a showing of extrinsic fraud or mistake. But, assuming that the construction of the provisions of said will was still a matter within the jurisdiction of the lower court, a reading of the significant clauses justifies the conclusion that the whole estate in fee went to the defendant daughter. The will provides:

"Second: I give and bequeath and devise to my beloved daughter Texanna B. Huston, all of my real estate situated in Warren and Henderson Counties and State of Illinois. Also all money loaned, jewelry, silverware, household goods, and any other personal property or real estate of which I may be possessed at the time of my death, *to her, and her heirs, forever.* * * *" (Italics ours.)

"Third. But should my daughter Texanna B. Huston, *die without issue*, I give, bequeath and devise my entire estate both real and personal, to my sister Ellen A. Penny of Henderson County of State of Ills., and her heirs, forever except that her daughter Fanny Penny shall receive my piano, more than either of her other heirs, and her son Percy Penny, five hundred dollars more, provided always he be a steady and honorable boy; if not he shall not receive more than the others." (Italics ours.)

[3] A clear intention appears in the second paragraph of the will to give to Texanna B. Huston an estate in fee simple, and such is the interest she took unless the subsequent provisions of the third paragraph operated to cut it down. A construction which will give an estate of inheritance to the first devisee is favored (Bookless v. Charnoch, 307 Ill. 578, 139 N. E. 15); and an estate of inheritance given by the terms of a will can be cut down to a life estate only by other subsequent provisions found in the will which express the intention to do so in clear and unambiguous language (Kohtz v. Eldred, 200 Ill. 60, 69 N. E. 900). In the instant case, there is no such expression of intention. The third paragraph seems to contemplate no more than a disposition to the sister of the testatrix, in the event that the daughter of the testatrix predecease her, leaving no issue. As the court said in Estate of Hamon, 60 Cal. App. 154, 212 P. 399, 402: "The most that can be said of the clause in the other section involved is that it creates an uncertainty as to whether the testator intended the words 'dies without issue' to refer to death before the testator * * * or to death at any time. To hold that it means death at any time would place a higher value on uncertainty than upon certainty as a goal in interpretation."

This was no doubt the view taken by the Illinois county court when it decreed distribution of the estate of Texanna B. Huston, without limitation. We see no reason to disturb either this determination or that of the lower court herein.

The judgment is affirmed.

We concur: WASTE, C. J.; PRESTON, J.; IRA F. THOMPSON, J.; SHENK, J.; CURTIS, J.; SEAWELL, J.

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217 Cal. 531

CRANE v. REARDON.

L. A. 13084.

Supreme Court of California.
March 23, 1933.

1. Gifts ⚿29.

Gift of shares of stock may be consummated by manual delivery without written indorsement.

2. Gifts ⚿65.

Donor's request for pen to sign over stock *held* not to render attempted gift ineffective for want of indorsement, where donor, contemplating death, made delivery and stated, "It is yours."

In Bank.

Appeal from Superior Court, Ventura County; Edward Henderson, Judge.

Action by Emma Crane against Oliver L. Reardon, as administrator of the estate of Charles C. Cashner, also known as C. C. Cashner, deceased. Judgment for plaintiff, and defendant appeals.

Affirmed.

Sheridan, Orr, Drapeau & Gardner and Erle S. Gardner, all of Ventura, for appellant.

James C. Hollingsworth and Don R. Holt, both of Ventura, for respondent.

LANGDON, Justice.

This is an action to quiet title to certain certificates of corporate stock, dividend checks, and stock purchase warrants. The testimony of plaintiff and her witnesses discloses the following facts: Charles C. Cashner, a single man, came to California on November 5, 1929, taking up his residence with plaintiff and her husband at Ojai. He had previously been a close friend of plaintiff's mother. Plaintiff and her husband furnished board and lodging to him until his death on December 8, 1929. On December 1, 1929,

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⚿For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes he became ill, and on December 3 was confined to his bed. He then gave plaintiff a written order directed to the Bank of Italy branch at Ojai, requesting that she be admitted to his safe deposit box to secure certain insurance papers; and he also instructed her to bring a brown envelope with inclosures from the box. She did so, and the envelope was, at his request, placed in his trunk. On the evening of December 7, 1929, Cashner was considerably worse, and, calling for the envelope, took it, partly removed some of the contents, showing that there were certificates of stock, purchase warrants, and checks therein, and handed the envelope and its contents to plaintiff, saying: "Here, Emma, take this stock. I want you to have it as I know you will always care for your mother. Give me a pen so I can sign it over to you." She replied: "Well, I don't think it is necessary tonight, as weak as you are. You can do it tomorrow or next day." He answered: "Well, I may not be here tomorrow or next day." There were present at that time the husband, mother, daughter, and son-in-law of plaintiff, and an acquaintance of the family. They all corroborated this testimony, some testifying that he had said: "Take it. It is yours." There was no conflicting evidence, and the trial court concluded that a valid gift had been made to plaintiff.

[1, 2] Defendant in his appeal makes no claim of fraud or undue influence, and rests his case solely upon the contention that the elements of a valid gift were lacking. Specifically it is contended that there was no delivery because, first, a written indorsement or assignment was necessary; and, second, whether necessary or not, the donor believed it necessary, and hence lacked the requisite intent to make a present gift. Neither point is convincing. While it has been held that under our statute there cannot be a valid oral gift of a chose in action not evidenced by a writing (Adams v. Merced Stone Co., 176 Cal. 415, 178 P. 498, 3 A. L. R. 928), it is well settled that, where the chose in action is evidenced by a written instrument such as a note, bank passbook, bill of exchange, etc., mere manual delivery without written indorsement is sufficient. Dellepiane v. Hynes, 83 Cal. App. 604, 257 P. 180. The same rule should be applied, and has been held to apply, to the delivery of shares of stock. Leyson v. Davis, 17 Mont. 220, 42 P. 775, 31 L. R. A. 429; Grimes v. Barndollar, 58 Colo. 421, 148 P. 256; Talbot v. Talbot, 32 R. I. 72, 78 A. 535, Ann. Cas. 1912C, 1221; Mechem, Gifts of Corporation Shares, 20 Ill. L. Rev. 9; 28 C. J. 700. The other point finds no support in the record. The evidence, fairly considered, points to the conclusion that the donor intended to part with title at the time of manual delivery, and his expressed desire to "sign it over" was simply for the purpose of facilitating the transfer, making it possible for the donee to have the same entered on the books of the corporation. There is not the slightest indication that he considered the gift itself incomplete, and his statement, "It is yours," dispels any possible doubt created by the other remark.

The judgment is affirmed.

We concur: WASTE, C. J.; PRESTON, J.; CURTIS, J.; SHENK, J.; IRA F. THOMPSON, J.

130 Cal.App. 454

STANKEY v. BODEN.

Civ. 7641.

District Court of Appeal, Second District, Division 2, California.

March 20, 1933.

Dismissal and nonsuit ⚷60(1).

Question arising on motion to dismiss action for lack of prosecution is addressed to discretion of trial judge.

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Action by Susie H. Stankey against Elizabeth Boden. From a judgment in favor of the defendant, the plaintiff appeals.

Affirmed.

J. E. Light, of Los Angeles, for appellant.

Jones, Stephenson, Palmer & Moore, of Los Angeles, for respondent.

STEPHENS, Justice.

The order appealed from followed a motion to dismiss an action for lack of prosecution. Appellant, whose action was dismissed, seeks to show by affidavit that the delay of over two years was caused by her attorneys and also by the fact that the defendant wrote her a letter in which it was stated that the writer would proceed with the case. The whole question was one of discretion of the trial judge and we discern no abuse thereof.

The judgment is affirmed.

We concur: WORKS, P. J.; ARCHBALD, Justice pro tem.

130 Cal.App. 250

RADONICH v. RADONICH.

Civ. 8598.

District Court of Appeal, First District, Division 1, California.
March 6, 1933.

1. **Appeal and error** 🔑948.

Reviewing court never presumes trial court abused discretion in issuing execution on judgment five years after entry thereof or in recalling and quashing such execution (Code Civ. Proc. § 685).

Code Civ. Proc. § 685 permits the enforcement of a judgment by leave of court after lapse of five years from entry of judgment.

2. **Divorce** 🔑263.

Quashing execution for alimony 15 years after interlocutory judgment awarding alimony for wife's support *held* no abuse of discretion, where wife was living with fifth after-acquired husband, and there was no showing such husband was unable to support her (Code Civ. Proc. § 685).

3. **Divorce** 🔑311.

Quashing execution for alimony 15 years after interlocutory judgment awarding alimony for children's support *held* no abuse of discretion, where children did not receive their support during such period through mother's efforts (Code Civ. Proc. § 685).

Facts disclosed that the divorced wife contracted five additional marriages during the fifteen years following the award of alimony in controversy; that at least three of such after-acquired husbands supported her and the boys of whom she had custody, while she was living with them; that during such period she received large sums for the support of herself and children from the industrial accident commission as a result of the death of one of such after-acquired husbands; and that during a considerable portion of time the boys were wards of the juvenile court and were supported by the department of public welfare.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Action by J. I. Radonich against Georgina Radonich. From an order quashing a writ of execution for unpaid alimony, defendant appeals.

Affirmed.

James P. Montgomery, of Oakland, for appellant.

Richard Liebman and Jo Lawrence, both of Oakland, for respondent.

KNIGHT, Justice.

Approximately fifteen years after the entry of the interlocutory judgment of divorce awarding appellant alimony in the above-entitled cause, she applied for and obtained an ex parte order, based on affidavit, for the issuance of an execution which the court shortly afterwards recalled and quashed on motion of respondent after a hearing on the merits; and this appeal was taken from the order made in the latter proceeding.

[1] Section 685 of the Code of Civil Procedure, pursuant to which the order for the issuance of the execution was granted, provides that "by leave of court" a judgment may be enforced or carried into execution after a lapse of five years from the date of its entry; and it is well settled that in reviewing the trial court's action either in granting an order for the issuance of an execution under the authority of said section, or in recalling and quashing an execution so issued, an abuse of discretion is never presumed; a clear showing of such abuse being essential to interference by the reviewing court. Wilder v. Wilder, 214 Cal. 783, 7 P.(2d) 1032; Parker v. Parker, 203 Cal. 787, 266 P. 283, 286; Wheeler v. Eldred, 137 Cal. 37, 69 P. 619.

In the present case the interlocutory judgment was entered in September, 1916. It awarded appellant the custody of the two minor children, Peter and John, aged five and four years, respectively, and directed respondent to pay appellant $12.50 a month toward her support and $20 a month for the maintenance of the children. Final judgment was entered in October, 1917. It contained no provision as to alimony. The following month respondent entered the army and later was sent overseas. He was discharged from the army in 1919; and in April, 1926, he regained custody of the children and thereafter supported them. In September, 1931, which, as will be noted, was fifteen years after the entry of the interlocutory judgment, and more than five years after respondent secured custody of the children, appellant obtained the ex parte order for the issuance of an execution to collect the accumulated alimony. The order was based on averments in appellant's affidavit to the effect that none of said payments had been made, and that appellant "continued to care for and have full and sole charge, control and support of said children up to the first of May, 1926." However, at the hearing of respondent's motion it was shown that during the fifteen years which elapsed between the granting of the interlocutory judgment of divorce and the issuance of the execution appellant contracted five additional marriages, some of them illegally; and that at least three of the after-acquired husbands supported her and the boys while she was living with them. In this regard the evidence established that between the date of the rendition of said interlocutory judgment on September 19, 1916, and its entry on September 26, 1916, under the fictitious name Georgina Radimir, appellant entered into a marriage ceremony with one Sherman S. Sisson, with whom she continued to live in matrimonial relationship until May, 1918, at which time he died as the result of an industrial accident. About a year later she married a man named Kern, but he was sent to the state prison and thereupon she was divorced from him. She next married one Ghiorza, from whom she obtained an interlocutory judgment of divorce in July, 1926, but the final decree was not entered until October, 1931, after appellant had been cross-examined with reference thereto in the present proceeding; and prior to its entry she contracted two additional marriages, the first with a man named Razum, from whom she claimed to have been divorced, and the second with Richard, with whom, so far as the record shows, she was still living.

Moreover, it was shown that during the time appellant was legal custodian of the children by virtue of said judgment, she received large sums of money for the support of herself and the children from the industrial accident commission; also, that during a considerable portion of said time the boys were wards of the juvenile court and were supported by the department of public welfare. The evidence relating thereto was as follows: Shortly after the death of Sisson, appellant made application to the industrial accident commission for compensation, alleging in her petition that Sisson was her husband and the father of the boys, and that they were dependent upon him for support. The commission entered findings accordingly and made an award to appellant in a sum exceeding $4,480. Afterwards the commission discovered that appellant had never been legally married to Sisson, and that he was not the father of the boys; whereupon the award in favor of appellant was set aside, upon the ground that it was obtained by fraud. The commission made additional findings, however, to the effect that at the time of Sisson's death the boys were living in his household, as members of his family; that they were being supported by him in good faith, and were wholly dependent upon him for support. It was ordered, therefore, that the award theretofore made to appellant be made payable to her as guardian of the boys, that $2,500 thereof be used by her to purchase a home for them, and that the balance be paid to her in monthly installments of $74 for their maintenance and support. She purchased the home as directed, for $2,500, but later sold it for $3,000. As guardian she accounted to the court for $2,000 of the sale price, and at the hearing of the present proceeding admitted having kept the remaining $1,000 for her own use and benefit. Furthermore, it was shown that in addition to the sum mentioned she received $1,983.05 from the commission in twenty-six monthly installments for the support of herself and children, for which she rendered no account whatever, and that during much of that period the boys were under the jurisdiction of the juvenile court and being supported by the department of public welfare, the juvenile authorities having first taken charge of the boys in 1920, because, so the petition therein recited, they had been deserted by their mother, whose whereabouts were unknown, and again in 1925 when they were committed to the custody of said authorities on petition of Ghiorza, for some alleged juvenile delinquency.

[2] When the foregoing facts and circumstances are considered in the light of the legal rules governing appellate courts in reviewing a proceeding of this kind, it is evident that there are no grounds upon which it may be declared as matter of law that the action of the trial court in recalling and quashing the execution constituted an abuse of discretion. With respect to the allowance made by the interlocutory judgment in favor of appellant for her own support, the case in principle is identical with and must be controlled by the doctrine stated in Parker v. Parker, supra. There the decree directed the husband to pay alimony for the support of his wife and minor child, and a few days after the entry of the final decree the divorced wife married a man named Pappert, from whom also she was subsequently divorced. The decree in the latter case likewise provided for her maintenance and support. Some ten years after being divorced from Parker she obtained an order for the issuance of a writ of execution, which Parker moved to have vacated and recalled and his motion was denied. The trial court's order made in this behalf was reversed on appeal, the court saying: "The court in the present proceeding made no finding that Pappert [the second husband] was unable to support his wife during their marriage, and the record does not present facts from which it may be reasonably said that such a finding could be implied. Such a showing and a finding based thereon, we think, were essential to a valid order requiring a former husband to continue to support his former wife during her marriage to another man. Furthermore, the fact that the plaintiff waited for over ten years before the original judgment was sought to be enforced by her, and during which she was the wife of another man, furnished a cogent reason which should have appealed to the discretion of the trial court, in determining whether the order for execution should issue. The showing made on the motion to vacate the order and recall the execution was suffi-

cient to compel the granting of the motion." In the present case there was no finding that appellant's present husband is unable to support her, nor, so far as our attention is called, was there any evidence introduced to that effect.

[3] And with respect to that portion of the judgment granting an allowance in favor of appellant for the support of the children, the issue before us is not whether, during the period of time the judgment was legally enforceable, respondent was absolved from complying with its terms merely because his children were being supported from other sources, but rather whether, in view of the fact that the children did not receive their support during said period of time through the efforts of appellant, the trial court abused its discretion in withholding its leave to allow appellant to collect the full amount of such judgment long after it had become barred by the statute of limitations. As stated, under the circumstances above related, we cannot say that it did.

The order appealed from is therefore affirmed.

We concur: TYLER, P. J.; CASHIN, J.

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130 Cal.App. 284

McNAMARA v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 8699.

District Court of Appeal, First District, Division 2, California.

March 9, 1933.

Hearing Denied by Supreme Court May 8, 1933.

1. Master and servant 🔑405(4).

Evidence sustained finding that death of laundry truck driver, who had been suffering from heart disease and was found dying in truck, was not caused by injury arising out of and in course of employment (St. 1917, p. 834, § 6 (a), as amended by St. 1929, p. 430).

2. Master and servant 🔑376(2).

Under Compensation Act, injury aggravating pre-existing disease is compensable (St. 1917, p. 833, § 3, subd. 4, as amended by St. 1919, p. 910, § 1).

3. Master and servant 🔑376(2).

Not every exertion in line of employee's duties, tending to consume reserve force of damaged heart, will constitute compensable claim (St. 1917, p. 833, § 3, subd. 4, as amended by St. 1919, p. 910, § 1).

4. Master and servant 🔑405(4).

In compensation proceeding for death of laundry truck driver found dying in truck, proof *held* not to show aggravation of existing heart disease by injury arising out of and in course of employment (St. 1917, p. 833, § 3, subd. 4, as amended by St. 1919, p. 910, § 1).

Proceeding under the Workmen's Compensation Act by Mrs. Minnie E. McNamara, claimant, for the death of her husband, D. S. McNamara, employee, opposed by the Metropolitan Contra Costa Laundry, employer, and the State Compensation Insurance Fund, insurer. To review an award of the Industrial Accident Commission denying death benefits, claimant brings certiorari.

Affirmed.

Stanley R. Sterne, of Oakland, for petitioner.

A. I. Townsend, of San Francisco, for respondent Industrial Accident Commission.

B. E. Pemberton and Henry G. Sanford, both of San Francisco, for respondent State Compensation Insurance Fund.

STURTEVANT, Justice.

This is a proceeding to obtain a death benefit for the widow of D. S. McNamara, who died on Monday, October 12, 1931. The defendant commission denied the application, and she has asked for a writ of review.

[1] In the year 1925 the decedent entered the employ of the Metropolitan Contra Costa Laundry Company. He was given employment in driving a Republic truck. The truck had no self-starter, and it was necessary to crank it. Sometimes in the morning when it was cold there was some difficulty in starting it. At all times another employee was present to give assistance in doing the cranking, if assistance was necessary. At the time the decedent took up the employment, the record does not disclose that he was suffering from heart trouble. On October 28, 1927, he underwent a medical examination which revealed that his heart was negative. In October, 1930, another examination indicated a slight reduplication of the mitral sound, but no further evidence of valvular or muscular disease. On September 23, 1931, another examination was made, and "he was found to be suffering from mitral regurgitation with good compensation and mild glycosuria. Hospital care was not advised." On Sunday, the day before his death, the decedent suffered two heart attacks, and the day before that he suffered one attack, no one of them being preceded by any strenuous exercise. Those attacks lasted two or three hours, and he was obliged to remain quiet during that period. On Monday morning he reported for work about 7 a. m. He was seen near his truck and about to crank it. At that time the mechanic was near by, but was not called upon to assist, and it is therefore inferred that the de-

cedent cranked the truck. A little later he went into the building and went up a flight of stairs of even degree consisting of sixteen or eighteen steps to the office to get his orders. Having obtained them, he went downstairs and took his seat in the truck. A few minutes later a pedestrian observed him seated at the wheel, the motor running, but the decedent leaning over in distress. Assistance came to his aid, and he was taken to the hospital, but died in a few minutes. His regular route was in a territory which is mostly level. On his list he had at times as many as two hundred and fifty calls during a week. In some places he was required to go upstairs to obtain the bundles or to deliver them. The record discloses that the weights of bundles varied, as do the bundles of any ordinary laundry delivery. During the preceding month the deceased had made no complaint regarding the truck, and had not asked for assistance to crank it. The petitioner calls attention to the fact that, by the terms of section 137 of the California Vehicle Act (St. 1923, p. 562), one having charge of a motor vehicle may not leave it standing on any public highway unattended without stopping the motor, and that it will be presumed the decedent obeyed the law and therefore cranked the truck after each call he made.

After the death of the decedent, Dr. Tiffany, county surgeon in Oakland, on October 12, 1931, performed an autopsy. He testified that death was caused by hypertrophy of the heart and valvular lesion. He testified that he found an enlarged heart which is called hypertrophy of the heart and an enlargement also of the valves which were not closed completely. Valvular lesion of the heart was the immediate cause of death. A valvular lesion is caused when a heart is overworked and it gives out and sudden death results. Exertion will cause that condition. A long hypothetical question, describing the activities of the decedent for six years and reciting some of the medical examinations, being propounded to the witness, he was asked whether such activities aggravated the cause of death, and he replied that they certainly did. Before the day of decedent's death the lesion was present. Any overexertion twenty-four, thirty-six, or forty-eight hours prior to the attack would contribute to the death. The witness testified that he had performed a great many autopsies and had examined many hearts. At the time of the autopsy the witness examined the brain, and the meninges, and the coronary arteries. He did not make an histological examination, nor a microscopical examination. He did not find any other cause of death excepting as stated above. He saw no trauma. He did not, nor did any other witness, testify that any blood vessel was ruptured.

Dr. J. Marion Read was called as a witness by the State Compensation Insurance Fund. He never saw the decedent before or after death. To him was propounded a hypothetical question containing ten folios or more and he was asked as to what caused death. He replied that the decedent died from natural causes. The hypothetical question propounded to the witness purported to cover the life of the decedent during the six years preceding his death and to include also subsequent facts, including the result of the autopsy and the report made thereon. The question stated assumed facts, which included the following: For several years prior to his death, the decedent was a laundry deliveryman. As such his work was of an ordinary nature in all respects; his hours were ordinary hours, and his route and equipment were ordinarily good. His deliveries were made by the use of a truck which had to be cranked to start it, but the truck was in ordinary repair, and was ordinarily easy to crank. On the morning of decedent's death he was seen to move the truck, and it may be assumed he had cranked it. The question recited the medical examinations hereinabove mentioned, and also the fact that on the day before his death the decedent had two heart attacks. Addressing himself to the assumed facts stated in the hypothetical question, the witness was of the opinion that death was due to coronary thrombosis. He testified that the attacks on the two preceding days tended to support that conclusion. That the decedent's death was not caused by the cranking of the automobile, he said, was evidenced by the fact that for twenty minutes or more, immediately after the cranking, no evidence of a collapse appeared. If the cranking of the truck had been the cause, the decedent would have collapsed immediately. Moreover, on other occasions when the decedent cranked the truck, he suffered no attack. As there was no evidence that the heart showed trauma, the time and manner of the collapse were such as to lead the witness to the belief that the attack on Monday morning was the same as the attacks on Saturday and Sunday, with the exception that the latter was fatal. In this connection the witness was of the opinion that the attack on Monday morning was no more the outcome of the activities of the decedent than were the two attacks on Sunday. The general rule of law governing such cases is concisely stated by the Supreme Court of West Virginia in the case entitled Martin v. State Compensation Com'r, 107 W. Va. 583, 149 S. E. 824, at page 826: "There is a great mass of decisions involving claims where the applicant was afflicted with heart disease at the time of the alleged injury. These decisions are discussed and listed in the text-books, and in annotations to decided cases. See Bradbury Work. Com. (3d Ed.) p. 378, par. 61, title 'Heart Disease'; annotation to Carroll v. Industrial Commission, 69 Colo. 473, 195 P. 1097, 19 A. L. R. 107. Without analyzing and discussing those decisions (which would unduly incumber our Reports), it may be deduced therefrom that compensation will not be awarded where the employee has chronic heart trouble which has reached such a stage that death is liable to ensue at any time, from any exertion, and death came while he was doing the ordinary work of his employment." In a long line of cases in this state those principles have been applied and followed. Two of those cases are G. L. Eastman Co. v. Industrial Acc. Com., 186 Cal. 587, 200 P. 17, and Nielsen et al. v. Industrial Acc. Com. (Cal. App.) 13 P.(2d) 517. The first case, on page 594 of 186 Cal., 200 P. 17, shows under what circumstances relief cannot be had; and the second case clearly indicates what change in the facts will justify granting relief. This petitioner cites and relies on Buckley v. Roche, 214 Cal. 241, 4 P.(2d) 929, as supporting her claim. We think it does not do so. It involved the construction of a pension statute. The foundation for a claim to a pension as a police officer may be predicated on the sole fact that the injury relied on arose "while in the performance of his duties." San Francisco Charter, § 4, chap. 10, art. 8. On the other hand, the claim of a workman must be based on an injury "arising out of and in the course of the employment." Workmen's Compensation, Insurance and Safety Act, § 6 (a), as amended by St. 1929, p. 430. The two statutes are materially different. Moreover, they were intended to be different. "The act [Workmen's Compensation] is not a substitute for disability or old age pensions. It cannot be strained to include that kind of relief." Madden's Case, 222 Mass. 487, 111 N. E. 379, 382, L. R. A. 1916D, 1000.

Making a different attack, the petitioner asserts that Dr. Tiffany performed the autopsy, and that Dr. Read was not present and never saw the heart of the decedent, and therefore there is no conflict in the evidence. Winthrop v. Industrial Acc. Com., 213 Cal. 351, 2 P.(2d) 142. With this assertion we do not agree. When petitioner's application was submitted to the defendant commission, there were two distinct theories presented. It was her contention, as shown by her expert, Dr. Tiffany, that the decedent's death was caused by hypertrophy of the heart and valvular lesion. That expert testified to all that he saw when he performed the operation; and he also testified to his conclusions based on the knowledge so acquired and the history of the case. On the other hand, it was the contention of the insurance carrier, as shown by its expert Dr. Read, that Dr. Tiffany was mistaken in his theory as shown above, and that death was caused by coronary thrombosis, which was not referable to the employment of the decedent, but was a natural cause. The conclusions of the latter witness were based on the facts testified to by Dr. Tiffany and on an extended history of the case. It thus appears that the two experts took into consideration the same facts, but reached different conclusions.

[2-4] Considerable is said in the briefs regarding the liability of the employer for aggravation of a pre-existing disease. Speaking generally, there is no question about such a liability. It is statutory. Section 3, subd. 4 (as amended by St. 1919, p. 910, § 1). However, that claim when asserted must be supported by proof. In a certain sense every day's work consumes so much reserve force of the heart of every laborer. But such fact, standing alone, will not support an award of compensation chargeable against industry. In the case under consideration, both experts testified that every exertion during the entire day of twenty-four hours tends to consume the reserve force of a damaged heart, and, in that sense, is an injury to it—is an aggravation of it. But not every such exertion in the line of the employee's duties will constitute a legal claim under the statutes providing for workmen's compensation. Martin v. State Compensation Com'r, supra. So in the instant case the petitioner's proof did not bring her within the limits of the statute concerning aggravation of a pre-existing disease.

The award is affirmed.

We concur: NOURSE, P. J.; SPENCE, J.

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130 Cal.App. 296

KELLER v. RICHBART.

Civ. 7519.

District Court of Appeal, Second District, Division 1, California.

March 9, 1933.

1. Landlord and tenant 🔑37.

Lease agreement must be construed most strictly against lessor who dictated it.

2. Frauds, statute of 🔑139(4).

Oral modification of lease is binding so far as it is executed (Civ. Code, §§ 1091, 1624).

3. Frauds, statute of 🔑129(3).

Lessor accepting rent under new lease and permitting lessee to expend money for improvements and new arrangements *held* estopped to repudiate lease for absence of his signature (Civ. Code, §§ 1091, 1623, 1624; Code Civ. Proc. § 1962, subd. 3).

4. Landlord and tenant 🔑48(1).

Leasing garage building for general cab business *held* under evidence leasing for "garage purposes" under prior lease prohibiting leasing for such purposes.

[Ed. Note.—For other definitions of "Garage," see Words and Phrases.]

5. Appeal and error 🔑230.

Defendant failing to timely object to verdict waived any objection to its form, and could not complain jury failed to find on issues of cross-complaint.

6. Landlord and tenant 🔑48(2).

$2,471.44 damages for loss of garage business sustained by lessee renting back part of garage building, when lessor violated lease agreement by leasing building to cab company conducting garage business, *held* supported by evidence.

Appeal from Superior Court, Los Angeles County; F. C. Valentine, Judge.

Action by George Keller against L. Richbart. From a judgment for plaintiff, defendant appeals.

Affirmed.

Benjamin J. Scheinman and Samuel De Groot, both of Los Angeles, for appellant.

Maurice Saeta, of Los Angeles, for respondent.

PER CURIAM.

The following opinion, which was prepared by the late Judge Clair Sprague Tappaan while acting as a justice pro tempore of this court, is hereby approved and adopted as the opinion of the court:

The plaintiff recovered a judgment against defendant, the jury assessing his damages at $2,471.44. From the judgment entered upon the jury's verdict defendant appeals. Plaintiff's complaint states a cause of action arising from certain alleged violations of the terms of a lease by defendant, the lessor herein named. Defendant made a general denial of the allegations of the complaint, and filed a cross-complaint claiming that certain rents were due him from plaintiff upon an implied contract.

From the evidence introduced at the trial it appears that the defendant was the owner of a certain garage building on the southeast corner of West Seventh and Magnolia streets in the city of Los Angeles. That in November, 1927, he leased to plaintiff the rear or south 15 feet of the building for three years at a monthly rental of $100. Plaintiff to have the right to use the front or Seventh street entrance to the building until a new entrance was cut on Magnolia street. Some months later plaintiff, requiring more room for his business, entered into negotiations with defendant for more floor space in the garage building where he was lessee. With that end in view, plaintiff wrote at defendant's dictation the following instrument:

"Five year lease April 1, 1928.

First Year	$2000.00	in case of sale 60 days Bonus.
Second Year	1500.00	
Third Year	1000.00	
Fourth Year	750.00	
Fifth Year	50.00	

"This applys to repair shop from north side of wash rack to south end of building. Rent to start from April 1st, 1928, at 150.00 dollars a month. 50.00 more to go on lease for last month. Mr. L. Richbart is not to make any changes on front of building till a drive way is put in west side of building and a wall put acrost. Mr. Richbart agrees not to rent front of building for garage purposes.

"[Signed] Geo. Keller."

Plaintiff signed this instrument and delivered it to defendant at his request. Contemporaneously with the execution and delivery of the above-mentioned instrument, plaintiff, at the request of defendant, gave to defendant a check for the sum of $150, which check defendant accepted and later cashed. This check had written upon its face the following: "Garage rent for April 1928 on new lease." It should be noted that defendant had up to this time received from plaintiff but $100 per month as rental of the premises occupied by plaintiff. Thereafter and at monthly intervals plaintiff delivered to defendant some ten checks in the sum of $150 each which defendant indorsed and cashed. These checks were all inscribed as "rent"; in some instances there was added "for back end of garage," and in others appeared "rent" naming the current month. After the signing of the instrument heretofore mentioned, plaintiff testified that he expended money in making improvements in his shop. He caused to be installed a washing machine for automobiles which he thereafter purchased and also purchased a gasoline pump. Though defendant took some preliminary steps looking to the installing of the wall across the garage, and the placing of a new entrance into the premises occupied by plaintiff, no actual work was done in that regard. For a time the front part of the garage was rented by defendant to some person other than plaintiff. It would appear that plaintiff and defendant had some conversation as to storage of automobiles in the unused part of the building and that defendant gave his tacit consent to such use. He kept his own automobile here at the time, and was often in the building. Though plaintiff collected the storage charges, he was forced to employ an additional man on account of the fact, he testified, of there being but a common entrance and no dividing wall across the garage. In February, 1929, defendant leased the garage, including the part held by plaintiff, to the General Cab Company, and at about the same time offered plaintiff the sum of $500 to vacate the premises held by him. This offer was refused by plaintiff. Defendant then agreed to pay the General Cab Company $400 "as expense of such eviction," referring to the eviction of plaintiff from the premises. These facts are interesting when defendant's position considered here is that the original lease was still in force, which provided that plaintiff should vacate upon the payment of $250.

The evidence introduced by plaintiff is to the effect that, after the General Cab Company entered into possession of the garage, he sent defendant the monthly rental provided to be paid by him in the instrument under which he claimed to hold the premises, that these checks were by defendant delivered to the General Cab Company, and that he (plaintiff), at the request of the cab company, exchanged them for checks of like amount made payable to the cab company. The evidence also shows that, after the cab company entered into control of the premises, it engaged in the garage business in a general way, and that plaintiff's business declined until after a period of about three months the income that plaintiff received therefrom became so small that he could no longer operate the business, and he was thereby forced to abandon the premises and store his equipment. The evidence also established the fact that during the time plaintiff occupied the premises in question, and until the cab company entered upon them, he had built up a business therein that was operated by him at a substantial profit and had acquired a "good-will" which was of value.

[1-3] Defendant's first few specifications of error all are directed to one proposition of law, and can very properly be considered here as presenting but a single question for determination. It is defendant's contention that the instrument, dated "April 1, 1928," and heretofore in this opinion set forth, was an attempt to make a new lease, and, as it was unsigned by the lessor, it was therefore void, and no rights were acquired thereunder by plaintiff. Defendant bases this contention on the statute of frauds. Civ. Code, §§ 1091, 1624. This instrument, though artlessly drawn, would seem (when it is considered that it must be construed most strictly as against defendant who dictated it) to contain all of the essentials of a valid lease. In any event, whether it be considered as a new lease or merely as a modification of the existing lease which at the time it was executed had some two years yet to run, both tenable theories under the facts here present, the identical question is presented. If the questioned instrument amounted to a modification of the existing lease between the parties, the failure of the defendant to sign would be immaterial under the circumstances of the instant case; an oral modification would have been binding, as far as it was executed. Anderson v. Adler, 42 Cal. App. 776, 778, 184 P. 42; Julian v. Gold, 214 Cal. 74, 3 P.(2d) 1009. On the other hand, if the instrument is to be considered as a new lease, under the circumstances presented by the record here, it would be inequitable to permit the defendant to raise the bar of the statute of frauds. The rule is well established in this jurisdiction that: "Whenever a party has, by his own declaration, act, or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act, or omission, be permitted falsify it." Code Civ. Proc. § 1962, subd. 3. This rule of law is clearly applicable here. Defendant accepted the rent under the new lease, declared before witnesses that he had made the lease, made measurement looking toward the improvements mentioned in the instrument, retained possession of the lease without question, and permitted plaintiff to expend moneys in improvement of the additional room included in the new arrangement. He was estopped from repudiating the lease. Defendant's failure to sign the lease when it was delivered to him by plaintiff, taken in connection with his other acts in relation thereto, would seem to fairly bring the instant case within the exception created by section 1623 of the Civil Code. Under circumstances somewhat similar to this case, our courts have applied the rule of estoppel just referred to. The following cases are illustrative of this point: Schubert v. Lowe, 193 Cal. 291, 295, 223 P. 550; Seymour v. Oelrichs, 156 Cal. 782, 795, 106 P. 88, 134 Am. St. Rep. 154; Holstrom v. Mullen, 84 Cal. App. 1, 257 P. 545; Heffernan v. Davis, 24 Cal. App. 295, 140 P. 716.

Defendant complains that the trial court was in error in permitting plaintiff to amend his complaint during the trial. The record fails to disclose that the court, in permitting this amendment, exercised other than sound judicial discretion. The amendment was authorized by section 473 of the Code of Civil Procedure.

[4] The next question presented here is that the leasing of the premises for "general cab business" was not one for "garage purposes." The evidence is ample to support the implied finding that the leasing was in fact one for "garage purposes."

[5] There is no merit in defendant's contention that the jury failed to find on the issues raised by the cross-complaint. Defendant waived any objection as to the form of verdict by his failure to make a timely objection thereto. Asebez v. Bliss, 178 Cal. 137, 172 P. 595. There was evidence sufficient to sustain the implied finding as against defendant upon these issues.

[6] The final point raised by defendant is that there was insufficient evidence to warrant the jury in finding the amount of damages awarded by them to plaintiff. The question is one of fact, and the record here is sufficient to support the award. Plaintiff introduced evidence which was not questioned, that the income received by him from the business was lost to him within a very short time after the premises came under the control of the cab company. He had derived a substantial profit therefrom up to that time. He had established a "going business" and had acquired a "good-will" in the location. This was a valuable property interest of which he was deprived by the acts of the defendant. The damages awarded, under the circumstances of the instant case, are not so large or unreasonable that this court would be justified in reversing the judgment or in declaring them unreasonable in amount.

The purported appeal from the order denying a new trial is dismissed. The judgment is affirmed.

130 Cal.App. 414

MILLER v. MAGILL.

Civ. 4759.

District Court of Appeal, Third District, California.

March 16, 1933.

1. Appeal and error 🔑1058(2).

In action for money loaned, excluding question what did plaintiff understand from cablegram asking for money to which plaintiff would have replied she understood it was request for loan, rather than gift, *held* not prejudicial where plaintiff had given same testimony.

2. Money lent 🔑7(2).

In action for money loaned, evidence of value of plaintiff's inherited estate and that before marriage plaintiff had little means *held* properly admitted to prove alleged loan was gift.

3. Appeal and error 🔑1050(1).

In action for money loaned, admitting evidence of plaintiff's wealth to show alleged loan was gift *held* not prejudicial as showing plaintiff was rich, especially since community necessarily knew of her wealth.

4. Appeal and error 🔑1050(1).

In action for money loaned, admitting evidence that plaintiff inherited her wealth *held* not prejudicial upon theory that jury would award small amount to plaintiff.

5. Gifts 🔑48.

Generally, courts make fullest possible investigation into cases where gift is claimed.

Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

Action by Doris M. Miller against Joe Magill. From the judgment for defendant, plaintiff appeals.

Affirmed.

J. Oscar Goldstein, of Chico, for appellant.

Ware & Ware, of Chico, for respondent.

PARKER, Justice pro tem., delivered the opinion of the court.

The action was to recover moneys alleged due and owing from defendant on account of loans and advancements. The case was tried by jury, and after a verdict returned in favor of defendant, judgment was accordingly entered. A motion for a new trial was denied. This appeal follows, plaintiff being the appellant.

No assignment is made of the insufficiency of the evidence to sustain the verdict. It is not claimed by appellant that the evidence, as a matter of law, is insufficient to justify the verdict and judgment. The foregoing statements are taken verbatim from appellant's brief. Nor is complaint made of the action of the trial court in instructions given, modified or refused. The entire appeal involves certain claimed errors in the admission and rejection of testimony.

That the specifications of error may be discussed it becomes necessary to give some general outline of the case.

While the complaint was in three counts, each seeking recovery of a specific amount, the real controversy results from one transaction involving the receipt by defendant of the sum of $1,500, which amount admittedly passed from plaintiff to defendant. The aggregate of all the sums claimed was $1,726.25, but no point is made on the appeal in so far as the smaller amounts comprising the balance might be involved. As to this $1,500 the plaintiff contends that she loaned this sum to defendant upon an implied promise of repayment. Defendant, admitting receipt of the money, classes it as a gift.

For some six or seven years defendant had been in the employ of the family of plaintiff, said family consisting of plaintiff and her husband, now deceased. After the demise of the husband, defendant continued in the employ of plaintiff. The nature of his employment was as a chauffeur.

It appears that plaintiff left the United States on a journey to Europe, just a pleasure tour. Prior to her departure she arranged with a trust company to care for certain business affairs during her absence, and the trust officer having immediate charge of her affairs was one Sims. Defendant was left at the home of plaintiff with general minor duties, such as keeping the automobiles in condition, preserving the household intact, etc.

It is conceded that Sims was not the general agent of plaintiff nor was he endowed with any authority as to the subject matter of this action. His status here is simply as a means or medium of communication with the plaintiff while and when the latter was absent.

The defendant Magill, during the absence of plaintiff, became desirous of establishing himself in business. He required funds. He discussed the matter with Sims and the latter sent a cablegram to plaintiff reading as follows: "Joe wants fifteen hundred dollars to buy garage business, Castroville—apparently good proposition—shall we pay him—cable reply." The answer received from plaintiff was as follows: "Pay Joe—hope he is successful —your letters not received—hope everything is O. K.—we are fine—regards."

[1] Plaintiff admitted receipt of the cablegram and the sending of the answer. Her counsel then asked her: "What did you understand by this cablegram?" Objection was interposed by defendant, and sustained. The first assignment of error centers about the court's ruling on this question. Much argument supports the contention, and many authorities are cited and rules of evidence quoted.

We find nothing to be gained by any extended analysis of the point. Should we find the error as claimed, we would then be required to determine whether or not any harm or prejudice to appellant resulted. If the question had been permitted, appellant claims that she would have answered that from the wording of the cablegram, and from all of the circumstances existing, she understood the message as an application for a loan rather than a request for a gift. The evidence thus brought out would have been cumulative. The appellant testified not once, but many times, that the transaction, from her viewpoint, at all times was a loan, and that she always understood it so to be. All of the evidence on both sides was on this issue and the phase of the case, relative to appellant's understanding of the situation, was fully developed. Therefore, we conclude that it is unnecessary to review the entire field of evidence and scrutinize the cases wherein it has frequently been held that under given conditions one may testify as to intent or motive. No injury could possibly have resulted from the trial court's ruling in this case, and the error would be insufficient to disturb the judgment.

[2] On the trial defendant was permitted to prove the value of the estate left to plaintiff by her deceased husband; he was permitted to show further that at the time of her marriage the plaintiff was a person of little means, dependent entirely upon her own efforts for support. This evidence was allowed over the strenuous and persistent objections of appellant.

Before discussing the merits of the objections, it would be well to further outline the picture presented from the record. There were but two witnesses who could throw any clear light upon the transaction: Plaintiff, who had parted with the money, and defendant, who had received it. Plaintiff claimed she loaned the money, and defendant's claim was that a gift was made to him. If the record stopped there, the jury would be put to somewhat of a hazard in speculating where the truth might be, and a verdict either way would find support. In other words, assuming each party appeared worthy of belief, the case would stand in balance. In Steil v. Sun Insurance Office, 171 Cal. 795, 155 P. 72, 75, there was before the court the question as to whether or not a fire insurance company had given oral consent that certain merchandise be covered after removal from one building to another. Plaintiff there had testified that consent was given, and defendant denied such an understanding. Plaintiff then offered testimony to show that the building to which the goods had been removed was a less hazardous building than the one in which the merchandise had formerly been kept. The court held such evidence admissible, saying: "It was material upon the disputed question whether or not the companies' agents had consented to continue the risk in the new place, showing that it was not against their interest, and, consequently, that it was more probable that they would consent than if the risk had been thereby increased." The rule thus recognized and stated is one of logical probability. Reasonably construed it renders material any fact or facts that have a reasonable tendency to facilitate a fair conclusion on a controverted issue. We can see nothing that would be of greater aid to a jury in determining an issue of loan or gift than a complete disclosure of the relative positions of the parties at the time involved.

[3] It is urged that if a jury is permitted to learn that one party is rich and the other poor, the verdict will reflect either sympathy or prejudice, with a total disregard of justice. It is claimed that experience affords a background for such an argument. Yet, recorded protest seems to indicate that both the rich and the poor remain malcontent. The rich decry the denial of even justice because of prejudice; the poor complain of the inequality that wealth creates. It is an age-old problem, and we seem no nearer a solution than when it first arose. But on the whole we find that rarely, if ever, has the law in its functioning warranted the criticism of either the rich or the poor. It so happens, fortunately or unfortunately, as the case may be, that one's relative status is often determined by his or her wealth. This results favorably,

as well as unfavorably, so that no peculiar hardship results, if we concede this much. We are not prone to give to the argument all of the weight that appellant claims for it. Where it appears in a case that either party has purposely and designedly stressed the point of the comparative wealth of the parties, we are then presented with a question of wilful misconduct, and the case will be treated accordingly. For instance, if in a case involving one of the nation's well-known financiers and capitalists, evidence were allowed showing his wealth, there could be little harm done, inasmuch as it would be evidence of a well-known fact, and little harm could result from its admission. However, if the fact of wealth should be urged as a reason why other facts should be disregarded or otherwise actively used to create prejudice, error would result. So in the instant case we may assume that the wealth of the plaintiff was a fact of common knowledge in the small community wherein the parties resided, and from which the jury was drawn. No person can be worth half a million dollars in a small community and conceal the fact. But aside from any question of general knowledge, the admitted facts, aside from the objectionable evidence, demonstrated the situation. It was in the record that defendant had been some six years in plaintiff's employ as a chauffeur; that her garage contained four automobiles of expensive make; that she owned a hunting lodge and one or two summer homes; that at the time of the transaction under discussion she was traveling through Europe with a woman companion; and that during her absence at least two attendants were kept at her home. Also, it was shown that prior to her husband's death, much of the time was spent in travel and diversion of expensive character. These facts must have created an impression of wealth, aside from direct evidence on the subject.

[4] Lastly is complaint made on the reception of evidence to the effect that plaintiffs' present resources were the fruits of inheritance, without which she would be impoverished and with no independent means. Appellant argues that this evidence was a mute argument to the jury that inasmuch as her money was practically a gift to her, the defendant might well be given a small amount on general notions of distribution. We are of the opinion that the question is one primarily of argument, and should have been addressed to the jury, as no doubt it was.

[5] We are not inclined to go too far in imagining what does or what does not influence the verdicts of juries. There was before the jury evidence of friendly and confidential relationship between plaintiff and defendant. It can readily be inferred that if plaintiff was a person whose premarital status had been that of a self-supporting worker, such a friendliness might perhaps have been more natural than in the case of one "to the manner born." There was evidence introduced to the effect that the husband of plaintiff and plaintiff had relied much upon the service of defendant; that both the husband and wife had often expressed the intention of doing something for defendant in the way of setting him up in some little business. The fact that the husband had deceased, and that the widow's wealth was of his bounty, was not so far from the issues of fact as to be deemed prejudicial to the extent demanding reversal. As a general rule of law and practice the courts are directed to make the fullest possible investigation into cases where a gift is claimed, and a recognition of such a rule may be found throughout the reports of both the Appellate and Supreme courts. Kennedy v. Scally, 62 Cal. App. 367, 217 P. 96; Monnette v. Title Co., 107 Cal. App. 313, 290 P. 668; Union Mutual v. Broderick, 196 Cal. 497, 238 P. 1034; Field v. Shorb, 99 Cal. 671, 34 P. 504; Russell v. Langford, 135 Cal. 356, 67 P. 331; 28 Cor. Jur. 674.

In passing we might add that if the situation had been reversed and if the amount involved had been the widow's mite, appellant would be here strenuously and successfully contending contrarywise to her present argument.

Regardless of speculations justifying the admission of the evidence, it is not contended that it is untrue, nor does it cast reflection upon plaintiff. Appellant admits the evidence sufficient to sustain the verdict, and a careful reading of the transcript confirms the admissions.

We deem appellant's grievances greatly imaginative. Quoting with approval from respondent's brief: "We have a story of years of loyal and intimate service; of promises of a gift; of application for the gift; of its approval by the one person in California at the time who was in the trust of appellant; an exchange of cablegrams directing, without question, payment."

All in all, the case was fully and fairly tried, and the jury was instructed on the law applicable. Inasmuch as the issues presented did involve much that was personal between the parties, it was but natural that the scope of inquiry became somewhat broadened. But we fail to find where any injustice has resulted.

The judgment is affirmed.

We concur: **PLUMMER, Acting P. J.; THOMPSON, J.**

130 Cal.App. 349

COHN et al. v. COHN et al.

Civ. 841.

District Court of Appeal, Fourth District, California.

March 13, 1933.

1. Trusts 🔑44(3).

In face of presumption arising from deeds absolute in form and reciting consideration, trust could only be established by clear and convincing evidence.

2. Trusts 🔑44(2).

Evidence sustained finding that grantee did not take title in trust for grantor.

3. Evidence 🔑269(3).

Grantor's letters and testimony of statements, made by grantor after delivery of deed, tending to show absolute conveyance, *held* admissible on issue whether grantee took title in trust for grantor (Code Civ. Proc. §§ 1853, 1870).

4. Witnesses 🔑202.

Where question was whether conveyance was absolute, grantor's statements to attorney in giving instructions for preparation of will *held* not objectionable as privileged, especially where made before another.

5. Trusts 🔑41.

Party seeking to establish trust had burden of proof.

6. Appeal and error 🔑1170(7).

Where admissible evidence sustained finding, errors, if any, in admission of evidence would not warrant reversal (Const. art. 6, § 4½).

Appeal from Superior Court, Kings County; K. Van Zante, Judge.

Action by Newton G. Cohn and others against Bertha Cohn and others. Judgment for defendants, and plaintiffs appeal.

Affirmed.

Joseph A. Brown, Joseph T. O'Connor, Thomas R. White, Milton Choynski, and Norman A. Eisner, all of San Francisco, for appellants.

H. Scott Jacobs and John G. Covert, both of Hanford, for respondents.

BARNARD, Presiding Justice.

This action was brought by certain heirs and devisees of Charles Cohn, deceased, for the purpose of establishing a trust as to some 2,200 acres of land situated in the Tulare lake bed in Kings county, which land had been conveyed by Charles Cohn in his lifetime to his brother, Levi Cohn. Plaintiffs contend that in fact this land was conveyed to Levi Cohn in trust for Charles Cohn or for him and his heirs. Charles Cohn conveyed the land in question to Levi Cohn by grant deed dated May 24, 1918, and recorded May 27, 1918. The deed recites a consideration of "Ten Dollars and other good and valuable consideration to him in hand paid," and $8 United States documentary stamps were affixed thereto and canceled. On June 6, 1918, Charles Cohn, as attorney in fact of Irving Cohn, executed another deed conveying the same land to Levi Cohn in consideration of $10 and other good and valuable consideration, which deed recited: "This deed is given for the purpose of correcting a deed dated the 24th day of May, 1918, and recorded in Book 65 of Deeds at page 493." It is conceded that at the times these deeds were executed the land in question was the property of Charles Cohn, and that Irving Cohn held the legal title in trust for Charles, who held Irving's power of attorney. Charles Cohn died on June 22, 1926. The defendant Bertha Cohn is the widow of Levi Cohn who, before his death, had conveyed the land to her. Bertha Cohn filed a cross-complaint asking that title to the land be quieted in her. After a trial the court found, on all disputed issues, in favor of Bertha Cohn, and from a judgment quieting her title this appeal is taken.

The main contention of appellants is that the evidence does not support the judgment, but is in all respects contrary thereto. It is contended that the first deed of May 24, 1918, is void for the reason that the legal title then stood in the name of Irving Cohn, and that title was conveyed to Levi Cohn only by the second deed dated June 6, 1918. It is then contended that it conclusively appears that the land was conveyed in trust to Levi Cohn by the second deed, because Charles Cohn then held a power of attorney executed by Levi Cohn and because the effect of this deed is disclosed and controlled by a certain letter written by Charles Cohn on May 29, 1918, five days after the execution of the first deed and eight days before the execution of the second deed. This letter begins: "Dear Bro Levi and sister Edith," but was mailed to the sister, Edith Fisher, who lived at San Anselmo, while Levi lived in Butte county. This letter, after stating that the writer owed $1,000 to Levi, Edith, and three other relatives, refers to the war, complains of the actions of several members of the family, and then continues:

"I have lost much as atty. in fact of Irving Cohn, deeded deed not yet returned to me by Kings Co. Recorder. All said Lake lands 2000 and odd hundred acres to L. Cohn, & my sole object as stated to protect you all beyond question of doubt and only I didn't deed to all of you instead of Levi it would be to complicated for me to handle, but while standing in Levi's name I hold his power of atty, and at all times can give it my prompt attention as if it stood in my own name, and in case of emergency he will protect you all, as your interests may appear. Very simple as you hold my notes and he will treat besides the 2000 acres all fair as himself. I hold patented lands in Tulare Lake for some 4000 more acres will get some crop this year. Most is under water—but in case of one favorable year on all the land just 1 crop will give you a fortune if 1 or 2 more dry seasons we will catch it.

"Say nothing to any body about this matter and Levi dont let Mr. D. S. Cohn messmerize you to not deed any 1 inch of this land. Consult me. Love to all retain this for reference. C. Cohn. P. S. I will probably w-want to deed my other 4000 acres to you also other lands and properties. All I want is the satisfaction of handling and management during my life and my normal faculties will permitt, but we must be just towards all and fair. Levi is getting along in age and is married. Hence Edith you and Levi not known to any one what you deem is best and less expensive and simplest form to formulate plan with justice and equity to all in conformity to justice and deserving and submit to me all I ask is little plain food and clothes while I exist. Love to all. C. Cohn."

It appears that after the death of Charles Cohn there was found among his papers a power of attorney to him executed by Levi Cohn, given and recorded in 1897, and the court found that this was given in connection with other lands not involved here.

[1] It may well be questioned whether this letter of May 29, 1918, relied upon by appellants as conclusively establishing a trust, would be sufficient for that purpose had no evidence been introduced by the respondents. The deeds conveying the property to Levi Cohn were absolute in form, recited a consideration, and, in face of the presumption arising therefrom, a trust could only be established by clear and convincing evidence. Sherman v. Sandell, 106 Cal. 373, 39 P. 797; Woodside v. Hewel, 109 Cal. 481, 42 P. 152. The letter in question is vague and indefinite. While it contains certain expressions indicating that the writer intended to give the land further attention or to exercise some control over the same, it contains other expressions indicating that the writer had conveyed the land absolutely. Neither the beneficiaries, the purposes, nor the conditions of any trust are set forth clearly or at all. It cannot be said that the first deed was of no effect, as, in any event, Irving Cohn was at that time holding the legal title to the land in trust for Charles Cohn, who had the right to convey his interest therein. 25 Cal. Jur. 323; Wright & Kimbrough v. Carly, 11 Cal. App. 325, 104 P. 1009. The second deed was corrective only, conveying the legal title, but the first deed had conveyed all of Charles' interest in the land, leaving only the naked title in Irving, as before. The letter was not written at the same time either of the deeds were executed, and, in fact, was written five days after Charles Cohn had parted with all his interest in the land, and after the deed had been recorded. It further appears that the letter was mailed to the sister, Edith Fisher, was produced by her at the time her deposition was taken in this case, and the record is absolutely devoid of any evidence that the letter was ever shown to or called to the attention of Levi Cohn.

In addition to the presumption arising from the deeds, the record contains other evidence supporting the findings of the trial court. While appellants produced a number of witnesses who testified that Levi Cohn had at various times made statements to the general effect that he held this land in trust, the deposition of Levi Cohn was introduced in which he denied all these conversations and having made any such statements, and in which he, not only denied any trust relationship, but testified to facts inconsistent therewith. He also testified that in 1919 or 1920 Charles said to him: "I have made you a landowner of a valuable land;" and that in April or May of 1926, Charles again said to him: "Don't sell, barter or trade that lake land; it is a very valuable piece of property." Bertha Cohn testified that her husband Levi paid the taxes on this property during his lifetime and that she paid the taxes after his death. On September 3, 1919, Charles Cohn wrote to his sister Edith Fisher and, referring to Levi Cohn, said: "I deed to this ingrate with no strings a independent fortune." It may here be observed that in all of his letters Charles Cohn was in the habit of referring to his relatives in terms not too complimentary. For example, at one time he wrote to his sister Edith as follows: "The entire family with rare exceptions are the most ignorant, idotic vicious unappreciative, degenerate ungrateful corrupt brainless vampires abortions petty larceny thieves bandits on the face of this earth."

[2] At another time he wrote: "God owes me a great grudge, so many idiots and embecels in one family." On February 3, 1919, Charles wrote to Levi: "Please send me check act your land taxes Kings County." And then, after referring to this land, giving the amount of taxes, he said: "In future you inform Kings Co. assessor send you blank statement direct and you can fill in and advise him to assess it to you direct." On February 26, 1920, Charles wrote to Levi in reference to a division of the crops produced on this land and on other lake lands owned by Charles, insisting that Levi make out a separate income tax report covering the proceeds of the land conveyed to him. Mrs. Bertha Cohn testified that Charles said to Levi in her presence in March, 1920, in reference to some work Levi had done for Charles: "Well,

you'll never regret it. I made you a rich man. * * * I deeded that lake land to you for you and your babies, and it will make you a rich man some day." The record contains sufficient evidence to sustain the findings complained of, and the matters referred to by appellants, at best, merely disclose some conflict.

[3] The only other point raised is that the court erred in admitting certain evidence. It is first urged that the letters written by Charles and certain oral testimony of statements made by him after the delivery of the deeds, tending to show that he had conveyed the land absolutely, were not admissible, it being argued that the acts and declarations of a grantor, after the delivery of a deed, may not be received either to impeach it or to sustain it. Appellants cite the following cases: Northern Calif. Conference Ass'n v. Smith, 209 Cal. 26, 285 P. 314; Gallagher v. Gallagher, 98 Cal. App. 180, 276 P. 634; Bollinger v. Bollinger, 154 Cal. 695, 99 P. 196; Emmons v. Barton, 109 Cal. 662, 42 P. 303; Mowry v. Heney, 86 Cal. 471, 25 P. 17; Yordi v. Yordi, 6 Cal. App. 20, 91 P. 348. While these cases sustain the rule that such acts and declarations may not be received to impeach a deed, they contain nothing to sustain the proposition that they may not be received to sustain the deed, and we are cited to no cases setting forth such a rule. One of the principal contentions made throughout this action is that Charles Cohn conveyed this land to Levi Cohn to be held in trust for himself. Upon this issue at least the evidence here attacked was admissible under section 1870 and 1853 of the Code of Civil Procedure. A further consideration is that, even if all such evidence should be disregarded, there would remain evidence sufficient to sustain the findings attacked.

[4] Appellants also attack as inadmissible certain evidence given by an attorney who drew the last will of Charles Cohn. It is urged that statements made to this attorney by Charles Cohn in giving instructions for the preparation of his will were privileged. Not only would it appear that this contention is without merit (Estate of Nelson, 132 Cal. 182, 64 P. 294; Estate of Dominici, 151 Cal. 181, 90 P. 448), but the record contains ample evidence that the statements objected to were made in the presence of a third person (Sharon v. Sharon, 79 Cal. 633, 22 P. 26, 131).

By his will, Charles Cohn disposed of an estate of approximately $1,000,000, giving approximately 80 per cent. thereof to Levi Cohn. It appears that some settlement was agreed upon between Levi Cohn and the other heirs, under which the other heirs were to receive 55 per cent. of the entire estate and Levi was to retain 45 per cent. thereof. We are asked to pass upon certain matters which might be involved in the final settlement of the estate in connection with this compromise, but these have no possible connection with the matter now before us and cannot be here decided.

[5, 6] The burden of proof throughout this action was upon the appellants. There is ample evidence, the admissibility of which is beyond question, to sustain the findings made, and, under section 4½ of article 6 of the Constitution, any possible errors in the admission of evidence cannot be held sufficient to warrant a reversal.

The judgment appealed from is affirmed.

We concur: MARKS, J.; JENNINGS, J.

130 Cal.App. 408

PEOPLE v. MURPHY.

Cr. 2165.

District Court of Appeal, Second District,
Division 2, California.
March 16, 1933.

Hearing Denied by Supreme Court April 14, 1933.

1. Escape 🔑5.

Crime of "assisting" escape of one in law's custody requires actual attempt by prisoner to free himself from confinement or custody (Pen. Code, § 109).

> A person can only "assist" another in what the latter makes an effort to do of his own volition.

> [Ed. Note.—For other definitions of "Assist," see Words and Phrases.]

2. Escape 🔑5.
Rescue 🔑1.

Person's attempt to free another from confinement or custody without any effort on latter's part constitutes "rescue," not "escape" (Pen. Code, §§ 101, 109).

[Ed. Note.—For other definitions of "Escape" and "Rescue," see Words and Phrases.]

3. Escape 🔑5.
Rescue 🔑1.

Act of arrested person's companion in striking officer and making him unconscious effected "rescue," and hence arrested person who took no part in disabling officer was not assisted by his companion to escape (Pen. Code, §§ 101, 109).

4. Escape 🔑1.
Rescue 🔑1.

As regards rescue or escape, policeman's custody over prisoner, to be legal, must be effective (Pen. Code, §§ 101, 109).

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Harold C. Murphy was convicted of simple assault under one count of an information, and under a second count was convicted of a violation of Penal Code, § 109, denouncing the crime of assisting the escape of one in the custody of the law, and he appeals.

Reversed as to the second count.

Hearing Denied by Supreme Court; SEAWELL, SHENK, and CURTIS, JJ., dissenting.

Frederic H. Vercoe, Public Defender, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

WORKS, Presiding Justice.

Defendant was convicted of simple assault, under the first count of an information, which charged assault with a deadly weapon, and was found guilty under the second count, which charged a violation of section 109 of the Penal Code, denouncing the crime of assisting the escape of one in the custody of the law. The appeal of defendant is general and is from the judgment and from an order of the trial court denying his motion for a new trial, but he complains only of the judgment and order under the second count.

[1, 2] The point is settled without dissent, in those few jurisdictions in which it has arisen, that one cannot be guilty of such a crime as that specified in section 109 of the Penal Code unless his effort accompanies an actual attempt upon the part of some one else to free himself from the confinement of prison walls or from the custody of some minion of the law. The question is one of first impression in California, but the unanimity of decision elsewhere seems based upon reason and logic. One can only assist another in what that other makes an effort to do of his own volition. If one attempts to free that other from restraint without any effort on the latter's part the crime is a rescue, denounced in this state by section 101 of the Penal Code. "These indictments being for the offense of aiding Wesley Hubert, a prisoner, to escape from custody, the first question is whether the offense proved was the one charged, or whether it was the offense of rescue. The two relevant sections of the Code are as follows: 'Rescue is the forcibly and knowingly freeing another from arrest or imprisonment.' Section 4478. 'If any person shall aid or assist any prisoner to escape, or attempt to escape, from the custody of any sheriff, coroner, constable, officer, or other person who shall have the lawful charge of such prisoner, such person so offending shall, on conviction, be punished,' etc. Section 4483. We think that rescue takes place where there is no effort on the part of the prisoner to escape, but his deliverance is effected by the intervention of others, without his co-operation; whereas the offense of aiding a prisoner to escape consists in inciting, supporting, or re-enforcing his exertions in his own behalf, tending to the accomplishment of that object." Robinson v. State, 82 Ga. 535, 9 S. E. 528, 529. See, also, Harvey v. State, 8 Ga. App. 660, 70 S. E. 141; State v. Sutton, 170 Ind. 473, 84 N. E. 824; State v. Christian, 253 Mo. 382, 161 S. W. 736; King v. Tilley, 168 Eng. Rep. (Crown Cases) 433; Rex v. Martin, 168 Eng. Rep. (Crown Cases) 757.

[3, 4] With this rule of law stated we now come to the facts of the present case. Appellant is charged with assisting the escape of one Nathan from the custody of a police officer. There is not the slightest direct evidence in the record of any attempt upon the part of Nathan to effect an escape, but the Attorney General insists that there is evidence upon which the jury might justly have inferred that such an attempt was made. We shall recite some of the evidence, in general, first, and shall then state that upon which respondent relies.

A police officer named Pursley, while on his beat at about 1:30 a. m., discovered an automobile parked in the street about fifteen feet from the curb line. Appellant and Nathan were in the front seat of the car, appellant being at the steering wheel. The vehicle belonged to appellant. The two men were "fighting," as the officer put it. He said that he "found one fellow in a very drunken condition, who was wanting to drive, and the other fellow would not let him drive." The drunken one was Nathan, but there was later evidence that appellant was also somewhat intoxicated. After some conversation the officer told Murphy to "take his car and go on home, and I would take care of the other fellow; so I gets Nathan over to the box"—meaning a police telephone box. Before he took Nathan, however, appellant, Pursley said, "tried to talk me into letting him go," but the officer would not do so. When asked as to appellant's condition Pursley said, "He was sober"—"sober enough to take care of himself." He said Nathan "was very drunk." In speaking of his taking Nathan over to the box the officer said: "I told him, * * * 'You come and go with me,' and he said, 'All right,' and he went very freely across the street, about 50 or 75 feet from the car, catercornered across the street, and sat down by the box very quietly." In the meanwhile appellant procured a wrench from the tool kit in his car and approached the other two, the officer standing at the telephone and Nathan sitting on the curb beside the pole to which the box was attached. Pursley did not see appellant's approach. He said: "I had called for the car to come out, and as I turned from the box, just turned around, Mr. Murphy struck me with a wrench right over the eye, cutting the eye on the inside and bruising the eye until it has been sore ever since." The blow also loosened teeth on one side of Pursley's head. It was for this attack that appellant was convicted of simple assault under the first count of the information. The blow rendered the officer unconscious and he fell to the pavement. "I was out; I don't know for how long. * * * When I came to and looked around there was no one in sight." Appellant and Nathan had both disappeared. The officer had taken their names and addresses when he first saw them and they were both arrested at appellant's home a little more than two hours later, where they were apparently awakened from sleep.

There was much testimony as to the condition of Nathan during the times that are of interest here. Police Sergeant Sweetman passed by soon after Pursley discovered appellant and Nathan and stopped a few moments. He said on the stand: "Nathan was then in the car and he was slouched over in the front seat and trying to talk. He kept up a continual attempt." This same officer also testified:

"Q. When you saw Mr. Nathan at that time and place, did you form an opinion as to whether or not he was intoxicated? A. I did.

"Q. Was he intoxicated? A. Yes, sir, he was.

"Q. How did he act? A. He was slouched over in the machine, in a position to show that he was not physically able to take care of himself, and half of what he said you could not understand. He talked continually."

And again, from the sergeant's testimony:

"Q. Do you think he could have climbed into an automobile without assistance at that time? A. I doubt it very much.

"Q. In your opinion, he had passed beyond the state of intoxication where a man is merely being reckless, and had proceeded to the stage where he was stupid and on the point of unconsciousness? A. Yes, to the point where he was not capable of taking care of himself.

"Q. Or doing anything to help himself? A. He could probably walk, but he was not in a safe condition; he would be liable to fall before he got very far.

"Q. Do you think he was in any condition to know what he was doing, or what anybody else might do in his behalf? A. No, I don't believe he was. His conversation was unintelligible, and you could not piece it together."

Police Officer Imbler was one of those who arrested appellant and Nathan. He testified thus of Nathan's condition at the time:

"How did Mr. Nathan's intoxicated condition manifest itself to you? A. To the extent of his intoxication?

"Q. Yes, how did you know; how did he act? A. He was not able to stand firmly by himself, and his speech was thick, and we had to half dress him ourselves.

"Q. Did any of the things he said to you make sense at all? A. No, I would not say they did. He would go from one subject to another.

"Q. In your opinion, was he so intoxicated that he did not know what he was doing at all, or know what others were doing about him? A. At that time I believe he had some idea; that is, he had enough physical condition to carry himself from the house out to the car by his own power, and in some of his conversation he seemed to be all right.

"Q. You think if he had been as drunk as described in my question that he had partially recovered from it when you saw him? My question was whether he knew what he was doing or what others about him were doing; in your opinion, if he had been in that condition, when you saw him he had partially recovered, when you got there. Is that what you mean? A. I don't understand.

"Q. How drunk was he? Was he so drunk he did not know what he was doing, or what other people around him were doing? A. He apparently did not from the conversation he had."

Officer Tucker was with Imbler when the arrest was made. He testified, after saying that he had heard Imbler's testimony:

"Q. Your answers would be the same if I asked the same questions? A. Not exactly.

"Q. What is your opinion? A. I would say he was a little drunker than the other officer stated he was."

The Attorney General advances these three propositions: (1) That Nathan was not so drunk that he was unable to form an intent to escape. (2) That he did in fact escape. (3) That he was assisted in the escape by appellant.

In support of the first proposition reference is made to the fact that when Pursley told Nathan to come with him the inebriate responded, "All right." Attention is called to the fact that Nathan then "went very freely across the street and sat down by the box very quietly," but it must here be observed that the statement that he went freely is to be construed that he went willingly, especially as Pursley testified on cross-examination that Nathan "could not walk without help." The Attorney General also refers to Imbler's statement concerning Nathan's condition at the time of the arrest, to the effect that Nathan "at that time * * * had some idea," and that "he had enough physical condition to carry himself from the house out to the car by his own power, and in some of his conversations he seemed to be all right." If we concede—although the concession is quite likely of doubtful propriety—that these items of evidence show a substantial conflict with other evidence upon the question whether Nathan was in a frame of mind which enabled him to hatch up an intent to escape, we are brought into insuperable difficulty under the next proposition advanced by respondent.

The proposition is that Nathan did in fact escape. We think this thesis is unjustified by the evidence. Nathan certainly made no endeavor to effect an escape before the cruel blow was inflicted by appellant upon Pursley. That blow and the consequent unconsciousness of the officer immediately effected a rescue. From the moment the officer ceased to be a sentient being Nathan was relieved of his thralldom. As in the case of a blockade under the rules of war, the custody of a policeman over his prisoner "to be legal must be effective." No effort was necessary on his part to free himself. Suppose the officer had been killed. Would Nathan then still have been a prisoner? If so, a prisoner to whom? Suppose, without the intervention of appellant and without even his presence in the proximity of policeman and prisoner, that Pursley had suffered a violent heart attack and had fallen to the pavement while he stood at the telephone box. Would Nathan longer have been his prisoner? Certainly a dead man cannot maintain a custody over another. Why is not this truism applicable in such an instance as this? How did Nathan know whether or not Pursley had passed to the great beyond after appellant had struck the villainous blow, granting that he had the sense left with which to know a blow had been inflicted? Was he bound to tire himself by waiting beside the recumbent Pursley, his former custodian, in order to determine whether he would survive or succumb, and, if the former, then resubmit himself to custody? We think not. As we have said, Nathan was the donee of a rescue when appellant struck Pursley down. Then he had the right to "fold his tents like the Arabs and as silently steal away."

This view disposes of the third proposition of respondent, that appellant "assisted" Nathan to escape.

Fortunately, it appears not to be too late, if the authorities be so advised, to inform against appellant for a rescue of Nathan.

The evidence was insufficient to support the verdict.

Having reached this conclusion, it becomes unnecessary to consider other points made by appellant.

Judgment and order reversed as to the second count of the information.

We concur: CRAIG, J.; STEPHENS, J.

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130 Cal.App. 529

McCLURKEN v. RALPH'S GROCERY CO.

Civ. 8786.

District Court of Appeal, Second District, Division 2, California.

March 23, 1933.

As Corrected on Denial of Rehearing April 18, 1933.

Hearing Denied by Supreme Court May 22, 1933.

1. **Negligence 🔑136(22).**

Grocer's negligence was for jury in action by customer who, while following clerk who was carrying sack of potatoes, fell on slippery floor littered with vegetable scraps.

2. **New trial 🔑38.**

New trial was proper, where court erroneously granted nonsuit in customer's action against grocer for injuries resulting from slippery floor.

Appeal from Superior Court, Los Angeles County; Joseph P. Sproul, Judge.

Action by J. P. McClurken against Ralph's Grocery Company. From order granting plaintiff new trial after nonsuit, defendant appeals.

Affirmed.

Hearing denied by Supreme Court; CURTIS and THOMPSON, JJ., dissenting.

George P. Kinkle and John S. Hunt, both of Los Angeles, for appellant.

Meserve, Mumper, Hughes & Robertson and Timon E. Owens, all of Los Angeles, for respondent.

STEPHENS, Justice.

[1, 2] The plaintiff, respondent here, testified at the trial that he was shopping in defendant's grocery store, and, while following a clerk, who was carrying a sack of potatoes through the store, "stepped on something very slick and slippery and slipped and fell violently to the floor." He also testified that he saw scraps of vegetables on the floor just where and as he fell and that the vegetable stand was about ten feet from where he fell. A motion for nonsuit was made and granted, and thereafter a new trial was granted. We are here considering the appeal upon the latter act.

The motion for nonsuit was made upon "the ground that there had been no showing made by the plaintiff of actionable negligence on the part of the defendant." The motion for a new trial is sought to be sustained alone upon the contention that the granting of the nonsuit was against law. Applied to the facts of the case, respondent, plaintiff below, thinks the plaintiff's testimony amounted to some substantial evidence of the defendant's negligence and that the question of negligence should have been submitted to the jury. The case of Williamson v. Hardy, 47 Cal. App. 377, 190 P. 646, 647, presents the same point upon the court's refusal to direct a verdict. The facts of the two cases have striking similarities. We quote from the opinion as follows: "Taking the plaintiff's positive testimony that she slipped and fell upon the floor of the defendant's market through having stepped upon a piece of oiled paper made slippery by the adhesion to it of scraps of fresh meat, it was a question for the jury to determine whether or not the defendant was negligent in permitting such a substance to be lying upon the floor of his market where customers were wont and were required to walk while making their purchases therein." A quotation from Gullick v. Interstate, etc., 111 Cal. App. 263, 295 P. 549, 551, is also pertinent: "The plaintiff was seventy-nine years of age, and at times somewhat confused in his testimony, but when we apply the rule which should be made use of upon a motion for a nonsuit it becomes apparent that the judgment should be reversed. The rule alluded to is that 'where evidence is fairly susceptible of two constructions, or if one of several inferences may reasonably be made, the court must take the view most favorable to the plaintiffs.' Berger v. Lane, 190 Cal. 443, 213 P. 45, 49." It would seem, then, that the trial court was wrong in determining that the evidence of plaintiff was in fact no evidence of negligence and that it should not have granted the nonsuit. In these circumstances the court was acting well within its rights in granting the new trial.

Appellant lays great stress on the Estate of Baird, 198 Cal. 490, 246 P. 324, as supporting his case. We think it is in accord with and supports the respondent's case. The two are parallel, in that nonsuits were had in both and new trials were ordered thereafter in both. The difference lies in the fact that in the instant case the motion for nonsuit was made and granted at the conclusion of plaintiff's case, whereas in the cited case the motion for nonsuit was made at the conclusion of plaintiff's case but granted after defendant's testimony had been taken. Obviously in both cases a motion for nonsuit would be based upon the insufficiency of plaintiff's testimony, but in the cited case the trial court seems to have erroneously considered the defendant's testimony as affecting its ruling. Of course, the insufficiency of a defendant's evidence or the untrustworthiness of his witnesses could not help plaintiff to make his case against a motion for nonsuit. If respondent's reasoning is correct, we should have to read the Baird Case as holding that the trial court could not correct its error on motion for new trial where a nonsuit had been erroneously granted on the ground that the evidence was insufficient to make a case. The opinion in that case contains one sentence that, taken away from its context, would seem to support this viewpoint. The opinion read as a whole does not so hold.

The granting of the motion for nonsuit was against law, and the trial court was right in granting a new trial.

Order affirmed.

We concur: CRAIG, Acting P. J.; ARCHBALD, Justice pro tem.

130 Cal.App. 507

PEOPLE v. HOLMES.

Cr. 243.

District Court of Appeal, Fourth District, California.

March 22, 1933.

1. Criminal law 🔑407(1), 741(3).

Evidence that defendant merely stated, "I have nothing to say," when alleged accomplice told story in defendant's presence, of commission of offenses, tended to show admission, weight of which was for jury.

2. Criminal law 🔑511(1).

In prosecution for injuring telephone lines, accomplice's testimony *held* sufficiently corroborated (Pen. Code, § 591).

3. Criminal law 🔑1166(1).

Consolidation of prosecutions for grand theft of automobile and for injuring telephone lines *held* not prejudicial, where, although few hours intervened between two offenses, taking of automobile was done to facilitate other offense (Pen. Code, §§ 591, 954).

Appeal from Superior Court, San Diego County; Arthur L. Mundo, Judge.

Joseph Holmes was convicted of injuring telephone lines, and he appeals.

Affirmed.

Edgar G. Langford, of Hollywood, for appellant.

U. S. Webb, Atty. Gen., and James S. Howie, Deputy Atty. Gen., for the People.

BARNARD, Presiding Justice.

The defendant was charged in one information with the crime of grand theft and in another information with the crime of injuring telephone lines, in violation of section 591 of the Penal Code. On motion of the district attorney, the two causes were consolidated for trial, and the defendant was found guilty of the crime of injuring telephone lines and not guilty of the crime of grand theft. From the ensuing judgment, and from an order denying a new trial, the defendant has appealed.

The sole ground of appeal is that the court erred in consolidating the two actions for trial; the appellant contending that this was prejudicial to him, for the reason that it is probable that he would not have been convicted if tried upon the charge of injuring telephone lines alone.

It appears from the evidence, although largely from the testimony of an accomplice named Vasquez, that both were members of the Marine Corps stationed at the Marine Base at San Diego; that Holmes, an experienced telephone operator, had ascertained that certain pay stations of the Southern California Telephone Company in San Diego were opened by the company's agents on or about the 20th of each month for the purpose of removing the money accumulated therein; that Holmes proposed to rob one or more of these stations, and particularly one located in Mercy Hospital in San Diego; that Holmes and Vasquez left the Marine Base on leave together, about 12 o'clock noon on August 18, 1932; that they returned together and were checked in at about 4:15 a. m. the following morning; that on leaving the Marine Base they went to Mercy Hospital, where they saw an automobile with the keys in the lock; that this car belonged to a doctor who had left therein a bag containing certain surgical instruments; that Holmes told Vasquez to take the car, drive it away, change the license plates thereon, and meet him later at a designated place; that Vasquez drove the car away, stole another set of license plates, put them on the car, and later met Holmes at the place agreed upon; that the two then went to the Naval Station where Holmes placed the doctor's bag in a locker he had there; that Holmes took from this locker his locker trunk and placed it in the car; that about 8 o'clock that night the two returned to Mercy Hospital, where Holmes went to the telephone booth while Vasquez remained on watch at the door; that a few moments later Holmes came out with the locker trunk in his hands and both of them carried it to the car; that they then drove to a convenient spot where Holmes broke open a coin box on a pay telephone and took therefrom approximately $23, which amount was equally divided between the two; and that the two then returned the locker trunk to Holmes' locker. There was also evidence that a pay station telephone set had been removed from Mercy Hospital, and that the bag and surgical instruments which the doctor had left in his car were found in Holmes' locker.

[1] Following their arrest, Vasquez, who had made a full confession, was taken to Holmes, and, in his presence, told the story of the commission of the two offenses about as outlined above, after which Holmes replied to the suggestion of the officers that he make a statement: "I have nothing to say." This evidence tended to show an admission of the truth of the charge, the weight of which was entirely a matter for the jury. People v. Ong Mon Foo, 182 Cal. 697, 189 P. 690; People v. Smith, 111 Cal. App. 579, 295 P. 862.

[2, 3] Although appellant does not raise the question that the accomplice was not corroborated, such corroboration sufficiently appears from this evidence tending to show an admission, and from the further facts that the two left the Naval Base at the same hour, returning together the following morning at 4:15, and that the bag and surgical instruments left in the car by the doctor were found in appellant's locker. The only argument advanced by the appellant as a reason why the two offenses were not connected in their commission, within the meaning of section 954 of the Penal Code, is that several hours intervened between the taking of the car and the taking of the pay station coin box. Not only does it appear from the evidence that the two offenses were closely connected in their commission, and that the taking of the car was done to facilitate the other offense, but the fact that a few hours intervened between the two offenses neither breaks the connection nor tends to indicate that prejudice might have resulted in trying the two causes together. People v. Feigelman, 65 Cal. App. 319, 223 P. 579; People v. Northcott, 209 Cal. 639, 289 P. 634, 70 A. L. R. 806.

That portion of the evidence received which would have been admissible had the appellant been tried only upon the charge upon which he was convicted fully indicates that the result would have been the same in that event, and that no prejudice has resulted to appellant. After reading the transcript, we are not of the opinion that any miscarriage of justice has occurred.

The judgment and order appealed from are affirmed.

We concur: JENNINGS, J.; MARKS, J.

130 Cal.App. 449

In re MARMADUKE'S GUARDIANSHIP.

MARMADUKE v. HILYARD.*

Civ. 8631.

District Court of Appeal, Second District, Division 2, California.

March 18, 1933.

Rehearing Denied April 13, 1933.

Hearing Denied by Supreme Court May 15, 1933.

1. Guardian and ward 🔑**25.**

Denying father's petition to revoke appointment of deceased mother's sister as child's guardian *held* within trial court's discretion under evidence in view of findings in guardianship proceeding.

2. Parent and child 🔑**2(3).**

Child's welfare takes precedence over parent's right to custody.

3. Parent and child 🔑**2(3).**

Child's welfare must be seriously threatened to justify refusal to award custody to parent.

Appeal from Superior Court, Los Angeles County; Charles S. Crail, Judge.

Petition by J. Morgan Marmaduke to revoke the appointment of Mabel S. Hilyard as guardian of the person and estate of Elayne Marmaduke, a minor. The petition was denied, and petitioner appeals.

Affirmed.

See, also, 114 Cal. App. 278, 299 P. 835.

Paul C. Hill, of Los Angeles, and McCaffrey & Scanland and J. Morgan Marmaduke, all of Oklahoma City, Okl., for appellant.

Joseph Scott and Benno M. Brink, both of Los Angeles, for respondent.

STEPHENS, Justice.

On March 17, 1931, respondent was appointed guardian of the person and estate of Elayne Marmaduke, then aged about nine years. On September 16, 1931, J. Morgan Marmaduke, father of said minor (the mother is dead), filed a petition to have such appointment vacated and revoked and to have the custody of said child awarded to him. The superior court held against him and we are considering his appeal.

Some legal points are presented, but they all merge into the question of fact upon which the trial was had, to wit: Is appellant, under all of the circumstances obtaining, a fit and proper person to have the custody of the child? Appellant in effect concedes that he must show present conditions to be so much better than those found in the guardianship proceeding as to justify a contrary holding. We shall briefly sketch the court's findings: In July, 1928, appellant was placed on probation for issuing fictitious checks. One of the probation requirements was that appellant remain out of California for ten years, and he went to Kansas City, Mo., taking Elayne with him. Parenthetically we here desire to express our doubts as to the legal rights, and our emphatic condemnation of the policy of American courts issuing decrees of banishment to citizens under any combination of circumstances. In the summer of 1929, respondent, with the knowledge, consent and request of appellant, returned Elayne to Los Angeles, Cal., and upon his request delivered her to his wife, Jean Marmaduke. Shortly thereafter the minor was taken from Jean Marmaduke by the juvenile court, declared a ward of the court, and placed in the custody of Mr. and Mrs. William H. Stubblefield, her maternal grandparents, and parents of respondent. Respondent lives with the Stubblefields and the minor is well cared for in the home. The minor lived with appellant, his wife Jean Marmaduke, and her son, about the age of Elayne, from November 24, 1928, to July 13, 1929. During this period the minor was kept in a "filthy, unclean and unkempt condition"; sleeping part of the time with the said son, who frequently soiled the bed with urine. Also part of the time she slept in a room with Mr. and Mrs. Marmaduke and observed sufficient happenings to suggest lewd practices on her part. She was caused to do work beyond her years and she witnessed quarrels and a physical encounter between appellant and his wife. Whisky was drunk in her presence and she was urged to drink it. She was not sent to school. She was whipped unnecessarily by Mrs. Marmaduke. She was given insufficient nourishment, and her stepmother used profane language in her presence. While appellant was under probation he passed checks to which he forged his father's name and his parents paid out ten or twelve thousand dollars on such account. Appellant is of a weak character and the conduct of father and stepmother is "below that which is ordinarily found in a well-conducted home." The testimony shows that appellant has not contributed in any way to the minor's support since the appointment of the guardian.

Appellant presents a number of affidavits, one by his wife and others by persons of substance in Oklahoma, where the family has lived for some time, to the effect that appellant is working in a high-grade law office as law clerk, receiving something more than $250 per month. That he is living an exemplary life.

[1-3] Appellant maintains that there is no evidence to support the trial court's decision. We cannot agree with him. The child's welfare comes first, and the right of a parent to the custody of his child comes next. In fact, the child's welfare must indeed be seriously threatened to justify a court's decree separating its custody from that of the parent.

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*Rehearing denied 20 P.(2d) 965.

The findings referred to present a bad picture; one, indeed, that would require remarkable evidence to convince a court that things had radically changed in the half year elapsing between the date they bear and the appellant's petition.

We think the trial court was well within its discretionary power in determining from all of the evidence that no relief should be granted petitioner.

Judgment affirmed.

We concur: CRAIG, Acting P. J.; ARCHBALD, Justice pro tem.

MacARTHUR v. INDUSTRIAL ACCIDENT COMMISSION et al. *

Civ. 8744.

District Court of Appeal, Second District, Division 2, California.

March 16, 1933.

Rehearing Denied April 15, 1933.

Hearing Granted by Supreme Court May 15, 1933.

1. Marriage 🔑50(1).

Woman's mistaken belief that regular marriage was legally impossible *held* not to justify inference that she entered into common-law marriage in bad faith.

2. Divorce 🔑327.

Casual testimony as to duration of residence in sister state before procurement of divorce from first husband cannot, in compensation proceeding concerning second husband's death, justify inference that decree was illegal because residence was insufficient.

3. Marriage 🔑50(1).

Evidence *held* to show that claimant was entitled to compensation as wife of deceased employee.

Proceeding under the Workmen's Compensation Act by Rae MacArthur for the death of her husband, Glenn MacArthur, opposed by the Raymond Concrete Pile Company, employer, and the Employers' Liability Assurance Corporation, Limited, of London, England, insurer. From award of Industrial Accident Commission denying adjustment of compensation, claimant brings certiorari.

Award annulled, with directions.

J. D. Bauer, of Los Angeles, for petitioner.

A. I. Townsend, of San Francisco, for respondents.

WORKS, Presiding Justice.

Petitioner applied for an adjustment of compensation for the death of Glenn MacArthur, alleged to have resulted from injuries suffered by him and arising in the course and out of his employment under respondent Concrete Pile Company. Respondent commission having denied the application on the ground that petitioner was not the wife of MacArthur at the time of his death, she came to this court for the writ of review, asking an annulment of the award made against her. We issued the writ with some misgivings, feeling that the case was one of great hardship upon petitioner and therefore desiring to examine the entire transcript of the evidence, naturally due under return to the writ. The transcript now lies before us.

We shall recite material portions of the evidence in the order in which it was unfolded at the hearing. Mrs. MacArthur, as we shall term her throughout, testified that she and MacArthur were married in Vancouver, British Columbia, probably on October 4, 1921, although she expressed some doubt as to the exact date, that she had no marriage certificate, that they "never had a license, it was just an agreement," and that the agreement was not in writing. This appears in the record:

"Q. In what manner was your marriage with Mr. MacArthur consummated and celebrated? A. Well, we agreed to live as man and wife.

"Q. And what was said at the time you made that agreement? A. Well, he asked me if I would marry him. I told him I had been married in Canada, but I had a divorce in the United States and I couldn't be married again. So then he wanted me to live with him as his wife and we agreed—I agreed to be his wife, and he agreed to be—to live with me as my husband and support me and keep me."

At the time, she had secured "no legal advice as to whether or not [she] could secure a marriage by ceremony and license in British Columbia," that she "had heard it from several," that "it was a rumor among [her] friends and acquaintances." The two immediately took up housekeeping together in Vancouver and remained there a year, and "then we came down here"; that is, to Wilmington, in the county of Los Angeles. Immediately after they came together, Mrs. MacArthur commenced a correspondence with MacArthur's mother, writing her that she had married her son. Upon examination by the referee, Mrs. MacArthur testified as follows:

"Q. Mrs. MacArthur, at the time you made this alleged agreement with Mr. Glenn MacArthur, did you then honestly believe that you were entering into a legal agreement or marriage? A. Yes.

"Q. Why did you believe that? A. Well, because I was married once and had a divorce.

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*For subsequent opinion see 29 P.2d 846.

"Q. And before you were married by a minister, you say? A. Yes.

"Q. Why didn't you get married by a minister this time? A. Because it was in Canada I was married before. * * *

"Q. Well, it was in Canada that you married this deceased, wasn't it? A. But I couldn't have no license. I couldn't be married there again.

"Q. Why? A. I didn't get a divorce in Canada.

"Q. Where did you get your divorce? A. They give you a divorce only on adultery.

"Q. Where did you get your divorce? A. At Tombstone, Arizona. * * *

"Q. Did you apply for any marriage license in Canada before you entered into this agreement? A. No.

"Q. Did you have him apply for any—meaning Mr. MacArthur? A. No. Just had an agreement among ourselves.

"Q. Had he ever been married before? A. No. * * *

"Q. Did he make any representations to you causing you to believe that you were entering into a legal agreement of marriage with him? A. Well, we thought we would go on and live for years, just the same, we was man and wife.

"Q. And did you believe that you were lawfully living with him as such during all the time that you lived with him? A. Yes, sir. * * *

"Q. That was your honest belief, was it? A. Yes, sir."

On cross-examination by counsel for the Concrete Pile Company, Mrs. MacArthur testified:

"Q. Now how was it that you made no attempt to have any marriage ceremony or to secure any marriage license for this relationship with Mr. Glenn MacArthur? A. Because we agreed to live as man and wife; he has always treated me as such, and I always acted—treated him as a wife.

"Q. Well, in the latter part of September or first part of October, 1921, was anything said about any marriage ceremony, that is, when you were in Vancouver? A. Yes. We—he asked me if I would marry him. I told him I was married there once before and I got my divorce in the United States, but it wouldn't be legal in Canada.

"Q. Then you knew that you could not legally marry him, is that true? A. Not in Canada.

"Q. Then when you came to the United States you made no attempt to legalize that relationship that you entered into in Vancouver, is that true? A. We made an agreement over in Vancouver to live as man and wife and we stayed with it and lived that way. * * *

"Q. That can be answered 'yes' or 'no.' A. No.

"Q. And you knew at the time that you made this so-called agreement in Vancouver that you could not legally marry Glenn MacArthur, is that a fact? A. Yes.

"Q. And you knew that the relationship you were having with him was not legal, is that true? * * * A. No.

"Q. You say it is not true that you did not know [*sic*]? A. Yes.

"Q. You knew you couldn't marry him legally, didn't you? A. Yes.

"Q. And you made no attempt to have any legal ceremony in the United States? A. No. * * *

"Q. Now, as I understand it, the reason that you did not apply for any marriage license in Vancouver was because you knew that you could not secure a license, is that right? A. Well, yes."

On redirect examination the witness testified:

"Q. Had you known of the common law—of a marriage known as the common law marriage? A. Yes. * * *

"Q. At the time that you and Mr. MacArthur started living together in Vancouver did he give you any ring? A. Yes, he got me a wedding ring. I told him he would have to get me a wedding ring, I didn't have any.

"Q. And he gave you the ring? A. Yes.

"Q. And you put it on and wore it? A. Yes, I wore it all the time.

"Q. Have you still got it? A. No, I haven't got the same one.

"Q. What became of it? A. It got too small and had to file it off.

"Q. And then—did he give you another ring then? A. Yes, he bought me the one I am wearing.

"Q. Did you believe at the time you made that agreement with Mr. MacArthur to live with him as his wife and he live with you as your husband, that you were entering into a legal marriage? A. Yes, I thought it would be all right as long as he supported me.

"Q. Have you always believed that? A. Yes.

"Q. When you came to the United States did you believe you were coming here with Mr. MacArthur, your husband? A. Yes.

"Q. Did you believe at the time you had your conversation with Mr. MacArthur about whether or not you could get a license in Canada that you could—did you then believe that you could be married by an agreement between you? Did you believe that you could be married by an agreement between you at that time? A. Yes."

On recross-examination Mrs. MacArthur testified:

"Q. On what did you base that belief? A. What is that?

"Q. On what did you base the belief that this so-called agreement was a legal marriage? A. Because he supported me, and he worked, and I was a legal wife to him and kept house and did everything a wife would do for a husband.

"Q. And did you know another couple living together in Vancouver who were not married? A. Yes.

"Q. And you knew that they could not be married? A. I don't know about them that they couldn't be married; I know they were living together as man and wife.

"Q. In any event, you knew that you couldn't be married there? A. Yes. * * *

"Q. And at the time you entered into this status with Glenn MacArthur did you make any inquiry as to any matters pertaining to marriage? A. No."

The witness testified further:

"Q. Did you believe at the time that you entered into your agreement of marriage with MacArthur that your agreement to marry and followed by cohabitation was just as legal as a marriage by license and solemnized by a preacher? A. I did."

In addition to these extracts from the testimony, a further and general statement should be made. Commencing at the time of the agreement mentioned by Mrs. MacArthur the parties lived together as husband and wife until the day of MacArthur's death, a period of about eleven years. They were never separated during that time except when in one instance he was in San Jose doing work for the Concrete Pile Company. This absence was from three to five weeks in length. Soon after they came together, she introduced him to her two brothers, to a sister, and to her parents as her husband. When they came to Wilmington, he introduced her to his mother as his wife, and they lived together in the mother's house for a short time. An aunt of his once lived in the same house with them for a brief period. They entered into several business transactions with others in which they figured as husband and wife. His earnings, which amounted when he was regularly employed to either forty-eight or fifty-four dollars the week, were handed to her each week, with the exception of four or five dollars which he retained to pay for cigarettes and to buy gasoline for his car. When he needed additional money, he applied to her for it. She had no income except that which she derived from him. What he gave to her she kept in a bank account in her name as Mrs. Rae MacArthur, and drew checks against the account for their joint benefit. She managed entirely the business of the household, whether domestic or financial. They were known to all with whom they came in contact as partners in the institution of marriage. In short, to the eyes of the peering world, they were as much husband and wife as any pair who ever came into the relationship through ceremony at the matrimonial altar, performed according to the laws concerning marriage.

It is conceded in the briefs that at the time when MacArthur and his alleged wife came together the laws of British Columbia permitted what is generally known as a common-law marriage. It is not contended by respondents, so far as *acts* are concerned, that what the parties did in October, 1921, followed by their behavior from that time until MacArthur's death, did not effect the consummation and continued maintenance of a legal relationship. It is certain that when the laws of California provided for common-law marriages, as they once did, the facts shown by the return here would have constituted as valid a connubial relationship as was ever created by license, followed by ceremony performed by judge or minister of the gospel. It is not even contended by respondents that persons divorced elsewhere than in British Columbia on other grounds than adultery could not contract a marriage in the province. In other words, the case on this particular point, under the contention of respondents, is this: Mrs. MacArthur was married to MacArthur *in deed*, but what she did amounted to nothing because her actions were performed in bad faith. So far as this point is concerned, then, unless evidence can be found in the return from which respondent commission could justly have determined that there was a lack of good faith behind Mrs. MacArthur's actions, the award against her must be annulled.

[1] We now turn to the brief of respondents. They say that Mrs. MacArthur's "testimony shows that she was of the opinion that, on account of her divorce decree not having been granted on the grounds of adultery, she was under a legal disability to contract a marriage in the regular way, which conclusively shows that the so-called agreement between petitioner and deceased to live together as husband and wife was not in good faith, but was entered into because she could not or thought she could not secure a marriage license or be married by ceremony." We think Mrs. MacArthur's testimony shows not at all that the agreement between her and MacArthur was not in good faith. In arriving at the conclusion which it did, respondent commission entered into the realm of assumption instead of resorting to legitimate and just inference. The fact that Mrs. MacArthur believed she could not marry MacArthur "in the regular way" affords no support whatever for an inference that she knew anything about the law concerning common-law marriage. The legal mind perceives that in basic principle, upon their foundation stones, the two kinds of

marriage are the same to this extent, that, where one could not be consummated for such a reason as that given by petitioner, the other could not. But to say of a lay mind that because it knew something about the one kind of marriage it knew also about the other, is to indulge in speculation and guesswork. In truth, lay people know very little upon the subject of common-law marriage. Indeed, they know little enough about the laws affecting "marriage in the regular way." This latter remark is justified upon common knowledge. Take, for instance, the quite prevalent misapprehension of the law relating to interlocutory decrees of divorce. Great numbers of people of more than fair intelligence contract bigamous marriages under the belief that they have the right to wed again after they or their former spouses have procured the entry of interlocutory decrees. If the good faith of these people were in question—wholly aside from the question whether they have violated the positive law denouncing bigamy—who, upon the fact that they had been married before and consequently knew something about the laws relating to marriage, could justly "infer" that they knew they had no right to contract second marriages between the interlocutory and final decrees which severed their first? Respondent commission failed to look at the question before it through the eyes of Mrs. MacArthur. It did not view the prospect from where she stood. She swears time after time that she believed MacArthur was her lawful husband, and they together, for eleven years marched through life as if they both believed they were legally wedded. There is nothing in the evidence which justified respondent commission in drawing any inference which could furnish a substantial conflict with the testimony of Mrs. MacArthur. It were equally as proper to infer that she knew nothing about the basic principles affecting common-law marriage as to infer that she knew any particular thing about them. Therefore the "inference" drawn amounted to nothing, was unjustified by the evidence, and was no more than conjecture.

Immediately following the above quotation from their brief, respondents say: "And further, after applicant and deceased moved from Vancouver, B. C., into the United States no marriage license was secured or no marriage ceremony was performed." Surely, if this proposition be viewed from the standpoint of the reiterated statements of Mrs. MacArthur under oath, it answers itself. If she and MacArthur were married at Vancouver, why should they have married again? If they had gone through a marriage ceremony in the United States, they would have stood self-convicted of the wrong of having sustained a meretricious relationship during the year preceding their entry into the country. Their failure to contract a marriage by license when they came across the border, and during a decade following that event, argues for the good faith of their agreement to live together as husband and wife.

It is contended by respondents that this marriage is set for naught by the recent decision of the Supreme Court in Flanagan v. Capital National Bank, 213 Cal. 664, 3 P.(2d) 307, 308, but we think not. There the plaintiff made claim to a share of alleged community property, the man with whom she had been living having died. The court said: "It is admitted by plaintiff that she never was legally married to the decedent, but it is urged that she has the status of a putative or de facto wife, and is entitled as such to claim a share in the property on equitable grounds, under the rule laid down in several decisions in this state," which are then cited. The court goes on, italics ours:

"In all of these cases, the essential basis of recovery is a bona fide belief on the part of the 'wife' in the existence of a valid marriage. *No such belief is shown by the evidence before us.* In about the year 1911 plaintiff went to live with Flanagan, and to outsiders they declared that they were married. *No license was procured and no solemnization was had.* In the examination of plaintiff by her attorney we find the following:

" 'Q. What did he say about the license?

" 'A. He said it was not necessary; we did not have to have any license. He says, "We will get along *as good as any couple that is married and better.*" '

"Further on she testified:

" 'Q. You relied upon his representations that you and he were *just as good as married?*

" 'A. I did, *nothing was ever discussed about it.*' "

The Supreme Court then immediately proceeds: "It would be difficult to believe that even an inexperienced foreigner, unacquainted with the laws and customs of this country, would consider that by this arrangement she had contracted a valid marriage. But plaintiff was not inexperienced. She had lived all her life in California, and had been previously legally married and divorced. Everything in the record suggests that she viewed the relationship not as a marriage, but as a satisfactory substitute for a marriage."

This proceeding presents an utterly different aspect from the case decided by the Supreme Court. That tribunal remarks that no belief is shown by the evidence that a valid marriage existed between the parties. Here there is no testimony on the question except that of Mrs. MacArthur to the effect that she believed a valid marriage existed, and we have already determined that nothing in the evidence justified the commission in indulging in any inference which would raise a conflict with her testimony. Considering the matters stated in our final quotation from the language of the Supreme Court, and considering that no such thing as a common-law marriage has been known to the polity of California for more than thirty years, if we register correctly the passage of time, the fact that Flanagan and his alleged "wife" procured no license and that there was no solemnization is most striking and important. The portion of the testimony quoted by the court in its opinion also speaks volumes which are not required to be translated.

[2] Respondents assert that it is "questionable" whether petitioner had procured a valid divorce in Arizona, this because the statute in force in the state at the time which is now of interest required a residence of six months within its borders by plaintiff before the commencement of suit, and she testified she had then lived there three or four months. The testimony to that effect came about in this way. Counsel for the Concrete Pile Company searchingly cross-examined Mrs. MacArthur as to her movements and whereabouts from the time she met her first husband to the time when she and MacArthur were married by the agreement between them. During this questioning she testified that she procured her divorce from her first husband in Tombstone, Ariz., July 22, 1916. In the midst of the examination came that part of the record quoted above and which ends:

"Q. And you made no attempt to have any legal ceremony in the United States? A. No."

Immediately following this extract the record shows:

"Q. How long did you live in Arizona prior to the 22nd of July, 1916? A. About three months.

"Q. And was Herbert Meehan [her first husband] living in Arizona at that time? A. No.

"Q. Where was it that you had last lived with him? A. Wallace, Idaho.

"Q. Wallace, Idaho; and when was it that you last lived with him? A. 1915.

"Q. In this divorce proceeding in Tombstone, Arizona, was there any alimony granted to you? A. No, I didn't ask for no alimony."

Further on, and we quote at length to show the method of the examination, the record shows the following:

"Q. And when was it you lived together with Herbert Meehan in Wallace, Idaho? A. In 1915.

"Q. And what was the last month you lived there? A. July.

"Q. And then did you go immediately to Arizona? A. No.

"Q. Where did you go from there? A. Went with a carnival, traveling with a carnival.

"Q. Traveling around the country? A. Yes.

"Q. And that was in the United States or in Canada? A. Yes, in the United States.

"Q. And how long did you remain with the carnival? A. From July to September.

"Q. July of 1915 to September, 1915? A. Yes.

"Q. And when you left the carnival where did you go? A. I went up to Washington, Seattle, Washington.

"Q. That was in September, 1915? A. 1915.

"Q. And how long did you remain there? A. Well, I was there during the winter.

"Q. And did you go from there to Tombstone, Arizona? A. Yes, I went from there to Douglas, Arizona.

"Q. And you had then been a resident of Arizona three months prior to the 22nd of July, 1916? A. Yes, about March or April I went there, I don't remember just when it was.

"Q. When you went to Tombstone, you mean? A. No, I applied for a divorce in Douglas and then I had to go to Tombstone for the divorce; that is the county seat; that is, it was at that time.

"Q. How long were you in the state of Arizona before you applied for a divorce? A. Three months or four, about three months, I guess it was."

This cross-examination was roving and the references to the period of residence of the witness by her were most casual. She said first "about three months" before the divorce decree was *granted* she went to Arizona immediately after she had been in Seattle "during the winter"; then she said she went to Arizona "about March or April, * * * I don't remember just when it was"; then, when asked how long she was in the state before she *applied* for the divorce, she replied, "Three months or four, about three months, I guess it was." It is to be observed, also, that she testified before the commission sixteen years after the period of her residence in Arizona, and apparently neither herself nor her counsel had the slightest idea that the construction now urged by respondent commission would be put upon her testimony. Apparently the point now urged was not being placed before the commission. The testimony came out in response to questions asked about Mrs. MacArthur's movements and activities during a number of years. We think the judgment of a sister state is not to be set for naught by such a casual and uncertain showing, and especially upon a mere collateral attack. The Arizona court necessarily inquired into the question of Mrs. MacArthur's residence and necessarily found that she had been within the state the required period before her action for divorce was commenced.

We think the testimony of Mrs. MacArthur now referred to presents no conflict with the evidence afforded by the judgment. The judgment imports verity in the face of such a showing and in such a proceeding as this.

[3] Award annulled, with directions to respondent Industrial Accident Commission to award compensation to petitioner.

I concur: CRAIG, Justice.

STEPHENS, Justice.

I concur:

Petitioner secured a divorce in Arizona. The Industrial Accident Commission, by its denial of an award to petitioner for the death of Glenn MacArthur, assumes that such decree of divorce is illegal. This was erroneous. The fact that petitioner testified indefinitely and casually that she was in Arizona three or four months before the divorce trial when the law requires a longer residence does not justify the conclusion that the divorce is invalid. She may have long been a resident of Arizona, but was actually in Arizona only a short time before the trial. She may not have clearly remembered just when she went to Arizona. A decree of a court of a sister state may not be so disregarded. It must be presumed that the Arizona court received proper proof of every essential to the decree it granted. It will be noted from the evidence that petitioner never herself doubts her legal divorcement. When later in British Columbia she desires to marry Glenn MacArthur, she is a single woman without any impediment to the right to marry. She seems to have mistaken the effect of the law, for she explains that a license cannot be obtained in the usual manner for the reason that her divorce in Arizona was obtained upon a ground not recognized by the laws of British Columbia. It is, however, the only fair inference from the evidence that she honestly thought she could enter into a common-law marriage; such a union being legal in that jurisdiction. The parties did all requisite things to constitute such a union and continued to live as husband and wife openly and decently for eleven years. A succinct and descriptive definition of a common-law marriage is given in Wittick's Estate, 164 Iowa, 485, 145 N. W. 913. It is: "Any mutual agreement between a man and woman to be husband and wife in præsenti, followed by cohabitation, constitutes a valid common-law marriage if the parties are not legally disabled from marrying; the mutual consent of the parties to the establishment of the marriage being the essential requisite." All of these elements are present in the instant case. Of course it must readily be conceded that the common-law marriage could no more be legally consummated than the marriage by license and ceremony, but this mistaken reasoning on petitioner's part for choosing the common-law procedure over the other in no way changes the fact that she was legally capable of doing just what she did do. Having assumed a legal status of marriage before coming to California, that status remained unchanged in California.

130 Cal.App. 532

BRALEY et al. v. EMPIRE WATER CO.

Civ. 833.

District Court of Appeal, Fourth District, California.

March 23, 1933.

1. Waters and water courses 🔑152(10).

Court's finding that purchasers of lands were entitled to beneficial interest in ditch system conveyed to water company by vendor *held* not inconsistent with finding that system was not held in trust by such company.

2. Waters and water courses 🔑240.

Landowner, owning water rights, is not necessarily legal or equitable owner of distributing system.

3. Waters and water courses 🔑254.

Water company's agency for landowners in delivering water to them *held* not conclusive of their complete ownership of instrumentalities used or right to take them over without compensating company.

4. Trusts 🔑63¾.

Formation of corporation, to which owner of land and water rights conveyed distribution system before selling lands and interests in such rights to others, created no resulting trust for latter.

5. Trusts 🔑63¾.

Land company's use of part of proceeds of its sale of lands to extend ditch system, after transferring it to water company in consideration of latter's stock, created no resulting trust in water company for land purchasers.

Appeal from Superior Court, Kings County; Frank Lamberson, Judge.

Action by Edward R. Braley and others against the Empire Water Company. Judgment for defendant, and plaintiffs appeal.

Affirmed.

Clark Clement, of Lemoore, for appellants.

O'Melveny, Tuller & Myers, of Los Angeles, and H. Scott Jacobs, of Hanford, for respondent.

BARNARD, Presiding Justice.

In January, 1906, the Empire Investment Company, hereinafter called the land company, owned some 18,000 acres lying on both sides of the Kings river and riparian thereto, which it desired to subdivide and sell. The land company also owned 8⅝ shares of stock in the Lemoore Canal & Irrigation Company, hereinafter called the canal company, these shares entitling the owner to certain water in addition to its riparian rights in the river. On January 8, 1906, the land company, by grant deed, conveyed to the Empire Water Company, hereinafter called the water company, certain described ditches and rights of way therefor, situated upon and used in connection with the lands owned by the land company, together with "all other water ditches and canals and interest in water ditches and canals which may now be located upon and existing upon said lands or used in connection therewith and owned by the said first party other than those particularly described; the intention being to convey to said second party all water ditches and parts of water system now existing upon said lands or used in connection therewith and owned by the said first party." This deed acknowledged the receipt of a good and valuable consideration and contained a clause authorizing the water company, as agent of the land company and its successors in interest, to take the waters of Kings river to which the land company's lands should be entitled, and to distribute the same through the "second party's water system" in accordance with an agreement of even date therewith. It further provided that no riparian or other water rights were thereby conveyed, that the same should remain appurtenant to said lands, and that the water company "has only the right to take and distribute the same as aforesaid as the agent of the first party and its assigns and successors in interest." The resolution authorizing this deed provided, among other things, that the land company should sell and convey to the water company "all ditches, canals, weirs, rights in canals or ditches, and all the necessary rights of way for canals and ditches through its lands in Kings county, and a right of way along Kings river, including a strip of at least forty (40) feet wide on each bank of the river." The acceptance of the deed was authorized by a resolution of the board of directors of the water company, in which, after reciting the proposition of the land company to exchange the existing water system for all of the capital stock of the water company, proceeds: "Now, therefore, be it resolved that this company hereby accepts said proposition and hereby purchases said ditches, water systems and rights of way, and other rights above mentioned; * * * and in payment therefor this company shall issue" all of its capital stock to the land company with the exception of one share to each director.

On the same day, the water company as first party and the land company as second party entered into a contract which, after describing the lands owned by the second party, states that the first party "is the owner of a complete and extensive water distribution system over and through said lands consisting of canals, ditches, pipe lines, weirs, dams and waterways, which have been constructed and now being extended over said lands, and interest in other canals, controlled by outside parties, and which are hereby referred to as 'auxiliary canals,'" and that both parties mutually desire to create and maintain a binding and permanent arrangement "whereby said water system shall be properly maintained and said water shall through and by means of said system be perpetually delivered and distributed to all of said lands and the subdivisions thereof" for the use of the second party and its successors in interest. This agreement provides that the first party shall furnish water to all of said lands; that the first party shall construct and extend the canals of its water system over said land and locate its auxiliary canals so that it may conveniently furnish and deliver water to all of said lands; that it shall place proper gates or outlets along its canals at such points as it may designate, which points, however, shall be convenient and practicable for reaching the various subdivisions of land where the water is to be used; that such gates are to be put in when lateral ditches have been constructed "as hereinafter provided"; and that the first party shall maintain its said water system but not including the lateral ditches "hereinafter provided for." It is then provided that the second party shall receive any water desired for said lands or any subdivision thereof at the points of delivery on the first party's canals or auxiliary canals "as above mentioned" and shall, at its own expense, build and construct any ditches which may be necessary to conduct such water from the point of delivery on the canals to the lands where the water is to be used; that the second party and its successors in interest shall thereafter keep and maintain such lateral ditches in good order and repair at their own expense; that the first party shall not be required to deliver any water to any subdivision of said lands until the construction of such branch ditches to receive the same; that the successors in interest of the second party shall pay to the first party $1 per acre per year as water rent or charge for furnishing or delivering the water as agreed; and that this rental or charge shall not be paid by the land company so long as it remains the owner of any particular parcel of the land. This contract further provided that the rights and benefits granted and the duties and liabilities imposed upon each purchaser should remain appurtenant to and binding upon each subdivision of the land so sold.

Between 1906 and 1911 practically all of this tract of land was sold by the land company. The deed received by each purchaser provided that he should receive with the land "all appurtenances, water and water rights thereunto belonging" but each deed contained the following: "Subject, however, to the rights and privileges of the Empire Water Company, and to the terms and conditions of the water agreement executed between the said grantor and the said Empire Water Company, recorded in Book three (3), page (8) of Contracts, Records of Kings County, California."

This action was filed in November, 1928, by a number of purchasers of land in this tract, it being alleged that the action was brought in behalf of all of the successors in interest of the land company. The purpose of the action is to have it decreed that the water company "holds the mere naked legal title to all the rights, privileges and property described in said deed" of January 8, 1906, and that the same is held in trust for the landowners in this tract. The complaint is based upon the theory that the water company was organized by the land company for the purpose of aiding in the sale of the land; that the intention of the incorporators was merely to furnish an instrumentality for managing and operating the water department of the land company; and that the conveyance of the ditches, canals, weirs and rights of way to the water company was made for the use and benefit of the land company and its successors in interest, and in trust for them. In a second cause of action, plaintiffs seek to terminate the trust mentioned and to eject the trustee on account of alleged failure to perform its duty to the beneficiaries of the trust.

The court found in favor of the defendant, finding in general that no trust existed in so far as the water distributing system is concerned. Among other things, the court found that it is not true that the ditches and water system described in the deed of January 8, 1906, was held in or under any trust; that the title of the water company in the distribution system was an absolute title in fee, subject only to a servitude in favor of the landowners who were entitled to receive water through said distributing system, which servitude constituted an easement appurtenant to the lands; that it was the intention of the incorporators that the water company should hold both the legal title and beneficial ownership of said ditches in its own right, subject only to the servitude mentioned; that the covenants and the obligations assumed by the water company formed a part of the consideration for the distributing system conveyed to it by the land company; and that the remainder of the water system was completed and paid for by the land company in accordance with the terms of the contract. The court further found that it was also the intention of the water company and all parties concerned that each purchaser of land in the Empire ranch should receive a beneficial interest and right in said ditch system in order that water might be delivered to his lands, and that it was the intention that the deed and contract above referred to should constitute one transaction. The plaintiffs have appealed from the judgment entered, it being contended that the findings are not supported by the evidence and that the finding last referred to not only conflicts with the other findings but, in itself, shows that a trust in favor of the landowners was intended and, therefore, resulted.

[1] In considering the sufficiency of the evidence to support the essential findings, we think it appears that the last finding referred to is not inconsistent with the other findings since the beneficial interest the landowners have through their right to be served from the ditch system is not inconsistent with a further right and interest remaining in the water company, and therefore that point need not be separately discussed. The real question involved is whether or not the situation disclosed by the evidence justifies findings and conclusions to the effect that the general water system involved is not held by the water company in trust for the landowners.

The appellants contend that the circumstances conclusively disclose a resulting trust and that the water company holds the naked legal title to the distribution system in trust for them as the successors in interest of the land company. It is argued that the existence of a resulting trust in all of the water system in favor of the landowners appears from certain evidence indicating that the water company was organized by the land company as a mere convenience for handling its water department and for the purpose of promoting sales of land; that the land company dominated the affairs of the water company in practically all its functions until about 1911 when the land was all sold; that admissions were made by certain officials of the land company and the water company subsequent to the execution of the deed and contract tending to show that a trust was intended; and that this further appears from the provisions of the deed and contract in question. In addition, appellants particularly rely upon the case of Quist v. Empire Water Company, 204 Cal. 646, 269 P. 533, in which it was held, in considering the same deed and contract involved here, that title to the 8⅝ shares of the capital stock of the canal company was held by the water company in trust for the landowners. It is argued that the ditch system here in question was transferred to the water company under the same conditions and for the same purposes as the shares of stock in the canal company, that the water and water right represented by the canal stock are useless without the means of distribution and, therefore, it must follow that the distribution system is also held by the water company in trust for the landowners. In the Quist Case, it was held that the water company had no interest or title in the water represented by the shares in the canal company other than the right given to divert and distribute these waters to the lands entitled thereto. While not a part of the holding therein, even in that case, the fact that the water company had an interest in the water distributing system apart from any interest in the shares of stock in the canal company, an interest which they might desire to sell and convey, is recognized and stated to have been apparently contemplated when a certain clause was used in the contract.

[2] It does not necessarily follow from the ownership of water rights in connection with certain land that the landowner has the same ownership, either legal or equitable, in the distributing system by which this water is brought to the land. In Allen v. Railroad Commission, 179 Cal. 68, 175 P. 466, 468, 8 A. L. R. 249, the court said: "The distributing system is a species of real property. Stanislaus Water Co. v. Bachman, 152 Cal. 726, 15 L. R. A. (N. S.) 359, 93 P. 858. The right of a landowner to receive water not devoted to public use upon land for its benefit, from an outside source, through a system of canals or pipes for conducting it to the land, is an easement attached to the land and a corresponding servitude upon the source of supply and the distributing system."

In Stratton v. Railroad Commission, 186 Cal. 119, 198 P. 1051, 1054, a case involving the same water system now under consideration, the court quoted as follows from an earlier case: " 'Where a number of persons owning land are each entitled to take water from a common stream or source, for use upon their respective tracts of land, either by virtue of an appropriation under the Civil Code or by prescription, or as riparian owners, the water right of each is individual and several, and must be considered as private property and not the subject of public use, although the persons so owning interests in the stream are very numerous and their lands include a large neighborhood. The owners of such water rights may make a joint diversion, and may carry the water from the point of diversion in a common conduit, made with common funds, and in such a case, in the absence of a special contract to the contrary, they will be the owners in common of the diversion works and conduits; but the respective water rights will remain several and will remain private property. If the persons owning such rights see fit to form a corporation and delegate to such corporation the work of making the diversion and distribution, and of constructing and keeping in repair the dams and conduits, reserving to themselves their rights in the water, as was done in this case, they do not thereby dedicate or appropriate to public use the water thus reserved and used by them. The corporation becomes merely their agent for the purpose of serving their several interests, so far as they may be served by a common system of works; the water remaining the subject of individual ownership and private use as before.' "

[3, 4] The fact that a corporation acts as agent for the landowners in delivering water is by no means conclusive that the principals are complete owners of the instrumentalities used in carrying out the agency agreement or that they may take over these instrumentalities without compensating the agent therefor. In the case at bar, the land company, while owning the land and the water rights, and before these plaintiffs acquired any interest in either, formed such a corporation and turned over to it a distribution system together with the right and duty of diverting and distributing the water. The conclusion is justified that the situation thus created was not a resulting trust but a matter of contract, the rights of the parties being expressed in the terms of the agreement, and that the corporation so formed took over the property conveyed to it subject to the rights and obligations created by the contract, including the right of the landowner to the service agreed to be rendered. In actual practice in the irrigated sections of this state, water distributing systems have frequently been owned and operated by corporations and property rights in such a system, separate and apart from a landowner's water rights and right to service from the system, have always been recognized. In many instances the landowners, after organizing an irrigation district, have purchased and paid large sums for such distributing systems. In this case the deed conveying the water system from the land company authorized the water company as agent of the land company and its successors in interest, to take the water from Kings river and "to distribute the same through the said second party's water system" in accordance with the agreement executed on the same day. This contract not only provides that the water company shall deliver the water to certain points it may designate which shall be convenient to the various subdivisions of the land and that it shall maintain the water system of which the contract declares it is the owner, but the contract further provides that the landowner shall pay for this service

and in addition shall construct and maintain his own lateral ditches without expense to the company.

The contract recognizes a continuing interest in the water company in the property conveyed by the deed and a continuing obligation on the part of purchasers of land in the tract to pay for the delivery of water, and instead of indicating an intention that the system is to be turned over to the landowners when the tract is all sold, it is expressly stated that the purpose is to make a permanent arrangement not to be changed except by a written instrument executed by all of the parties thereto, their successors or assigns. This contract was not only recorded but each purchaser accepted title to his land subject thereto. While the appellants rely on claimed admissions subsequently made by officials of the water company and of the land company, these can be of value only as throwing light on the original intention of the parties. Irrespective of any other evidence, the instruments executed at the time sufficiently evidence the lack of any intent to convey the distributing system to the water company in trust for the land company to support the judgment. Lezinsky v. Mason, etc., Co., 185 Cal. 240, 196 P. 884.

[5] The appellants further urge that they paid the consideration for the transfer made to the water company since the land company used part of the proceeds from the sale of its lands in extending the ditch system so that water could be brought to all parts of the tract. Any extensions made would seem to have been made in accordance with the contract. The amounts paid by purchasers of land in the tract formed no part of the consideration for the prior conveyance to the water company. The consideration for that transfer was, as found by the court, all of the stock in the water company and the assumption by that company of certain obligations. This consideration moved from the water company and was received by the land company, not paid by it. In Fulton v. Jansen, 99 Cal. 587, 34 P. 331, 332, the rule is thus stated: "In order to raise such resulting trust by payment of the purchase money, it is essential that the payment be actually made by the beneficiary, or that an absolute obligation to pay should be incurred by him, 'as a part of the original transaction of purchase, at or before the time of the conveyance. No subsequent and entirely independent contract, intervention, or payment on his part would raise any resulting trust.' Pom. Eq. Jur. § 1037."

Most of the evidence relied upon by appellants tends to show certain misrepresentations made by the land company in selling land to them and their predecessors, rather than to show the existence of such a trust as is here claimed. In any event, not only did they take title to their respective lands subject to a particular situation then existing and expressly referred to in their deeds, but nothing is here pointed out that does more than create a conflict. In our opinion, the finding to the effect that the distributing system described in the deed of January 8, 1906, was not conveyed to the water company in trust for the landowners in this tract is sustained by the evidence.

Complaint is made of the failure of the trial court to make findings in reference to the issues raised in the allegations of the second cause of action and the answer thereto. The second cause of action related to the removal of the trustee for failure to perform its duty under the trust and, if the judgment rendered upon the first cause of action is correct, and no trust existed, these matters became immaterial.

For the reasons given the judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.

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130 Cal.App. 501

ARMSTRONG et al. v. SCHOENBORN.

Civ. 4727.

District Court of Appeal, Third District, California.
March 22, 1933.

1. Executors and administrators ⚷59.

In action to impress funds with trust, evidence sustained finding that decedent, to whom mortgage and note were assigned for collection, received full cash value thereof, and that fund was in bank account at time of death and came into defendant's possession as executrix.

2. Executors and administrators ⚷59.

Where decedent holds money in trust and amount of decedent's bank deposit is greater than trust fund, amount on deposit will, absent showing to contrary, be presumed to be money held in trust.

3. Trial ⚷404(1).

All findings must be read together, and, if conflicting, must be reconciled, if possible.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by J. D. Armstrong and another against Veral Schoenborn, as executrix of the estate of A. L. Schoenborn, deceased.

From a judgment in favor of plaintiffs, defendant appeals.

Affirmed.

W. D. Van Nostran, Bruce Wallace, and Dryer, Castle & Richards, all of Los Angeles, for appellant.

H. M. Lineman and Mab Copland Lineman, both of Los Angeles, for respondents.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

Plaintiffs, who are respondents herein, filed a complaint against defendant to impress a trust upon certain moneys in her hands as executrix of the last will and testament of A. L. Schoenborn, deceased. The complaint is in two counts.

In the first cause of action, it is alleged that plaintiffs assigned to A. L. Schoenborn, defendant's testator, a note and mortgage of $3,500 for collection, executed by one Taylor. Schoenborn released this mortgage of $3,500 and substituted therefor a new mortgage of $4,000, executed by a man named Walker, who had succeeded to the interest of Taylor in the mortgaged property. Thereafter Schoenborn assigned this substituted note and mortgage of $4,000 to certain parties by the name of Brown. The Browns had theretofore assigned to Schoenborn a note and mortgage of $4,500, and had a credit balance with Schoenborn for that amount at the time of the assignment, and, when the assignment was made by Schoenborn of the $4,000 mortgage to them, he deducted $4,000 from the Brown account and credited the same to the account of plaintiffs, leaving a credit balance on the books in favor of the Browns for $500. Two days after the transaction thus detailed, Schoenborn died.

The second cause of action alleges that plaintiffs and respondents purchased from Schoenborn a mortgage for $4,500, known as the Gilman mortgage. No payments by Schoenborn were made to the Armstrongs on account of principal, although he had collected a total of $1,100 on account thereof—$700 on May 12, 1928, and $400 on February 15, 1929. This money Schoenborn deposited in his bank account, but did not notify plaintiffs of the receipt thereof, and continued the payment of interest on the full amount of the note as he had from the beginning of the transaction.

At the date of the death of Schoenborn on April 17, 1929, he had a total of over $14,500 on deposit in his name in various banks. These several banks, however, refused to pay these amounts to the executrix, they claiming to hold all moneys on deposit by reason of obligations of the deceased to them.

The inventory and appraisement on file in the Schoenborn estate show a total appraised value of the estate of deceased of over $550,000, with outstanding mortgages on real property of $185,000, in addition to claims filed against the estate of approximately $500,000. There is no proof nor allegation, however, as to the amount of the claims which may have been allowed against the estate.

The trial court concluded as a matter of law that plaintiffs were entitled to a judgment against the estate of decedent upon both counts upon the theory that the moneys were held in trust and were not assets of the estate, and that plaintiffs were not relegated to the position of general creditors of the estate. From this judgment defendant, as executrix, appeals, and the issues thus presented are before us for determination.

The case of Elizalde v. Elizalde, 137 Cal. 634, 66 P. 369, 70 P. 861, has thus very appropriately expressed the law, as applicable to the case before us: "It is, however, contended on behalf of the appellant that, unless the plaintiff could identify the specific trust fund held by the deceased from the general assets of his estate, he can assert only the claim of a creditor, for which he must present his claim for allowance against the estate, and that such identification was not made. In Lathrop v. Bampton, 31 Cal. 17, 89 Am. Dec. 141, it was said: 'The identity of a trust fund consisting of money may be preserved so long as it may be followed and distinguished from all other funds, not by identifying the individual pieces or coins, but by showing a separate and independent fund or value, readily distinguishable from all other funds.' And again: 'If at the time of his death the defendant's testator was in the possession of the trust fund, or other property into which he may have converted it, and such fund or other property had come into the possession of the defendant, he would have held it upon the same terms as his testator held it.' This does not mean that the trust fund is to be kept as a separate and independent fund, or in a special account from all other funds of the trustee. In Lewin, Trusts, *894, it is said in reference to the mingling by the trustee of trust funds with his own: 'It may be said that the trust money has, like water, run into the general mass, and become amalgamated, and therefore the cestui que trust has no lien. But clearly this cannot be maintained. * * * Though the identical pieces of coin cannot be ascertained, yet, as there is so much belonging to the trust in the general heap, the cestui que trust is entitled to take so much out.' And again: 'If a trustee pay trust money into a bank to the account of himself, not in any way earmarked with the trust, and also keep private moneys of his own to the same account, the court will disentangle the account and separate the trust from the private moneys, and award the former specifically to the cestui que trust.' If the trustee, after so mingling the funds, has drawn therefrom from time to time, it will be presumed that the moneys so drawn were from his own portion of the fund, rather than from the moneys held by him in trust. In re Hallett's Estate [L. R.], 13 Ch. Div. 696; Central National Bank v. Insurance Co., 104 U. S. 54, 26 L. Ed. 693; Lewin, Trusts, *895. So long as the amount in the fund is greater than the amount of the trust fund it will, in the absence of any showing to the contrary, be presumed to be that held in trust. Whether the moneys are mingled in one account at a bank or are kept together in the strong box of the trustee is immaterial."

[1] Counsel do not dispute the principle of law thus expressed, but it is claimed by appellant that at least two of the findings made by the court are not supported by the evidence. The first finding complained of is: "That said decedent received and had the full cash value thereof in his bank account and possession at the time of his death. That upon the death of said decedent, said funds which were and are in fact the funds of plaintiff herein came into the possession of the defendant as executrix but not individually and she is now holding and has control of same, as such executrix."

In support of this finding, we summarize briefly portions of testimony relating thereto. Mr. Waddell, the bookkeeper for the deceased in his lifetime, testified: "Q. Now will you start at the beginning of that transaction and tell us what were the facts?" To which he answered, in substance, as follows: The $3,500 note which was executed by Percy A. Taylor and wife was reassigned to Mr. Schoenborn on April 1, 1929, by the Armstrongs. The Taylors having sold the property to George W. Walker and wife, they took up that mortgage by executing a new note in the amount of $4,000, payable to Mr. Schoenborn, which was by Mr. Schoenborn assigned to Marian and Ruth Brown on April 15, 1929, which was two days prior to the death of Mr. Schoenborn. On April 15th, Mr. Schoenborn had a note belonging to the Brown sisters which they had assigned to him, and for which they had received a credit on the books of $4,500; no cash had been collected for that. The entry of that transaction shows that it was completed about March 1, 1929. When the Brown sisters purchased the Walker note of $4,000, that amount was deducted from the credit of the Brown sisters and credited to the Armstrongs, leaving a credit balance in favor of the Brown sisters of about $500.

From the foregoing the court had the right to infer that, after receiving from them a note and mortgage of $4,500, Schoenborn converted the same to cash and thereupon stated upon his books the transaction as a cash item in favor of the Brown sisters, and that, at the time the Walker mortgage of $4,000 was transferred to them, it was so turned over to them in lieu of cash, reducing the amount of their credit by the sum of $3,500 as far as the Armstrongs were concerned, plus the $500 additional amount added to the new Walker mortgage, making a total liquidation of the account to the extent of $4,000, and leaving a credit to the Brown sisters of $500.

In view of the findings, the trial court apparently presumed that the entries in the book correctly described the transaction, and that all details were fair and regular, and that the deceased had in his possession as a trust fund, money resulting from the transaction, and that the proceeds from this transaction to the extent of $3,500 were mingled with the funds of the decedent in his possession, or in his bank account. It appears from the evidence that Schoenborn acquired these various notes secured by mortgages by assignment; we may assume the ordinary business procedure was followed, and, although no separate deposits were created in the bank nor any actual transfer of money, still his system of bookkeeping showed credit entries in the proper accounts, and there was thereby a transfer in the ownership of the funds on deposit in his name.

Appellant also takes exception to the finding of the court with reference to the $1,100 collected by the testator on the principal of the Gilman mortgage, in that the court found that upon the testator's death that sum was thereupon taken over and into possession of the defendant herein in her capacity as executrix and that she now holds possession of, and has control of, the same as such executrix. This finds support in the stipulation of counsel that the inventory and appraisement filed in the estate shows the moneys on hand at the time of death which also represent the moneys that came into the hands of the appellant as executrix. The deposits of these amounts were definitely traced into the bank account of Schoenborn.

[2] There is no evidence in the case which shows what, if any, claims have been allowed against the estate, and there is therefore no evidence to support the contention of appellant that the estate is insolvent, but the court properly found that the estate was solvent, and, under the rule as cited in the Elizalde Case, supra, the amount on deposit being greater than the amount of the trust fund, will, in the absence of any showing to the contrary, be presumed to be the money held in trust.

Appellant quotes certain testimony of the executrix that no money has come into her hands as such executrix, but the funds are being held by the various banks for claim against the estate. No suits have been filed, however, to determine the right of the banks to so hold these funds, nor have any claims been allowed in their favor. Neither does the fact that it appears from the inventory that the money on deposit was "subject to claim of said bank as to the above fund", do more than evidence the existence of an unliquidated claim.

[3] Objections are made to certain other findings upon the ground they are conflicting, but the law directs all findings to be read together, and if possible to reconcile and harmonize any conflict. With that in view, we do not find any conflicts that are incapable of being harmonized.

For the foregoing reasons, the judgment is affirmed.

We concur: **PLUMMER, J.**; **R. L. THOMPSON, J.**

130 Cal.App. 519

GETTY v. GETTY et al.

Civ. 1003.

District Court of Appeal, Fourth District, California.

March 22, 1933.

1. Courts ⚷18.

Complaint involving right to land in another state *held* demurrable for lack of jurisdiction of subject-matter.

2. Wills ⚷747.

Complaint showing that land claimed by plaintiff was distributed some twelve years previously according to will wherein plaintiff was named residuary trustee and executor *held* demurrable as not stating cause of action.

Appeal from Superior Court, Los Angeles County; Harry R. Archbald, Judge.

Action by John Getty against W. A. Getty, trustee, and others. From judgment for defendants, plaintiff appeals.

Affirmed.

J. S. Le Page, of Long Beach, for appellant.

Julius Smidt, of Los Angeles, for respondents.

VAN ZANTE, Justice pro tem.

This is an appeal from a judgment of dismissal entered after an order sustaining a demurrer to the amended complaint without leave to amend.

The property involved in this action is two hundred forty acres of land in Hanson county, S. D. It appears in the amended complaint that in its final decree made on the 31st day of March, 1917, the county court of Hanson county, S. D., distributed this property to the defendants in accordance with the provisions of a will. Apparently the jurisdiction of the court or the validity of the decree was never questioned until the 19th day of November, 1929, when the plaintiff filed his original complaint herein. The plaintiff now contends that in accordance with the provisions of the will this property should have been distributed to him.

[1] One of the several grounds of the demurrer was that the trial court had no jurisdiction of the subject-matter of the action. We think that the ruling of the trial court in sustaining the demurrer without leave to amend on the ground that it had no jurisdiction of the subject-matter of the action was correct. "Lying at the very base of the controversy, and first to be decided, is the validity of the claim of the appellants that the decree attempts to adjudicate interests in property situated beyond the territorial jurisdiction, and that the courts of this state are without power to make such adjudication. That the courts of California cannot make a decree which will operate to change the title to real or personal property beyond the territorial limits of this state is conceded on all hands." Title Insurance & Trust Co. v. California Development Co., 171 Cal. 173, 197, 152 P. 542, 553. "Appellant's first contention is unquestionably correct. That the courts of one state cannot make a decree which will operate to change or directly affect the title to real property beyond the territorial limits of its jurisdiction must be conceded. The doctrine that a court, not having jurisdiction of the res, cannot affect it by its decree is firmly established." Taylor v. Taylor, 192 Cal. 71, 76, 218 P. 756, 758, 51 A. L. R. 1074. "In fact, the filing of such an action in a county other than that in which is situated the real property involved is so completely a nullity that the venue cannot be changed to the county in which the property lies, for no court can have jurisdiction of such an action unless it was *commenced* in the county where the land is situated." Maguire v. Cunningham, 64 Cal. App. 536, 542, 222 P. 838, 840.

[2] A further ground upon which the defendants demurred to the amended complaint was that it did not state facts sufficient to constitute a cause of action. The demurrer was properly sustained on this ground. Indeed, the only language in the will under which plaintiff claims, or possibly could claim any interest in the property involved, other than nominating him an executor of the will, is found in the seventh paragraph and reads in part as follows: "Seventh: All the rest, residue and remainder of my estate, of whatsoever kind or nature, whether real, personal or mixed, and wheresoever situated, I give, devise and bequeath to my said husband,

John Getty, if he shall survive me, and if he shall not survive me then to the Long Beach Savings Bank and Trust Company of the city of Long Beach, State of California, but in trust, however, for the following uses and purposes, that is to say: To hold, manage, invest and reinvest the same, and out of the proceeds therefrom:" (Then follow several specific directions to pay the proceeds to relatives other than appellant.) Manifestly, appellant has no interest in the property distributed under the provisions of the will.

The judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

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130 Cal.App. 469

BROMBERG v. SIGNAL GASOLINE CORPORATION.

Civ. 7606.

District Court of Appeal, Second District, Division 1, California.

March 21, 1933.

1. Sales 🔑418(3).

Measure of damages for breach of contract to sell specified quantity of casing-head gasoline at price per gallon fixed at 2½ cents less than retail price per gallon of specified gasoline is difference between contract price and price at which buyer could have purchased casing-head gasoline in open market (Civ. Code, §§ 3308, 3354).

2. Sales 🔑418(1).

Buyer who failed to prove market value of casing-head gasoline *held* entitled to only nominal damages for seller's breach of contract to sell specified quantity of casing-head gasoline at price per gallon fixed at 2½ cents less than retail price per gallon of specified gasoline (Civ. Code, §§ 3308, 3354, 3360).

3. Damages 🔑12.

Generally, where plaintiff offers no evidence regarding amount of damages sustained, nominal damages only are recoverable for breach of contract (Civ. Code, § 3360).

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action by Robert Bromberg, as trustee in bankruptcy of the Vernon Oil Refining Company, against the Signal Gasoline Corporation. From a judgment in favor of plaintiff, he appeals.

Affirmed.

R. Dechter and Russell B. Seymour, both of Los Angeles, for appellant.

C. La V. Larzelere and Finlayson, Bennett & Morrow, all of Los Angeles, for respondent.

HOUSER, Justice.

In effect, the pertinent facts upon which the instant appeal is based are as follows: By the terms of a contract, the defendant became obligated to sell to the plaintiff a specified quantity of casing-head gasoline at a price per gallon fixed at 2½ cents less than the retail price per gallon of a product known as Red Crown gasoline. Upon the refusal of the defendant to comply with the provisions of the agreement in that regard, the plaintiff commenced an action against the defendant for the damages which the plaintiff claimed had resulted from said alleged breach. The trial court found that the agreement had been breached by the defendant, but rendered a judgment in favor of the plaintiff for nominal damages only, to wit, in the sum of $1. It is from such judgment that the plaintiff prosecutes this appeal.

[1] Appellant contends that, since at a price per gallon equal to the retail selling price per gallon of Red Crown gasoline, or what would amount to a profit of 2½ cents per gallon, it might have resold all the casing-head gasoline which the defendant agreed to deliver to the plaintiff, it was entitled to recover from the defendant such profits as would have resulted from such resale. On the other hand, without in any manner conceding that the evidence adduced on the trial of the action shows that the plaintiff could have resold the gasoline, the respondent insists that (except in circumstances not shown by the evidence to have been present) the rule of damages applicable to the facts herein is that the plaintiff was entitled to recover such damages only as would be represented by the difference between the price agreed to be paid per gallon and the price per gallon at which plaintiff could have purchased the casing-head gasoline in the open market. That the said contention of the respondent is the correct rule, see sections 3354 and 3308 of the Civil Code, as was provided by the latter section prior to June 19, 1931; also 8 Cal. Jur. 785, 823; 22 Cal. Jur. 1043; 1928 Supp. to Cal. Jur. par. 107, of Sales, p. 1450; and authorities therein respectively cited. It is clear that, although the method adopted by the parties to the contract for the purpose of determining the selling price of casing-head gasoline was novel or unusual, nevertheless it afforded a means by which such price might be ascertained and made certain. If such contract price, determined in accordance with the provisions of the agreement of the parties, had been less than the market price for the casing-head gasoline, necessarily the damage to plaintiff which resulted from the breach of the contract would have been the difference

between the contract price, thus determined, and the market price. The fact that the retail price of a commodity known as Red Crown gasoline was selected as a basis for the determination of the price of the casing-head gasoline, could have had no adverse effect upon the certainty of the price to be paid for the latter product. Nor did the fact that such basic commodity was a product which was similar to the commodity which was the subject of the agreement of the parties to the contract have any peculiar influence on the certainty of the contract price. The market price of the commodity selected for comparison was of no more consequence in a question affecting the rights of the respective parties than would have been the retail price of a dozen eggs, or a bushel of wheat, or a bushel of potatoes; either of which likewise might have been agreed upon as a commodity upon the retail price of which the sales price of the casing-head gasoline might have been made to depend.

[2] On the trial of the action, the plaintiff not only failed and refused to prove what was the market value of the casing-head gasoline which it had agreed to purchase from the defendant, but announced in open court that it would object to any evidence which might be offered by the defendant in that regard. Since plaintiff failed to prove the only damages which it was entitled to recover in the action, a judgment for nominal damages only was all that the trial court was authorized to render in its behalf. Civ. Code, § 3360.

In the case of Utter v. Chapman, 38 Cal. 659, 663, 664, it is said: "The purchaser, in an action for a failure to deliver the goods purchased, may not only recover the price paid, but, also, the excess of the market value, at the time of the breach, above the contract price; but if he has not paid the price, he can recover only such excess, and if there be no excess, he cannot recover anything beyond nominal damages."

To the same effect see Hancock v. Hubbell, 71 Cal. 537, 12 P. 618.

[3] In general, where, in an action for breach of contract, no evidence has been offered regarding the amount of damages sustained by the plaintiff in the action, the statement of the law (with numerous authorities in support thereof) with reference to the propriety of an award of nominal damages may be found in volume 17, Corpus Juris, page 720 et seq., where it is said: "* * * Where a legal wrong is established but there is no evidence as to actual damages nominal damages are properly awarded. In other words, where plaintiff establishes a cause of action but fails to show any damage he may recover nominal damages. So in an action founded upon a contract a plaintiff, in order to recover more than nominal damages, must adduce evidence that an actual substantial loss or injury has been sustained, unless the contract itself furnishes a guide to the measurement of the damages. * * *"

And in the opinion in the case of Olin Co. v. Lambach, 35 Idaho, 767, 209 P. 277, 278, 279, 44 A. L. R. 354, it is declared that: "Nominal damages are recoverable for a breach of contract where there is no proof of actual damage. [Citing authorities.] Where no evidence is offered as to the difference between the contract price and the market value, the seller is entitled to nominal damages"—citing authorities.

For the reason that by appellant's brief all other questions presented to this court for its determination are dependent upon the rules of law hereinbefore declared applicable to the facts in this appeal, it becomes unnecessary to devote further attention to the points suggested by the appellant.

The judgment is affirmed.

We concur: CONREY, P. J.; YORK, J.

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130 Cal.App. 224

MASON v. CITY OF LOS ANGELES et al.

Civ. 7287.

District Court of Appeal, Second District, Division 2, California.

March 2, 1933.

1. Municipal corporations ⚷199.

Fireman *held* not "public officer" under charter of city of Los Angeles within rule that salary of public officer is incident to title to office and accrues regardless of occupancy or performance of its duties (St. 1925, p. 1039, § 5; p. 1056, §§ 70, 71; p. 1070, §§ 131, 134).

[Ed. Note.—For other definitions of "Officer," see Words and Phrases.]

2. Municipal corporations ⚷123.

Only such persons as are designated "officers" in Los Angeles city charter are "officers" (St. 1925, p. 1039, § 5; p. 1056, §§ 70, 71; p. 1070, §§ 131, 135).

3. Evidence ⚷44.

Court will judicially notice that officers of fire department do not by themselves operate the motors which run the trucks nor handle the ladders, picks, axes, and other implements used in fire fighting (St. 1925, p. 1039, § 5; p. 1056, §§ 70, 71; p. 1070, §§ 131, 135).

4. Municipal corporations ⚷202.

Duties of a "fireman" consist in following instructions of officers of fire department by performance of some of actual physical work (St. 1925, p. 1039, § 5; p. 1056, §§ 70, 71; p. 1070, §§ 131, 135).

[Ed. Note.—For other definitions of "Firemen," see Words and Phrases.]

5. Municipal corporations 🔑220(6).

In absence of statute to contrary, persons employed by city are not entitled to compensation during wrongful suspension or removal (St. 1925, p. 1070, § 135).

6. Municipal corporations 🔑199.

Fireman who was adjudged insane, and thereafter rendered no duties, *held* thereafter entitled to no compensation, although only action taken to remove him was entry upon records by chief engineer of fireman's resignation (St. 1925, p. 1070, § 135).

7. Municipal corporations 🔑123.

That person is holding position with municipality by certain tenure, under civil service or charter provision, and is doing public service in such department, does not alone make him a "public officer."

8. Municipal corporations 🔑123.

"Officer" is distinguished from municipal employee in the greater importance, dignity, and independence of his position, and in the authority to direct and supervise others.

9. Municipal corporations 🔑162(1).

Both under city charter of Los Angeles and statute, offices become vacant when incumbents are adjudged insane and city is thereby relieved from payment of further salaries (St. 1925, p. 1040, § 9; Pol. Code, § 996, subd. 2).

Appeal from Superior Court, Los Angeles County; Ernest Weyand, Judge.

Action for writ of mandate by Millard D. Mason, an insane person, by his guardian Martha H. Mason, against the City of Los Angeles and others. From judgment for defendants, plaintiff appeals.

Affirmed.

Rollinson, Orbison, Phister & Irwin, of Los Angeles, for appellant.

Erwin P. Werner and Jerrell Babb, both of Los Angeles, for respondents.

ARCHBALD, Justice pro tem.

Millard D. Mason was on the 23d day of April, 1928, a duly appointed and acting member of the Los Angeles fire department. On that date, pursuant to order of the chief engineer of said department, he was taken to the psychopathic ward of the General Hospital for observation, and one week later was adjudged insane and committed to the state hospital at Patton. Apparently no affirmative action has been taken to remove him from his position as fireman except that taken by the chief engineer, who on the 3d of May, 1928, entered upon the records of the department what purported to be Mason's resignation. Demand was later made by Mason through his guardian ad litem that said chief engineer, whose duty it was to make up the pay roll, enter Mason's name thereon, which was refused. This proceeding was brought in mandamus to compel such entry as of April 20, 1928, to compel the city auditor to approve such salary demand and to approve pay checks therefor, and to compel the city treasurer to pay the same. From a judgment in favor of defendants an appeal was taken.

The salary of members of the Los Angeles fire department, including members of the class of appellant, is fixed by city ordinance: that of appellant under such ordinance being $200 per month less a 4 per cent. contribution to the pension fund. Under the charter of the city the chief administrative officer of the fire department is the chief engineer (Stats. 1925, p. 1070, § 134), whose duty it is, at the expiration of the period fixed in the salary ordinance, to make out a pay roll "of all persons employed in such department or office during the preceding salary period, stating the amount of compensation of such persons in detail" (section 364). It is appellant's contention that he is a public officer, and that the salary of his office, being fixed by city ordinance and not by contract, is incident to the title to the office regardless of its occupancy and the performance of the duties thereof.

At least one count of appellant's petition in the trial court is framed on such theory, and the duty of the chief engineer, so far as payment of departmental salaries is concerned, would seem to be purely ministerial, as well as that of the auditor and treasurer. There being no room for the exercise of discretion on the part of such officers, therefore, mandamus would seem to be a proper remedy. Allied Architects Ass'n v. Payne, 192 Cal. 431, 221 P. 209, 30 A. L. R. 1029.

[1] Appellant urges that his contention is the recognized rule in this state, citing the case of Jackson v. Wilde, 52 Cal. App. 259, 198 P. 822, in support thereof. That case was urged as authority for a reversal of the judgment in Evans v. Los Angeles Ry. Corp. (City of Los Angeles), 14 P.(2d) 752, and with regard to it the Supreme Court says, at page 754: "The case of Jackson v. Wilde, supra, states that a fireman is a public officer and that his salary is annexed to his office and payable whether he is rendering services or not, and that therefore this payment [of salary under ordinance during disability] cannot be considered compensation [under the Workmen's Compensation Act]. We deem it unnecessary to discuss the conflict of authority on the question whether firemen are 'public officers' rather than employees, since

such a characterization does not solve the fundamental problem of the proper interpretation of the ordinance and the state law." We therefore cannot agree with counsel for appellant that the question is settled in this state. We are not unmindful of the many respectable authorities outside of the state supporting appellant's position, but regardless of what the situation may be in other states or under the charter of the city of San Diego under consideration in Jackson v. Wilde, we are forced to the conclusion that under the charter of the City of Los Angeles appellant was not a public officer.

Section 5 of the charter last mentioned (St. 1925, p. 1039) provides that the officers of the city shall be "the Members of the Boards of the Departments and the Chief Administrative Officer of each Department" and "such other officers as shall be named by ordinance." Section 70 (page 1056) creates the various departments of the city, among which is that of "Fire." Section 71 (page 1056) provides that such departments "shall each be under the control and management of a board of five commissioners." Section 134 makes the chief engineer of the fire department its chief administrative officer, and section 135 (St. 1925, p. 1070, as amended by St. 1931, p. 2621), gives such officer the power to "suspend or remove" any officer or employee of the fire department for cause. Such section also provides that in case of such removal or suspension the accused has the right to have the charges tried by a board of inquiry appointed by the chief engineer, "to consist of three (3) officers of the rank of Battalion Chief or higher chosen by the accused at the time of filing such application [for hearing], by drawing three (3) names from a box containing slips of paper on which are the names of all officers qualified to sit upon said Board of Inquiry."

[2-4] Our attention is not called to any ordinance making a fireman an officer of the city of Los Angeles, and in the face of a charter provision expressly designating the officers of that city we can only draw the conclusion that all not so designated are not officers of the city and therefore are not public officers. Consequently we fail to see how appellant can bring himself within the official class. Burroughs v. Eastman, 93 Mich. 433, 53 N. W. 532; Brown v. Uhr (Tex. Civ. App.) 187 S. W. 381. It also appears from the portion of the charter cited that within the fire department itself there are different officers contemplated. The boards of inquiry are to be comprised of three officers of the rank of "Battalion Chief or higher," and we think we may presume that under the battalion chief there is probably a "captain" over each fire company. Yet these are not made *officers* of the city by the charter. When the words "officer and employee" are used in section 135 with reference to the power of the chief engineer to remove or suspend, the charter certainly draws only a distinction between those who are officers of the department and those who are employees. In fact, the inference to be drawn from the charter is that there are those in the department force who perform duties under the supervision and direction of the officers thereof and who are employees as contrasted with those designated as officers. This is clearly shown by section 131 of the charter (St. 1925, p. 1070) which provides in part as follows, the italics being ours: "The officers of the Fire Department *in charge* at the scene of any fire shall have full power and authority to direct the operation of extinguishing the same and to take the necessary precautions to prevent the spread thereof." And we think we may take judicial notice of the fact that the officers of the department do not, by themselves, operate the motors which run the trucks, nor do they handle the ladders, picks, axes, and other implements used in fire fighting. In our opinion we may properly conclude that the duties of a "fireman" consist in following the instructions of the officers of the department by the performance of some of the actual physical work.

[5, 6] It would seem, too, that that part of section 135 which says that "any person," i. e., any officer or employee, "restored to duty or reinstated in his position after suspension or removal * * * shall be entitled to receive compensation from the city the same as if such suspension or removal had not been made," makes the inference conclusive that except for such provision the persons therein named would not be entitled to compensation during the period they have been wrongfully suspended or removed. Walsh v. Bridgeport, 88 Conn. 528, 91 A. 969, Ann. Cas. 1917B, 318. It would be an anomalous situation if an officer or employee of the department who is ready, willing and able to work, but who has been wrongfully prevented from working, were not entitled to his lost salary except for an express provision entitling him to it, while one who is incapacitated from work, not by reason of disability incurred in the performance of his duty, and who stands in the same class so far as performance of a duty to the public is concerned as the one suspended or removed, would be entitled to his full salary for an indefinite period, although his brother so removed, under the charter provision which prevents compensation after reinstatement, would be limited to a definite period of "six months." We must conclude, therefore, that there is no sanction in the charter to pay compensation in such a case to one so incapacitated, and that such sanction must be found before it can be done.

[7, 8] The great majority of the cases we have seen from other jurisdictions which support appellant's contention do not seem to be based on a construction either of the charter

provisions of the municipality or of the law providing for the organization of a fire department, but on the general principle of the law relating to public officers and a determination by the courts that a fireman is such an officer. While the cases so holding are the majority in number, in our opinion the minority cases have the greater weight of authority. Some of such cases, involving the question whether or not a fireman comes within the Workmen's Compensation Act of the particular state, like that of McDonald v. New Haven, 94 Conn. 403, 109 A. 176, 180, 10 A. L. R. 193, construe such act as applicable only to a relationship of employer and employee, arising out of contract, and hold that a fireman, being appointed to his position, which is created by law, "and performing duties which flow from sovereign authority," occupies a public office, and that his relation is in no sense contractual, which last conclusion is correct although we cannot agree that he "occupies a public office." Undoubtedly if it were not for the firemen the department would not perform its public function of protecting the combustible property of the city; but in our opinion it does not necessarily follow, because of that, that they are holding public offices. The responsibility is placed upon the commissioners and the chief engineer of the department by the charter, and the firemen and other officers under them simply assist in performing such public duty, exercising no part of the discretion which is vested in their superiors by the charter. Carried to its logical conclusion, such an argument as that presented here would make a public officer of every person, however menial his duties, employed in a department of the municipality, to whom the charter has given certain functions to perform for the public benefit, because he is appointed, his position is created, and his wages or salary is fixed, by law. He may hold his position by a certain tenure, under civil service or charter provision, and be doing a public service by laboring in such department, but that alone certainly does not make him a public officer. As the then Justice Cooley of the Supreme Court of Michigan said in the case of Throop v. Langdon, 40 Mich. 673, 682, "the officer is distinguished from the employee in the greater importance, dignity and independence of his position"; and, he might have added, "in the authority to direct and supervise, either expressly given him by the law creating the office or necessarily implied"—which, of course, must need the assistance of others not having any of those distinguishing characteristics, or there would be none to direct and supervise in carrying out the responsibility fixed by law on such officer.

[9] But we fail to see how being a public officer would give to appellant the desired relief. Section 9 of article 2 of the charter (St. 1925, p. 1040) before us provides: "An office becomes vacant when the incumbent thereof * * * is adjudged insane," etc. Inasmuch as this section is in the article designating who are officers of the city, appellant urges that it applies only to the officers so designated. There is no question, though, but that it was the intention of the voters of Los Angeles who adopted the charter, and of the Legislature which ratified the same, that such section should apply to all "officers" of the city; and if appellant was at the time of his affliction possessed of an office we are certain that it became vacant ipso facto—if not under said section of the charter, then under section 996 of the Political Code, which provides that "an office becomes vacant on the happening of either of the following events before the expiration of the term: * * * 2. His [the incumbent's] insanity, found upon a commission of lunacy issued to determine the fact." "It will be seen that with respect to the case in hand the provisions of the charter and the state law are identical. Either, in the absence of the other, would give the same effect to any one of the enumerated contingencies, * * * that is to say, the office ipso facto becomes vacant." McKannay v. Horton, 151 Cal. 711, 717, 91 P. 598, 600, 13 L. R. A. (N. S.) 661, 121 Am. St. Rep. 146.

Judgment affirmed.

We concur: WORKS, P. J.; CRAIG, J.

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130 Cal.App. 584

PEOPLE v. GIANNI et al.

Civ. 4754.

District Court of Appeal, Third District, California.

March 24, 1933.

Hearing Denied by Supreme Court May 22, 1933.

1. Eminent domain 🔑96.

To recover damages to residue where part of tract is taken, direct connection must exist between damages and severance, or construction of improvement (Code Civ. Proc. § 1248; Const. art. 1, § 14).

2. Eminent domain 🔑113.

Where state left old main highway intact but took one-fifth of an acre from 63-acre tract fronting thereon, to establish new main highway, owner could not recover for diminished value resulting from relocation of main highway (Code Civ. Proc. § 1248; Const. art. 1, § 14).

It was conceded that regardless of consequences owner would have no cause of action for damage from mere fact that state moved location of highway, but it was argued that if any part of tract, however small, was taken, then damage following from removal or relocation of highway became compensable.

Appeal from Superior Court, Placer County; J. B. Landis, Judge.

Action in eminent domain by the People, acting through the Department of Public Works, against G. Gianni and others. From the judgment of condemnation, defendant named appeals.

Affirmed.

Harry A. Encell and C. W. Peterson, both of San Francisco, and K. D. Robinson, of Auburn, for appellant.

Hugh K. McKevitt, Halloway Jones and George C. Hadley, all of San Francisco, and W. H. Slade, of Auburn, for respondent.

PARKER, Justice pro tem., delivered the opinion of the court.

This is an action in eminent domain. The state seeks to take a small portion of appellant's land. The area of the portion sought is .21 of an acre. This small portion forms a part of a larger tract owned by appellant and of a total area of approximately 63 acres. Judgment and final order of condemnation was entered, and the value of the property taken was fixed at $10.50, and the court found and decreed that the damage accruing to the balance of the land by reason of the portion taken was and is the sum of no dollars. The appeal is prosecuted by defendant Gianni.

Neither the regularity of the proceeding nor the authority for its institution is questioned. No complaint is made concerning the value of the land taken. The sole point of the appeal is on the question of damage resulting to the remaining portion.

There is little dispute on the facts. As stated, appellant is the owner of a 63-acre tract. This tract had a highway frontage of some 1,900 feet, and on the frontage had been maintained certain business establishments. This frontage on a main highway gave to the entire area a market value which otherwise it would not have. The plaintiff state, acting through its authorized department, determined upon a relocation of the main highway. The plan adopted was to route travel over a new road, though the former road was neithėr closed nor abandoned. The new highway left the lands of defendant with no frontage thereon, and did lessen the rental value of his premises, and beyond question diminished the value of his remaining area. There seems no dispute on this. The area taken, one-fifth of an acre, was taken for the use of the new highway and as a necessary part thereof.

Without detailing the testimony, it is conceded that the damage claimed arises wholly by reason of the change of location of the highway. No other claim of damage is urged. This may state the question with slight inaccuracy, but as the exact situation will develop itself the general statement suffices for the present.

Defendant concedes that if the state had moved the location of the highway, that alone would give him no cause of action for damage, regardless of what the consequences might be. But, he argues, when there is a taking of any of the parcel, however small, then the damage following from the removal or relocation of the highway becomes compensable. Stated differently, if the state had gone two yards or two miles entirely off the property of defendant, though exactly the same damage as here alleged might result, no damage could be awarded. But because in relocating the highway the state took one-fifth of an acre from a corner of the tract, then defendant must be compensated not only for the land taken, but also for all of the damage resulting from the relocation. At first blush it would appear that the problem solves itself. Yet appellant in an exhaustive and well-reasoned brief has brought out the question with bolder relief, and the many sides presented force a controversy in reaching any logical determination. The exact question seems to have escaped capture, due perhaps to the fact that it has to this time concealed itself among the yet unhappened.

[1] There are certain well-recognized principles underlying the rule of eminent domain. First, that the right or property of the individual should and must yield to the necessity of the sovereign state; second, that the rights of the citizen should not be taken without just compensation. On the first there has never been any serious contention; this principle is almost universally conceded, and with no difficulty in its application. On the second, too, we find little dissension on the principle, but in the application thereof we meet a wide divergence of views. The Constitution of this state provides that private property shall not be taken or damaged for public use without just compensation having first been made to, or paid into court for, the owner. Const., art. 1, § 14. Section 1248 of the Code of Civil Procedure provides that, in eminent domain proceedings, where the property sought to be condemned constitutes only a part of a larger parcel, the court must ascertain and assess the damages which will accrue to the portion not sought to be condemned, by reason of its severance from the portion sought to be condemned, and the construction of the improvement in the manner

proposed by plaintiff. These provisions of law have been often construed; it would serve no useful purpose to review and analyze the cases, as the result would be to bring us back to the exact starting point, namely, the sections quoted, constitutional and statutory.

The authorities seem in accord to the effect that an owner shall be compensated for all damage sustained. Almost every conceivable situation has presented itself in the cases cited, both in California and other jurisdictions. But the authorities cited and those we have discovered do not squarely embrace the point before us. We might concede the claim that a test of damage is the value of the property before the taking and its value thereafter. But this test is not conclusive. By way of illustration, it cannot be denied that in a vast majority of cases a development of new territory reacts to the damage of established districts. Almost every large city demonstrates a decrease in realty values consequent upon a branching out of business and population. To apply the test of values, before and after, in those cases would be beyond any notion of law or reason. Wolff v. City of Los Angeles, 49 Cal. App. 400, 193 P. 862, 863.

The Code section quoted specifically relates that the severance damages to be awarded are such as will accrue to the portion not condemned, by reason of its severance and by reason of the construction of the improvement, etc. It is not a strained or forced construction to hold that the section implies at least some slight but direct connection between the claimed damage and either the severance or the construction of the improvement. In lieu of citation we quote from appellant's reply brief as follows: "We would have no quarrel with those cases (cited by respondent) if they were cited to support a case involving the relocation of a highway without taking any private property. Truly the State must have the right to change its highways to accord with public demand and convenience. And if it is merely and solely a proposition of changing a highway without the taking of private property we would have to yield to the contentions of the respondent." This concession is forced by the authorities.

[2] Whatever of apparent hardships there may be in particular cases where roads have been created for public use when the country was new, as in this state, and for the temporary convenience of a sparsely settled country, a greater hardship would be entailed upon the public if these roads could not now be vacated or changed to meet the present situation without compensating those whose premises may abut thereon for the loss or inconvenience they may sustain, as, if that were the rule, none would consent to the change, and the added burden would be an embargo upon the creation of new and desirable roads. Levee District No. 9 v. Farmer, 101 Cal. 178, 35 P. 569, 23 L. R. A. 388. To the same effect: Eachus v. Los Angeles, etc., Ry. Co., 103 Cal. 614, 37 P. 750, 42 Am. St. Rep. 149; Wolff v. City of Los Angeles, supra; In re Mt. Washington Road Co., 35 N. H. 134. In the case of Wolff v. City of Los Angeles, supra, the court, in construing the constitutional provision, and with particular reference to the term "damaged," uses this language: "We do not intend to say, nor do we think, it extends to such damage as the owner of the property injured sustains in common with the other abutters on the street or the general public, but only to that special injury which he receives over and above such common injury"—citing Reardon v. San Francisco, 66 Cal. 492, 6 P. 317, 56 Am. Rep. 109.

The phrase "over and above such common injury" has much significance. It concedes to all a certain damage, a damnum absque injuria. It implies that there may be cases where the removal or relocation may work some special damage not common to other abutting owners or the general public, in which event compensation shall be made. But obviously the nature of special damage does not mean individual damage. If it should or could be so construed, the result would destroy the principle.

No matter how we shape the facts in the instant case, the claim of damage rests wholly upon the relocation or removal of the highway. All that defendant suffers from the taking is the small area taken, for which he is compensated. His concession, hereinbefore noted, practically controls the case. This one result is unescapable. The injury causing the claimed damage is the change of route. This damage results regardless of whether or not the small portion of land is taken. Given an injury the damage from which is neither lessened nor aggravated by the taking, we must conclude the taking causes no damage. Damage, in its very essence, is always a result, and under the law herein discussed such result must flow from one or both of two things; namely, from the severance of the part taken or from the construction of the improvement. There is admittedly no damage from severance, and the mere change of route in itself does not make the character or the construction of the improvement a private injury. Needless to state, we disregard the value of the property taken, in view of the fact that no question is raised on this feature of the suit.

We are appreciative of the earnestness of appellant's contention and of the fact that much authority and many learned text-writers on the subject seem to support his theory. Yet we conclude that appellant seeks compensation for the loss of something he never had, something in which he had no claim of property right or ownership at any time; that, something being the right and privilege, as against the state or any one else, to pe petuate the highway along and in front of appellant's lands. This is his sole loss, and we conclude it to be noncompensable in damages.

The judgment therefore is affirmed; appellant to recover costs.

We concur: PLUMMER, Acting P. J.; THOMPSON, J.

130 Cal.App. 472

WALLNER v. PICKWICK STAGES SYSTEM.

Civ. 7742.

District Court of Appeal, Second District, Division 1, California.

March 21, 1933.

1. Automobiles ⚷244(45).

Evidence that bus struck truck parked near curb for repairs, causing it to roll onto plaintiff, *held* not to show that plaintiff was contributorily negligent.

2. Appeal and error ⚷1064(1).

That instruction omitted element of proximate cause between defendant's negligence and plaintiff's injuries *held* not prejudicial, where rule concerning elements of proximate cause was stated at least six times in instructions given.

Appeal from Superior Court, Los Angeles County; Edwin F. Hahn, Judge.

Action by Lloyd Wallner against the Pickwick Stages System. From judgment for plaintiff, defendant appeals. On motion to dismiss appeal or affirm judgment.

Judgment affirmed.

De Forrest Home, Warren E. Libby, William A. Sherwin, and B. P. Gibbs, all of Los Angeles, for appellant.

Walter I. Lyon and George P. Kinkle, both of Los Angeles, for respondent.

CONREY, Presiding Justice.

On motion to dismiss appeal or affirm judgment under Rule V, section 3. Pursuant to the verdict of a jury, plaintiff was awarded damages for personal injuries caused by negligence of the defendant.

The only assignments of error are: (1) That the court erred in ruling as a matter of law that the plaintiff was not guilty of contributory negligence at the time of the happening of the accident, and in instructing the jury to the same effect. (2) That the court erred in giving to the jury instructions which assumed the absence of contributory negligence, and peremptorily instructing the jury to return a verdict in favor of the plaintiff in the event they found that defendant was negligent and that such negligence proximately contributed to the happening of the accident. (3) That the court erred in giving an instruction defining the conditions under which the jury should bring in a verdict for the plaintiff, and in omitting from such instruction the element of proximate cause.

[1] On the first point, I think it is plainly true that there was no evidence tending to prove negligence on the part of the plaintiff. Appellant's own statement of the facts, as well as the more complete record, fails to show any facts from which such negligence could reasonably be inferred. The manner of the accident was as follows: Defendant's bus struck the left front of a truck which was standing on the east side of Alameda street; its front right wheel being within a foot of the curb, and the rear wheel within two feet of the curb. The plaintiff was standing alongside the right front wheel of the truck, having one of his feet on the curb and other on the street between the curb and the truck. This truck had been stopped at that place because of a broken tie rod. Plaintiff's employer had been requested to repair the truck, and the plaintiff had just finished an examination of a part of the truck. At that moment the bus came by and hit the truck in such a way that the right front wheel of the truck rolled upon the foot of the plaintiff. It seems to us that there was very slight excuse for the plea of contributory negligence in this case.

[2] The second point is determined by the first. As to the third point: It is true that the criticized instruction is defective in omitting the element of proximate cause in the relation between defendant's negligence and the plaintiff's injury. But, inasmuch as the rule concerning the element of proximate cause was stated by the court at least half a dozen times in the instructions given, it cannot very well be that the failure to repeat the statement in this instruction was a prejudicial error. The jury was instructed in so many words that, "unless the plaintiff convinces you by preponderance of the evidence that the accident was proximately caused by the negligence of the driver of defendant's stage, your verdict must be for the defendants."

All of these things appear so clearly that, in the absence of any other stated ground of appeal, we think the motion to affirm should be granted.

The judgment is affirmed.

We concur: HOUSER, J.; YORK, J.

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130 Cal.App. 371

In re TOBIN.

Cr. 1252.

District Court of Appeal, Third District, California.

March 14, 1933.

1. **Pardon** 🔑4, 10.
Prisons 🔑15.

Granting or revoking paroles or allowing or forfeiting credits rests in sound discretion of board of prison terms and paroles (Pen. Code, § 1168, subd. 3, par. 5, and subd. 4, pars. 8, 11, 14).

2. **Pardon** 🔑10.
Prisons 🔑15.

Revocation of parole and forfeiture of credits because of prisoner's falsification of prison records before paroled *held* authorized, notwithstanding parole was not violated thereby (Pen. Code, § 1168, subd. 3, par. 5, and subd. 4, pars. 8, 11, 14; § 1578, subd. 3).

Appeal from Superior Court, Sacramento County; Martin I. Welsh, Judge.

Application by John J. Tobin for a writ of habeas corpus. From an order granting a writ of habeas corpus, the People of the State of California appeal.

Order reversed, and writ denied.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

Clifford Thoms, of Los Angeles, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

This application comes before us upon an appeal by the people from an order of the superior court of Sacramento county granting a writ of habeas corpus.

The record shows that the petitioner, John J. Tobin, was received at Folsom Prison on the 11th day of November, 1925, by virtue of a judgment of conviction of first degree robbery entered in the superior court of Los Angeles county; thereafter the board of prison directors imposed a sentence upon the petitioner of a term of twelve years; that on the 11th day of July, 1931, the petitioner was granted a parole, effective immediately; that on the 15th day of September, 1931, the petitioner was arrested and returned to the state prison at Folsom; that on September 20, 1931, the board of prison terms and parole, at its meeting in Folsom, ordered the petitioner back to prison, and thereupon he was again placed in custody within the prison walls at Folsom; on the 29th day of September, 1931, there was served on the said John J. Tobin a copy of charges preferred by the warden of the state prison at Folsom, charging him with altering certain prisoners' records while acting as an assistant to the clerk in the record clerk's office at Folsom Prison, which alterations were made prior to July 11, 1931; thereafter, and on October 7, 1931, after due notice had been given thereof, a hearing was had by the board of prison terms and paroles, at which hearing the petitioner pleaded guilty to the change of the records of Folsom Prison, as charged by the warden thereof, and at said hearing all the credits that the said petitioner had earned, and that he might thereafter earn, were declared forfeited and canceled.

The facts upon which the petitioner was rearrested, his parole rescinded, and his credits declared forfeited are based upon the admitted charge that, while employed as an assistant to the record clerk of the state prison at Folsom, the petitioner falsified the records as to certain prisoners confined in Folsom Prison.

Upon this hearing it is contended that the petitioner could only be rearrested, his credits forfeited, and his person confined within the walls of Folsom Prison by a violation of some of the terms of his probation as specified in the list of rules for his future conduct read and delivered to the petitioner upon the granting of his parole.

This contention is supported by the decision of the United States District Court for the District of Kansas in Ex parte Urbanowicz, 24 F.(2d) 574, where it was held that a parole granted to a United States prisoner could not be canceled or rescinded save and except for some offense committed by him subsequent to the date of the parole, which constituted a violation of the terms of the parole. The decision proceeds upon the theory that the order granting the parole is akin to a judgment of a court, and precludes inquiry as to all matters known or unknown preceding the granting thereof; that a parole when granted, becomes a matter of right and not a privilege, and proceeds upon the theory that a paroled prisoner is entitled to notice, entitled to a hearing or trial, and opportunity to present his defense or explanation, if any he has, before an order or revocation can be legally made.

A reference to sections 714 to 722, inclusive, 18 USCA, discloses that United States parole boards are given no such authority as is vested either in the courts of this state in granting probation or to what is now the board of prison terms and paroles.

By paragraph 11 of subdivision 4 of section 1168, Penal Code, full power is given to the board of prison terms and paroles to retake any prisoner on parole, to suspend, cancel, or revoke a parole without notice being given to such prisoner. Under the section of the Penal Code just referred to, a paroled prisoner in California is not entitled either to a hearing or a trial. By the fifth paragraph of subdivision 3 of section 1168, supra, the prisoner is given a right to a hearing, and a trial before his credits can be forfeited. It appears in this case that the petitioner was given such a hearing before his credits were declared forfeited, and it also appears that the petitioner was given a hearing before the order for his parole was rescinded. Under the eighth paragraph of subdivision 4, supra, a prisoner on parole is all the while under the legal custody and control of the board. This section is a legal expression of what the courts of this state have already held. In re Heckman, 90 Cal. App. 700, 266 P. 585. The fourteenth paragraph of subdivision 4 of section 1168, supra, does provide that no parole shall be revoked and no credits shall be forfeited without cause, and that the cause of revoking the parole or forfeiting the credits must be stated in the order of revocation or forfeiture, as the case may be. There is no provision contained in section 1168, supra, requiring that the cause of revocation of a parole or the forfeiture of credits must be something that occurs at any particular time during the running of the sentence pronounced upon the prisoner.

[1] As said in the dissenting opinion in the case of State v. Zolantakis, 70 Utah, 296, 259 P. 1044, 54 A. L. R. 1463, we think "from the very nature of the subject, the whole matter of granting and revoking suspensions must rest in the discretion of the court." Here, from the very nature of the case, the whole matter of granting or revoking paroles, or of allowing or forfeiting credits, must rest in the sound discretion of the board of prison terms and paroles. The petitioner, during this parole, was not freed from the consequences of his guilt. The granting of the parole to him was not a matter of right, but a matter of privilege, or rather, a matter of grace, as expressed in some of the opinions. The power of the board to revoke without notice, as expressed in the statute, precludes the idea of there being any vested right in the petitioner to remain outside of the prison walls.

[2] Subdivision 3 of section 1578 of the Penal Code requires the warden of a state prison to keep a registry of all convicts. The falsification of this record is a public offense. The petitioner in this case was guilty of a public offense not shown by the record and not discovered by the officers having charge of the record until after July 11, 1931. The falsification of the record by the petitioner, once it was discovered, furnished a basis fa the board of prison terms and paroles to revoke his credits. A prisoner with credits revoked is not one who has complied with all the terms and conditions of the rules and regulations of the prison, and is therefore not entitled to be outside of the prison walls upon parole.

In the case of In re Young, 121 Cal. App. 711, 10 P.(2d) 154, this court, in passing upon the revocation of a probation order without notice, held that the prisoner was not entitled to either notice or trial. The reasoning of the opinion in that case and the authorities there cited are applicable here, and need not be set forth in extenso.

In a large number of states where the statutes do not give such authority it is held that an order vacating the suspension of a sentence or the granting of a parole cannot be set aside without notice. In some of the states where the statutes are silent it is held that notice should be given, and in other states that notice need not be given, and that no trial need be had. In this state, as we have shown, the paroled prisoner may be rearrested and reconfined within the prison walls, without either notice or trial, but his credits, once given, cannot be revoked without notice and a hearing.

To adopt the petitioner's contention and hold that a prisoner who has been guilty of fraud and deceit, thereby securing credits and a parole to which he was not entitled, is no longer amenable to, and beyond the jurisdiction of the board of prison terms and paroles to recall the privilege granted under such circumstances, seems to us to undermine the very purpose for which credits are allowed for good behavior, exemplary conduct, lawful action, and obedience to the rules and regulations of state prisons leading up to the extension of the further privilege of personal liberty outside the walls of the institution to which the prisoner has been committed.

It cannot be doubted in this proceeding that the board of prison terms and paroles had ample authority to declare a forfeiture of all the credits earned and to be earned by the petitioner, immediately upon discovery of the offense committed by the petitioner in falsifying the records of the institution where he was confined. A revocation of the parole order would follow as a matter of course.

The order of the trial court is reversed, and the writ denied.

We concur: **PULLEN, P. J.; R. L. THOMPSON, J.**

130 Cal.App. 316

GACKSTETTER v. MARKET STREET RY. CO. et al.

Civ. 8420.

District Court of Appeal, First District, Division 1, California.

March 13, 1933.

1. Street railroads 🔑**117(13).**

In action for injuries to three year old child by street car, street railroad's negligence *held* for jury.

2. Appeal and error 🔑**931(1).**

On appeal from judgment for plaintiff, appellate court in determining whether case was made for jury must review evidence most favorably to plaintiff.

3. Street railroads 🔑**118(14).**

Instruction that three year old child struck by street car was too young to be chargeable with negligence *held* not abuse of discretion.

4. Appeal and error 🔑**1195(4).**

Opinion on previous appeal did not establish as matter of law that plaintiff could not recover where evidence on second trial tended to prove facts materially different.

5. Street railroads 🔑**95(3).**

That child was near track when observed by street car motorman required him to proceed with caution and use ordinary care.

6. Street railroads 🔑**118(6).**

Instruction in substance that street car motorman approaching child on highway and seeing it in place of danger must keep vehicle under control reasonably necessary to avoid collision *held* warranted by evidence.

7. Trial 🔑**253(4).**

In action for injuries to three year old child struck by street car, instruction if defendants operated car in negligent manner proximately causing injury to find verdict for plaintiff *held* not erroneous because omitting reference to contributory negligence.

8. Street railroads 🔑**118(14).**

Instruction if injuries to three year old child were caused solely by child's fault, to find for street railroad *held* properly refused; word "fault" as used being equivalent of negligence.

[Ed. Note.—For other definitions of "Fault," see Words and Phrases.]

9. Trial 🔑**260(8).**

Street railroad could not complain of refusal to instruct jury to find for it if accident was caused solely by fault of child struck in view of instruction given.

Instruction refused was that, if jury found that accident to three year old child struck by street car was caused solely and entirely by fault of child, jury must find for street railroad; and the instruction given was that, if accident was caused solely by child's act, and street railroad used ordinary care to avoid injuring her, she could not recover.

10. Trial 🔑**260(8).**

Refusal of instruction regarding street car motorman's right to expect child would not suddenly run across street, covered by charge given, *held* not prejudicial.

Instruction refused was that motorman had right to expect, in absence of warning or knowledge to contrary, that child would not suddenly run across street or into car, if jury so found; and instruction given was that, if jury found that motorman had no reason to believe that child would suddenly run on or in such close proximity to the track until too late to avoid injury, verdict must be for defendants.

11. Evidence 🔑**251(2).**

Admissions made by guardian ad litem in pleading *held* incompetent to affect interests of child represented.

12. Evidence 🔑**568(6).**

In street car accident case, testimony of passenger who had been reading paper but stated car was going pretty fast was too uncertain to serve as basis for finding and should have been stricken on motion.

Passenger on street car testified that he heard bell sound, a scream, and that car was suddenly stopped, and that speed of car was about 20 or 25 miles an hour; and on cross-examination, he admitted that he was reading newspaper at time and had little opportunity to observe speed, but stated that judging from speed always traveled at that point at that time, his conclusion was as stated and that he had no ground for his statement except that when he heard first scream he knew that car was going pretty fast.

13. Trial 🔑**60(1), 252(3).**

Admitting speed ordinance and giving instruction that if street car striking child violated ordinance, street railroad was negligent, *held* erroneous where there was no competent evidence of speed.

14. New trial 🔑**29.**

Plaintiff's attorney's conduct creating impression that relatives of defendants' attorneys were serving on panel and making implied charges that defendant had attempted to suppress evidence and that defendants' medical witness would color his testimony to secure future employment, together with other errors, required new trial.

Facts disclosed that during examination of jurors plaintiff's attorney stated that names of brother of one of attorneys for defendants, and mother and sister of another appeared on jury list; that while case was being presented plaintiff's attorney inquired if defendant motorman was then in court; that demand was made on defendants' attorney to produce him, and an attempt was made to examine one of attorneys as to his whereabouts, although there was nothing to indicate defendant street railroad was attempting to conceal motorman, its codefendant; and that during cross-examination of defendants' medical witness, plaintiff's attorney asked him whether witness wanted to obtain further employment from defendant and wanted to make good impression by showing that he was right kind of expert for them.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by Betty Gackstetter, a minor, by John Gackstetter, her guardian ad litem, against the Market Street Railway Company and another. From a judgment for plaintiff, defendants appeal.

Reversed.

William M. Abbott, Walter H. Linforth, and William M. Cannon, all of San Francisco, for appellants.

Vincent W. Hallinan and C. K. Bonestell, both of San Francisco, for respondent.

PER CURIAM.

The plaintiff, a minor, was injured by a car operated by defendant Market Street Railway Company. She was between three and four years of age at the time of the accident. The action is against the company and its employee, the motorman who was operating the car. A jury returned a verdict for the plaintiff against both defendants. A motion for a new trial having been made and denied an appeal was taken from the judgment.

[1-4] This was the second trial of the case. A judgment entered against the defendants on a previous trial was reversed. Gackstetter v. Market Street Railway Co., 104 Cal. App. 89, 285 P. 409. The date of the accident was June 24, 1925, at about 3:30 p. m. It occurred on Hayes street between Broderick and Divisadero streets in San Francisco. Between the two streets last mentioned Hayes street slopes to the east, the grade being 3.6 per cent. Defendant company maintained a double-track railway thereon, and the car which struck plaintiff was descending the grade. The motorman testified that from Broderick street to the place of the accident the car was traveling between seven and eight miles an hour. He first testified that at that speed the car could be stopped within ten or fifteen feet. Later he stated that under the conditions prevailing at the time a stop could have been made within ten or twelve feet; also that the brakes were in good condition. As he approached he saw the plaintiff and another child standing about eight feet from the south rail of the track and he thereupon reversed the motors and stopped the car, but not before striking her. The distance from the point where the motorman first saw the child's movement toward the track to the point of collision is not clear from the testimony. It appears that a map was referred to at the time, and places and distances marked thereon by the witnesses, but this map was not brought up on appeal. It can be gathered, however, from the arguments of counsel to the jury that the car was then about forty feet away. The testimony is conflicting as to the first position of the child as the car approached; witnesses for the plaintiff testified that she was on the sidewalk on the north side of the street and started to run to the south side. As she passed over the tracks the fender of the car struck her, throwing her to the right of the track upon a pile of rock or sand alongside, from which she rolled under the car, which was then slowing up. According to one of these witnesses, when the car stopped the child's leg was between the two right front wheels. All the other witnesses, however, who observed her position testified that her leg was beneath the brake shoe in front of the right front wheel. The testimony of the witnesses to the accident cannot be reconciled; but, contrary to defendants' contention, we cannot fairly say that either version was inherently improbable. The matter was one for the jury, and the evidence must, of course, be reviewed most favorably to the plaintiff. People v. Woo, 181 Cal. 315, 184 P. 389; Packer v. Wagner, 109 Cal. App. 26, 292 P. 523.

The witness Blass testified that the car was "going quickly," but that she could not judge the speed. Another witness, police officer McDonnell, who testified to the speed, was the witness mentioned in the opinion on the former appeal. His testimony will be hereafter considered.

The court instructed that the plaintiff was too young to be chargeable with negligence under the circumstances shown. The submission to the jury of the question was discretionary, and we cannot say that the evidence was such that the instruction constituted an abuse of discretion. 45 Cor. Jur., Negligence, § 553, p. 1001; Mayne v. San Diego Elec. Ry. Co., 179 Cal. 173, 175 P. 690; Wallace v. Gt. Western Power Co., 204 Cal. 15, 266 P. 281.

In principle, whether the motorman, after seeing plaintiff, apprehended her dangerous position, and used ordinary care thereafter to avoid injuring her, were questions of fact. Darling v. Pacific Elec. Ry. Co., 197 Cal. 702, 242 P. 703; Chappell v. San Diego, etc., Ry. Co., 201 Cal. 560, 258 P. 73. While the evidence on the question of responsibility was close, nevertheless, assuming that witnesses other than McDonnell were correct in their estimates of speed—which varied from seven to ten miles an hour—there was, as stated, a conflict as to the circumstances of the accident, and concerning the distance between the position of the car when the child was first seen by the motorman and the place of collision, making the question of negligence one for the jury. Nor, in view of the evidence, which tended to prove facts materially different from those stated in the opinion on the previous appeal, did that decision establish as a matter of law that plaintiff could not recover.

Defendants complain of a number of instructions given by the court and its refusal of others, together with rulings made during the course of the trial.

[5] As to the instructions other than the one to which we have referred, the court charged that the presence of a small child in the street or near the curbing, who is seen by the driver of the vehicle should be a warning to the driver, requiring the exercise of ordinary care for the safety of the child. The fact that the child was near the track when observed by the motorman required him to proceed with caution and to use ordinary care for its safety. 60 Cor. Jur., Street Railroads, § 351, pp. 471, 472; 45 Cor. Jur., Negligence, § 78, p. 702; Lampton v. Davis, etc., Bread Co., 48 Cal. App. 116, 191 P. 710; Parra v. Cleaver, 110 Cal. App. 168, 294 P. 6. No higher degree of care was imposed upon the motorman by the instruction complained of.

[6] Another instruction charged that when the driver of a vehicle on a public highway is approaching a child upon the same and sees it in a place of danger, or in such a position that he may reasonably apprehend that if come upon without warning it might through fright or bewilderment place itself in a position of danger, it is his duty to keep the vehicle under such control as is reasonably necessary to avoid a collision. Defendants claim that there was no evidence that the child when first seen was in a place of danger, or that such was the case at any time until by her sudden change of position it was impossible to avoid injuring her. The testimony that the child came from the north rather than the south side of the street tended to contradict the testimony of the motorman as to her position when she first came under his observation. He testified in substance that his view was unobstructed and that he was watchful in the operation of the car. Consequently, if the child started to cross from the north it is reasonably probable that she was seen by the motorman. As held in Hoy v. Tornich, 199 Cal. 545, 250 P. 565, and Darling v. Pacific Elec. Ry. Co., supra, where the operator of a car testifies that he was looking ahead on an unobstructed thoroughfare a jury is warranted in disbelieving his testimony that he did not see the child thereon. So here, in view of the testimony, the jury might have believed that the child came from the north rather than the south, and as she approached must have been seen by the motorman. He admitted that he saw her when the car was a certain distance away; and the jury was not bound by his testimony that she was then on the south side of the track. We think the instruction was not improper.

[7] Defendants complain of two other instructions, which stated in substance that, if the jury found that the defendants operated the car in a negligent manner, and such negligence proximately contributed to any injury suffered by the plaintiff, then their verdict should be for the latter. It is urged that this instruction erroneously omitted any reference to the plaintiff's contributory negligence.

As stated, it does not appear that the court abused its discretion in instructing the jury that plaintiff was too young to be chargeable with negligence; consequently the instructions were not improper.

[8, 9] The same is true of the court's refusal to instruct that if they found the accident was caused solely and entirely by the fault of plaintiff the jury must find for defendants. The word "fault" in the instruction was the equivalent of negligence (Marston v. Pickwick Stages, 78 Cal. App. 526, 248 P. 930), and was manifestly so intended. In view of the conclusion that the child was not chargeable with negligence the same was properly refused. However, the jury was instructed that if the accident was caused solely by plaintiff's acts, and that defendants used ordinary care to avoid injuring her, she could not recover.

[10] The court refused an instruction that the motorman had the right to expect, in the absence of warning or knowledge to the contrary, that plaintiff would not suddenly run across the street or into the car, if the jury so found. The jury, however, was instructed that if they found that the motorman had no reason to believe that the plaintiff would suddenly run upon or in such close proximity to the track until too late to avoid injury their verdict must be for the defendants. This instruction was in substance the same as that offered, and the refusal of the latter was not prejudicial.

[11] Plaintiff appeared by her guardian ad litem, who verified the complaint. It was alleged therein that she was injured while crossing the street from the south side. Later an amendment of the complaint was filed alleging that she crossed from the north. Defendants offered the original complaint in evidence and sought to read it to the jury for the purpose of proving an admission by the

plaintiff. The court ruled against its admissibility, and this is assigned as error.

It appears to be well settled that admissions by a guardian ad litem are incompetent to affect the interests of the person represented. 22 Cor. Jur., Evidence, § 408, p. 353; Kidwell v. Ketler, 146 Cal. 12, 79 P. 514.

[12] The witness McDonnell, who was a passenger on the car, testified that he heard the bell sound, a scream, and that the car was suddenly stopped. He further stated in response to a question as to the speed of the car "I should judge about 20 or 25 miles an hour." On cross-examination he was asked upon what he based his estimate. He replied, "* * * Judging from the speed of the car I judged it was going at that speed." He admitted that he was reading a newspaper at the time, and had little opportunity to observe the speed before he heard the scream, but that "judging from the speed always traveled at that point at that time" his conclusion was as stated. He further stated that he had no ground therefor "except when I heard the first scream I know the car was going pretty fast." As was said with respect to the testimony of this witness on the former appeal, "It is clear that the officer in effect testified that he had no knowledge on the subject of the speed of the car and, therefore, his testimony on that subject does not conclude a court of justice." As was held in Diamond v. Weyerhaeuser, 178 Cal. 541, 174 P. 38, expressions by a witness that a vehicle is "going pretty fast," "very fast," and the like are merely relative, and entirely too uncertain to serve as the basis for a finding as to speed. See, also, Rosander v. Market Street Ry. Co., 89 Cal. App. 710, 265 P. 536.

This rule also applies to the testimony of the witness Blass on the same question.

Defendants moved to strike McDonnell's conclusion as to the speed of the car, and the denial of the motion is assigned as error. We are satisfied that the motion should have been granted.

[13] In this connection, and over defendants' objection that there was no evidence justifying its admission, an ordinance of the municipality, prohibiting the operation of cars in the block where the accident happened at a speed greater than 15 miles an hour, was admitted in evidence. The court also instructed that if the jury found that the ordinance was violated by defendants they were negligent as a matter of law.

The only testimony that the speed of the car exceeded this limit was that of McDonnell, which, as stated, was too uncertain to serve as the basis of a finding in that respect. It has been frequently held that an abstract instruction, to justify which there is no evidence, is erroneous, and if it is calculated to mislead the jury, affords ground for reversal. Estate of Calkins, 112 Cal. 296, 44 P. 577; Jones v. Goldtree Bros. Co., 142 Cal. 383, 77 P. 939; Thomas v. Northwestern Life Ins. Co., 142 Cal. 79, 75 P. 665; Wallis v. Southern Pacific Co., 184 Cal. 662, 195 P. 408, 15 A. L. R. 117; Barrett v. Southern Pacific Co., 207 Cal. 154, 277 P. 481.

[14] It is further claimed that plaintiff's counsel was guilty of misconduct which prevented defendants from having a fair trial.

In this connection various acts are relied upon. During the examination of the jurors as to their qualifications plaintiff's attorney stated that the names of the brother of one of the attorneys for the defendants, and the mother and sister of another, appeared on the jury list, and questions were asked over objection as to whether the jurors present knew these persons or had served with them as jurors in the trial of any case. These questions were answered in the negative. It is claimed that the purpose and effect of the questions was to prejudice the minds of the jurors by creating the impression that relatives of these attorneys were serving on the panel assigned to try the case.

While the trial was in progress there appeared in two San Francisco daily newspapers articles stating matters connected with the case, including the business of plaintiff's guardian ad litem and the entry of a previous judgment and its reversal. The amount of the previous verdict was stated as $15,000, when in fact it was for $5,000. It appeared from testimony taken at the trial that the statements made in the articles were communicated by a brother of plaintiff's attorney who was employed in the latter's office. While the fact that the articles were caused to be published during the trial indicates an intention to influence the result, it was not shown that any member of the jury read the articles.

On the second day of the trial and while the plaintiff's case was being presented her attorney inquired if defendant McClelland, who was the motorman, was then in court. Following the inquiry the attorney went to the door leading to the courtroom and called for this defendant. Later, a demand was made on defendant's attorney to produce him, and an attempt was made to examine one of the attorneys as to his whereabouts. There was nothing to indicate that the railway company was attempting to conceal its codefendant, who had already been examined as a witness for plaintiff, and he later appeared and was further examined by her attorney.

A physician called by defendants, who had testified that he had never before acted as a witness for defendant railway company, was on cross-examination asked the following questions: "You want to make a good impression and show that you are the right kind of an expert for them, don't you?" also, "I asked you if it was not true, this being your first experience for the Market Street Railway in court, you wanted to obtain further employment from them in this way, and wanted to make a good impression on them by showing that you are the right kind of an expert for them." Nothing tending to impeach the qualifications or credibility of this witness was adduced, and the purpose of these questions evidently was to cause the jury to infer that for the sake of future employment the witness would color his testimony so as to make it favorable to the defendants.

The argument of plaintiff's attorney to the jury contained numerous erroneous statements with respect to the testimony, and is replete with abusive references to defendants and their counsel. While it may be that these statements alone would not be sufficient to warrant a reversal, their effect must be considered in connection with the other acts complained of.

In each instance objection was made and the acts and statements assigned as misconduct. Usually an admonition to disregard the statements was given the jury, and the court endeavored to remove any prejudicial effect likely to be caused thereby. They were, however, so numerous, and their tendency so manifestly prejudicial, that it is doubtful whether a harmful result could have been prevented.

In Keena v. United Railroads, 197 Cal. 148, 239 P. 1061, conduct similar in character to the above was considered. There counsel for Keena, without cause and in the presence of the jury, charged that defendant had suppressed evidence. This was held to be misconduct; and it appearing as a reasonable probability that its effect was to influence the jury, the judgment was reversed. Likewise, denunciations of defendant's counsel by reference to matters having no connection with the case and calculated to prejudice the jury have been condemned. Peacock v. Levy, 114 Cal. App. 246, 299 P. 790. And the same is true of suggestions to the effect that a party charged with negligence was insured against loss. Curtis v. McAuliffe, 106 Cal. App. 1, 288 P. 675. The rule has also been applied to erroneous statements by counsel as to the law of the case. Baroni v. Rosenberg, 209 Cal. 4, 284 P. 1111.

The conduct complained of, commencing with the examination of the jurors, the implied charges that defendant company had attempted to suppress evidence, the questions asked the latter's medical witness, together with the matters stated in the argument, strongly indicated a settled intention to prejudice the jury against the defendants. As was said in Lafargue v. United Railroads, 183 Cal. 720, 192 P. 538, 541, and quoted with approval in the Keena Case, supra, "it seems to us that an entirely false quantity was injected into the case by plaintiff's counsel * * * and that the false quantity so introduced was of a character so prejudicial to the defendant as to have prevented the jury from considering the case fairly upon its real merits."

While usually the act of a trial court in granting or denying a new trial will not be disturbed, here the evidence on the question of the defendants' negligence was close, and the jury would have been justified in finding that the acts of the child were the sole proximate cause of her injuries. In view of this the errors complained of, namely, the refusal to strike the testimony of McDonnell, the admission in evidence of the ordinance mentioned, the instruction regarding the effect of its violation, with the acts of counsel above discussed, considered from the point of view of their cumulative effect, reasonably support the conclusion that but for these matters the result would have been different, and that defendants' motion should have been granted. The publications mentioned were, of course, material only as facts showing an intention to influence the jury.

Other questions are raised by the appellants, but these require no discussion.

The judgment is reversed.

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130 Cal.App. 328

AUSTIN v. ROBERTS et al.

Civ. 8607.

District Court of Appeal, First District, Division 2, California.

March 13, 1933.

1. Appeal and error 🔑1002.

Verdict on conflicting evidence is conclusive on review.

2. Landlord and tenant 🔑180(4).

Lessee allegedly owning personalty in factory could not recover value of personalty in eviction action; it not appearing that lessors injured or exercised or authorized act of dominion over personalty.

3. Landlord and tenant 🔑180(3).

Lessee seeking damages for eviction from factory had burden of segregating personalty owned by him from personalty subject to mortgage subsequently foreclosed and showing injury to particular articles.

4. Landlord and tenant 🔑180(3).

Lessee claiming damages for eviction from factory had burden of proving lost profits and should have shown portion of loss

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🔑For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

caused by lessors' wrongful acts as distinguished from portion caused by sale of certain personalty used in factory to third persons (Civ. Code, § 3301).

5. **Damages** ⚷6.

Statute disallowing damages for breach of contract unless clearly ascertainable applies to lost profits (Civ. Code, § 3301).

6. **Landlord and tenant** ⚷180(4).

In eviction action, lost profits are recoverable only under exceptional circumstances (Civ. Code, § 3301).

Appeal from Superior Court, Alameda County; E. C. Robinson, Judge.

Action by H. C. Austin against Morris Roberts and others. From a judgment for plaintiff, defendants appeal, and plaintiff appeals from an order granting a new trial.

Judgment reversed.

Glickman & Glickman and Tevis Jacobs, all of Oakland, for appellants.

Alfred Nelson and J. Raegan Talbot, both of Oakland, for respondent.

STURTEVANT, Justice.

This is an appeal by the defendants from a judgment entered on a verdict rendered against them in an action alleging eviction.

Prior to June, 1927, Morris Roberts and Annie Roberts owned a number of lots contiguous to each other and located in Berkeley, Alameda county. H. Zemon and Celia Zemon owned certain contiguous lots. On the property was located a building that was occupied as a factory. The defendants did not claim title to the building or contents. At about the same time the building and contents were owned by Rev. B. Garfinkle. The defendants executed a lease to the plaintiff on the 1st day of June, 1927, by the terms of which they leased the land, and the document contained a provision that the building then on the property and any building thereafter to be placed thereon should be and become the property of the tenants. The term of the lease was two years, and that term by a later agreement was extended three years, making a total of five years. The plaintiff entered into possession and for a few months paid $100 per month, the rental reserved in the lease. However, on January 1, 1928, he stopped operating his business and did not pay any rental from January 1, 1928, to August 1, 1928. Some time during the latter part of July, 1928, S. R. Glover, who had theretofore been an employee on the premises, commenced to negotiate with George Hudson in an endeavor to get him interested in purchasing the property. They conferred with the plaintiff and certain business arrangements were discussed, but no agreement was reached. During those discussions it transpired that the title to the personal property was owned by Rev. Garfinkle and that these defendants were the lessors.

On July 28, 1928, George Hudson and S. R. Glover called on Roberts asking for a lease, including an option to buy. They were given an option, but it was never exercised and expired August 7, 1928. No formal lease to them was ever asked or executed. They never paid the owners any rent and never tendered any rent. Immediately after receiving the written option, Glover and Hudson went to the property and entered therein. On July 29, 1928, having heard that Glover and Hudson were occupying the property, the plaintiff went there and ordered them out. They replied that they had bought the movable property and had agreed to lease the land. Several disputes followed between the plaintiff on the one hand and Glover and Hudson on the other hand at which the defendants were not present and knew nothing until long thereafter. On August 11, 1928, the plaintiff paid to the defendants $600 in back rent. On August 15 he paid $218, that being the balance in back rent and accrued interest as provided in the lease. At the time said payments were made he did not advise the defendants that Glover and Hudson were in the premises nor that they were making any adverse claims to him. However, the plaintiff testified that on the 9th day of August, 1928, he informed the defendant, Mrs. Zemon, and she directed the plaintiff to see Mr. Glickman, who was the attorney for the defendants. He called on Mr. Glickman on August 9, 10, and 11, 1928. On one of those dates he made one of the payments of back rent but did not advise Mr. Glickman that Glover and Hudson were in the premises. When Hudson called on July 28, 1928, Roberts told him that Rev. Garfinkle owned the personal property on the premises and that defendants made no claim to it. Not later than August 1st Hudson bought from Rev. Garfinkle the personal property and received a bill of sale.

Having paid up the back rent in August, from time to time thereafter the plaintiff paid the rent as it accrued. Such payments were made including the month of May, 1929, but thereafter he paid no more rent. Claiming rent due them for the months of June to October, 1929, the defendants assigned their claim to I. Holmok. On the 15th day of October, 1929, the latter commenced an action in the justice's court to recover the accrued rent. Thereafter this action was commenced for the purpose of obtaining an injunction restraining further proceedings in the justice's court and to recover damages for an alleged eviction. As stated above, the verdict was in favor of the plaintiff. The defendants made a motion for a new trial, but the order granting it was not entered until the sixty-first day after the notice of intention to move for a new trial was filed. Assuming that the order came too late and was invalid, Payne v. Hunt, 214 Cal. 605, 7 P.(2d) 302, the defendants appealed from the judgment.

[1] The defendants claim there is no proof of any act on the part of the defendants which constitutes an eviction. However, we find in the transcript certain statements by Hudson that Roberts told him to go take possession of the plant. Whether that statement was the conclusion of the witness as to the meaning of Roberts' statements in the conversation held on July 29, 1928, does not appear. Therefore we think that at the least there was a conflict in the evidence and a court of review is bound by the verdict of the jury.

[2] In the first count of his complaint the plaintiff pleaded a list of articles of personal property of which he claimed to be the owner and which were in the plant at the time Glover and Hudson entered. He did not attempt to plead that he removed or attempted to remove them because of his eviction and that they were injured thereby, but he alleged the value and claimed such value as damages. On that claim the jury returned a special verdict in the sum of $8,281.90. There is not a particle of evidence that these defendants ever personally exercised or authorized an act of dominion over, or injured, any one of the articles. The uncontradicted evidence in the record is to the effect that on July 28, 1928, Glover and Hudson were told that the defendants made no claim to any of the personal property contained in the plant and did not give any authorizations concerning it.

[3] Furthermore, there was another fatal defect in the proof as to the first count. Rev. Garfinkle obtained his title by accepting a chattel mortgage which was later foreclosed. That document enumerated numerous articles of personal property. On the trial the plaintiff claimed title to some of the personal property. In Exhibit C he listed the articles. While a witness on the stand he testified that there were several material duplications between the articles enumerated in the chattel mortgage and those in Exhibit C. He did not testify that there were not many more duplications. There was no evidence that there were in the plant at any time duplicates of the same articles. In short, there was no evidence before the jury from which it could be ascertained whether the plaintiff had placed on the premises any additional items of personal property after the execution of the mortgage to Rev. Garfinkle. However, there was evidence that when the mortgage was made to Rev. Garfinkle the parties intended that it should cover all of the personal property then located on the premises. The burden of making the segregation and showing the injury, if any, to any particular article rested on the plaintiff, and in the absence of such proof he was not entitled to recover. Croze v. St. Mary's Canal Mineral Land Co., 153 Mich. 363, 117 N. W. 81, 85; Id., 143 Mich. 514, 107 N. W. 92, 94, 313, 114 Am. St. Rep. 677. The special verdict in the sum of $8,281.90 on the first count is not supported in whole or in part by any evidence.

[4-6] In his second count the plaintiff sought damages for loss of profits. He alleged that he had certain firm contracts for the sale of the products of the plant for the two succeeding years and that the net profit per ton was $4. He then alleged that the plant could press five hundred tons per month. He prayed damages accordingly. An examination of the record discloses that the plaintiff took the stand and in support of his pleading testified as to the output of the factory, the cost of the output, and the additional fact that the plaintiff had obtained a contract under which he could sell the output over a period of three months at $10 a ton. As to the extent of the output and the cost thereof he based his statements on what had formerly been done in the factory. But prior to July 29, 1928, the plaintiff had had the use of the defendants' land, the use of the personal property of Rev. Garfinkle, and the use of the plaintiff's personal property, if any, which had not been mortgaged. There is no evidence that with the bare land, together with his own personal property, the plaintiff could have operated at all. He testified he did not need all of Rev. Garfinkle's property. How much of it he did need he did not state. Conceding that plaintiff suffered a loss of profits, there is no evidence showing what part of that loss was caused by the wrongful acts of any of the defendants and what part was caused by the sale of Rev. Garfinkle to Glover and Hudson. The burden of making the proof rested on the plaintiff. It is statutory that "No damages can be recovered for a breach of contract which are not clearly ascertainable in both their nature and origin." Civ. Code, § 3301. That rule applies to lost profits as well as to other elements of damage. That in an action for eviction under certain circumstances lost profits may be recovered has been directly held. Hawthorne v. Siegel, 88 Cal. 159, 167, 25 P. 1114, 22 Am. St. Rep. 291. But the rule applies only under exceptional circumstances. California P. Mfg. Co. v. Stafford P. Co., 192 Cal. 479, 485, 221 P. 345, 32 A. L. R. 114. He who would claim lost profits must show the exceptional circumstances supporting his claim. In 17 C. J. 758, the author says: "Where there is evidence as to damage from various causes, as to a portion of which defendant cannot be held

responsible, and no evidence as to the portion of the damage resulting from the separate causes, the proof is too uncertain to permit the jury arbitrarily to apportion a part or all of the proved damages, to the acts for which defendant is responsible." Smith v. Billings Sugar Co., 37 Mont. 128, 94 P. 839, 15 L. R. A. (N. S.) 837, involved a controversy regarding an alleged breach of contract providing for the management of the planting, growing and marketing of sugar beets. On page 841 of 94 P., 37 Mont. 128, the Supreme Court of Montana said: "The duty to furnish the laborers in proper time devolved upon the plaintiff himself; and, since the complaint alleges that the damages resulted from the failure to furnish the laborers in proper time, coupled with the company's failure to properly instruct them, it is impossible to say what, if any, portion of the damages resulted from the fault of the company, and what portion from the fault of the plaintiff himself." In the case of Smuggler-Union Mining Co. v. Kent, 47 Colo. 320, 112 P. 223, the court was considering an action in eviction. The plaintiffs had been the lessees of a part of a mine. In the mine were several shafts. Under the terms of their lease the plaintiffs should have taken the ore out of the seventh level and down the Union shaft. However, they were given the privilege to take two lots of ore out of a different shaft. In attempting to prove loss of profits they introduced proof regarding the costs, etc., in mining those two particular lots. Speaking of that proof, on page 227 of 112 P., 47 Colo. 320, the court said: "Plaintiffs may have produced enough evidence as to the profits they made out of the two lots of ore which they mined and milled by special permission of defendant; but they failed to prove that they would have made any profits, even out of these shipments, had they mined and removed the ores as they were required to do by the lease." Chicago, B. & Q. R. Co. v. Gelvin (C. C. A.) 238 F. 14, L. R. A. 1917C, 983, was an action for damages for negligently allowing a fire to spread. The fire spread over the pasture of the plaintiff. In his proof he sought to recover lost profits as an element of his damage. On page 22 of 238 F., L. R. A. 1917C, 988, the court said: "Instead of this record, it was incumbent upon the plaintiff to show, with reasonable certainty, what damage flowed from the alleged injury, by showing the value of the cattle immediately before and immediately after the injury, at the farm of the plaintiff. The record showing different conditions, occurring subsequent to the fire, naturally affecting the gain in weight of these cattle, for which it is conceded the defendant could not be held responsible, without any proof of how much of the damage resulted from these conditions as distinguished from the damage resulting from the alleged injury, with nothing in the way of testimony of any witness pretending to even estimate the proportion of the damage resulting from either of the causes, is far short of that reasonable certainty required by law, and upon such a record a jury cannot arbitrarily apportion a part, or all, of the proven damages to the cause for which the defendant is responsible (Knowlton v. Chicago & N. W. R. Co., 115 Minn. 71, 131 N. W. 858), and the verdict of the jury upon the first cause of action, predicated upon a consideration of this evidence, is erroneous." See, also, First Nat. Bank v. Peterson, 47 Idaho, 794, 279 P. 302, 305. In the instant case the plaintiff introduced no proof showing what profits were lost by reason of the acts of the defendants. Nevertheless the jury returned a verdict in his favor for $3,000 as compensation for lost profits. It was clearly a guess and was not supported by any evidence.

The plaintiff has appealed from the order granting a new trial. It is supported by the transcript brought up by the defendants. In view of what we have said regarding the appeal from the judgment, it is clear that there is no need to discuss the plaintiff's appeal.

The judgment is reversed.

We concur: SPENCE, Acting P. J.; GOODELL, Justice pro tem.

130 Cal.App. 514

HABER v. J. G. BOSWELL CO. et al.

Civ. 837.

District Court of Appeal, Fourth District, California.

March 22, 1933.

1. Chattel mortgages ⚷227.

Lien of lessor's equitable mortgage, claimed to arise from lessee's agreement to mortgage crop, *held* not to attach to proceeds in hands of third person, where lessor failed to object to removal of crop (Civ. Code, §§ 2872, 2972).

The complaint alleged that the lessee had agreed to deliver to the lessor a second mortgage on the cotton crop, that he did not do so, and that lessor had equitable lien on the crop; but there was no allegation of any duty upon the third person to withhold sufficient of crop proceeds to satisfy the claim and no allegation that lessor did not consent to removal of the crop or that removal was tortious; and there was no allegation that crop was removed or sold against protest or over objections of lessor.

2. Appeal and error 🔑172(3).

Where plaintiff did not apply below to amend complaint, court on appeal from judgment of dismissal merely determines whether demurrer was properly sustained.

3. Chattel mortgages 🔑217.

Generally, lien of crop mortgage ceases upon removal of crop from land.

4. Pleading 🔑225(2).

Sustaining demurrer to complaint without leave to amend *held* not abuse of discretion where no request was made to amend.

Appeal from Superior Court, Tulare County; Frank Lamberson, Judge.

Action by P. B. Haber against the J. G. Boswell Company and others. From a judgment of dismissal in favor of defendant named, plaintiff appeals.

Affirmed.

H. A. Savage, of Fresno, for appellant.

Sidney J. W. Sharp and M. Wingrove, both of Hanford, for respondent.

CAMPBELL, Justice pro tem.

A general and special demurrer to plaintiff's complaint was interposed by defendants. It was sustained without leave to amend as to defendant and respondent J. G. Boswell Company, a corporation, and sustained with leave to amend as to defendants E. W. Sanders and Mrs. E. W. Sanders, within fifteen days after the notice of the ruling. From the judgment of dismissal in favor of said J. G. Boswell Company, a corporation, following the order sustaining its demurrer, this appeal has been taken.

The part of the complaint material to this appeal, after alleging that the J. G. Boswell Company is a corporation, proceeds that plaintiff and defendant E. W. Sanders entered into a lease for three hundred twenty acres of cotton land, and:

"II. That on or about the 1st day of February, 1929, plaintiff and defendant, E. W. Sanders, entered into a certain written lease, a copy of which lease is attached hereto and made a part hereof and marked Exhibit 'A.' * * * That said lease was drawn by J. G. Boswell Company, and said J. G. Boswell Company knew at all times herein mentioned, the contents of said lease, and knew plaintiff's rent had not been paid and knew plaintiff had an equitable lien on the crop of cotton growing during the year 1929 on said leased land as security for the rent under said lease. * * *

"'The balance of said rental shall be payable to the Lessor immediately upon the harvesting and removal of the cotton crop by the Lessee. And for the purpose of securing the payment of said balance, the Lessee covenants and agrees that on or before April 1st, 1929, he will make, execute and deliver to the Lessor a second mortgage on said cotton crop; it being expressly understood and agreed between the parties hereto that the Lessee contemplates and shall have the right to make a first crop mortgage thereon with J. G. Boswell Company for the purpose of financing his farming operations under this lease.'

"That said defendant E. W. Sanders stated that he would execute the crop mortgage referred to in said lease, however, never would and never did execute the same."

[1, 2] The record discloses that appellant did not apply to the lower court for permission to amend his complaint. The only question, therefore, for this court to determine is whether or not the demurrer of the respondent was for any reason properly sustained. Murphy v. Murphy, 57 Cal. App. 182, 207 P. 43; Bailey Trading Co. v. Levy, 72 Cal. App. 339, 237 P. 408; Thomson v. Mortgage Investment Co., 99 Cal. App. 205, 278 P. 468. In the first place there is no allegation in the complaint of any facts or circumstances which would show or tend to show some duty or obligation upon respondent to withhold sufficient of the crop proceeds to satisfy the alleged claim. (2) There is no allegation in the complaint that appellant did not consent to the removal of the crops. (3) There is no allegation in the complaint that the removal of the crops was tortious. (4) The complaint is lacking in allegation either that the cotton was removed or sold or that the proceeds thereof were paid to defendant Sanders against the protest or over the objections of appellant. It is quite clear from the allegation of the complaint that appellant made no move whatsoever to prevent any of these things being done, and even now he is not seeking to prevent the removal and sale of the cotton unharvested at the time of the commencement of his action, or impress a lien upon said cotton. The allegation of the complaint is susceptible of but two interpretations—either that appellant stood passively by with full knowledge of the disposition being made of the cotton and the proceeds, or that appellant consented to such disposition in reliance upon Sanders' promise to pay the rental out of the proceeds. In either case the result would be the same. The lien of the alleged equitable mortgage was lost upon the removal and sale of the cōtton and did not attach to the proceeds. Section 2872 of the Civil Code defines a "lien" as follows: "A lien is a charge imposed in some mode other than by a transfer in trust upon specific property by which it is made security for the performance of an act."

Section 2972 of the Civil Code provides that: "The lien of a mortgage on a growing crop continues on the crop after severance, whether remaining in its original state or converted into another product, so long as the same remains on the land of mortgagor."

In construing the Code section last above cited, it has been held that the lien of the mortgage is prima facie extinguished by the removal of the crop from the premises of the mortgagor. This is a general rule and it devolves upon one claiming otherwise to overcome this prima facie case by showing that his case is an exception. In the case of Horgan v. Zanetta, 107 Cal. 27, 40 P. 22, 24, the court said: "It does not appear that the mortgagee used any care or diligence in looking after the crop when harvested, or paid any attention to the grain until after it had been attached, which was about a month and a half after Murphy commenced to harvest it, and nearly a month after he had removed it from his land. We think that, under these facts, Cole was not estopped from denying the continuance of the mortgage lien, and that, at the time of the attachment, the said lien had been extinguished by the removal of the grain from the land of the mortgagee on which it was raised."

[3] The case of Gates v. Tom Quong, 3 Cal. App. 443, 85 P. 662, is also authority for the general rule of law that the lien of the mortgage ceases upon the removal of the crop from the land upon which the crop grew, and therefore the lien of the mortgage does not follow and attach to the proceeds of the crop. The court in this case mentions two exceptions to the above rule. One is where there is an agreement that the proceeds shall be applied to the mortgage indebtedness, and the other is where there is a tortious removal of the crops. It is clear that neither of these two exceptions has any application to the case at bar because it is not alleged that there was any agreement by either Sanders or the J. G. Boswell Company that the proceeds of the cotton crop should be paid to appellant nor is it anywhere alleged that the removal of the crop by Sanders was tortious. In the case of Riddle v. Etling, 84 Cal. App. 460, 463, 258 P. 162, 163, the court said: "While, depending upon the circumstances, the lien of the mortgage may have continued on the barley, the plaintiff had no lien upon the money in defendant's hands which was paid for the barley. If the plaintiff had authorized or ratified the sale made by the defendant, the result would be the same. The lien on the barley in that case would be extinguished and would not be transferred to the proceeds in the hands of the defendant. Maier v. Freeman, 112 Cal. 8, 44 P. 357, 53 Am. St. Rep. 151."

[4] Under appellant's allegations of fact in the instant case the lien of the alleged equitable mortgage did not and could not attach to the proceeds of the sale of the cotton in the hands of the J. G. Boswell Company, respondent herein. Appellant is seeking to impress his alleged lien only upon such proceeds. It follows that, as a matter of course, the complaint did not state a cause of action against respondent and the demurrer was properly sustained. Under the circumstances appellant is precluded from claiming on appeal that the lower court abused its discretion in sustaining the demurrer without leave to amend. In the case of Thomson v. Mortgage Investment Company, supra, the court in its opinion states (page 211 of 99 Cal. App., 278 P. 468, 471): "The record upon appeal does not affirmatively show a request for the filing of an amended complaint; therefore there cannot be imputed to the lower court an abuse of discretion in denying plaintiffs' leave to further amend. [Citing authorities.] The only question, therefore, for this court to determine is whether or not the demurrers of the respondents were for any reason properly sustained."

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

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130 Cal.App. 485

GELLER v. SMITH et al.

Civ. 4744.

District Court of Appeal, Third District, California.

March 21, 1933.

1. Mines and minerals 🔑79(1).

"Bonus," as applied to oil lease, *held* to mean money paid by lessee to lessor in consideration of execution of lease, as distinguished from return or royalty reserved by lessor to be paid by lessee through term of lease.

[Ed. Note.—For other definitions of "Bonus," see Words and Phrases.]

2. Mines and minerals 🔑79(7).

Where defendants, in consideration of quitclaim deed, agreed to pay plaintiff half of bonus paid for lease of oil land, and evidence showed that lessee paid $2,000 for obtaining lease, dividing sum into $1,500 commission and $500 bonus at defendants' request, finding that all of $2,000 was "bonus" *heia* proper.

Fact that part of such sum was used to pay commission and that part only went to landowners did not change character of sum from that of "bonus."

Appeal from Superior Court, Los Angeles County; B. Ray Schauer, Judge.

Action by W. A. Geller against Norman A. Smith and another. From a judgment in favor of plaintiff, defendants appeal.

Affirmed.

Will H. Winston, of Long Beach, for appellants.

Edwards & Johnson and Arthur J. Edwards, all of Los Angeles, and P. H. Johnson, of Sacramento, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

The plaintiff recovered judgment in the superior court of Los Angeles county for the sum of $1,000, for and on account of one-half of the bonus of $2,000 paid for the lease of certain oil lands situate in said county. The record does not show exactly the character of the claim, or title or right of the plaintiff in and to the lands hereafter described, but it is admitted in the action that the plaintiff had some claim thereto.

In consideration of the execution of a quitclaim deed by the plaintiff to the properties hereinafter mentioned, the following agreement was entered into:

"Los Angeles, California,
"November 16, 1926.

"Witnesseth, that this day, November 16, 1926, an agreement between W. A. Geller, Norman A. Smith and George C. Withers for that certain property located in the City of Long Beach, County of Los Angeles, State of California, to-wit: Lots sixteen (16), seventeen (17), eighteen (18) and nineteen (19), Block four (4), Palm Island Tract. Be it understood that said Norman A. Smith and George C. Withers agree to pay said W. A. Geller one-half (½) of any bonus paid on said property, deal to be consummated by either party with a minimum sum to W. A. Geller of Two Hundred and Fifty Dollars ($250.). Be it understood that said W. A. Geller will deliver quitclaim deed on said property in favor of said lessors on that certain lease in favor of Umpire Petroleum Corporation and by mesne assignment assigned to said W. A. Geller.

"[Signed] Norman A. Smith
"[Signed] George C. Withers
"[Signed] W. A. Geller."

Thereafter the defendants, in behalf of certain owners of said property other than the plaintiff, after negotiating with the California Petroleum Corporation, effected a lease of the premises to said corporation, and, as found by the trial court, obtained from said corporation for said lease a bonus in the sum of $2,000. The testimony in relation to the payment of the $2,000 is as follows:

In sustaining an objection, the court said:

"I think the objection is well taken. It seems to me that is the whole issue in the case, the question of whether or not a bonus was paid.

"The Court: It is the deal with the California Petroleum Company that I am interested in. What he did at the bank does not make any difference.

"Mr. Withers: The deal with the California Petroleum Company—we leased that property to the California Petroleum Company for $2,000.00.

"By the Court: Q. $2,000.00 bonus, is that it?

"Mr. Withers: A. For $2,000.00. In leasing that we had the California declare that as a $500.00 bonus and $1,500.00 commission, that is just exactly the way we got that.

"The Court: All right.

"Mr. Edwards: Q. Who negotiated that deal by which that money was paid to you or to Mr. Smith?

"Mr. Withers: A. We, as a firm, negotiated it.

"Mr. Edwards: Q. You and Mr. Smith, as a firm, negotiated the deal by which the $2,000.00 was received?

"Mr. Withers: A. Yes.

"Mr. Edwards: Q. And you and Mr. Smith controlled that company and negotiated in the name of that company, didn't you?

"Mr. Withers: A. Yes.

"Mr. Edwards: Q. And you and Mr. Smith had the California Petroleum separate the $2,000 into $500 and $1,500?

"Mr. Withers: A. We declared $1,500.00 commission with the California Petroleum Company; under any other circumstances that deal would not have gone through in any other way.

"Mr. Edwards: Q. And it was at your request that they separated it?

"Mr. Withers: A. It was bound to be at our request.

"Mr. Edwards: Q. They understood that they were to pay the $2,000.00 in order to get the lease.

"Mr. Withers: A. We were negotiating that lease and we had a right to all, if it was $3,000.00 bonus.

"Mr. Edwards: Q. It wasn't made at the Oil Company's request?

"Mr. Withers: A. No sir.

"Mr. Edwards: Q. They were willing to pay $2,000.00 and they did not care how it was divided?

"Mr. Withers: A. No sir; I don't imagine that they did. I don't know whether they did or not."

[1, 2] In summarizing his views on the foregoing testimony, the trial judge used the following language: "Apparently, it all hinges on the meaning of the word 'bonus.' I think the word 'bonus' has a legal meaning, but a certain term may have a significant meaning in a certain business and in a certain locality, and if it varies with the locality, it may be established by evidence. On the other hand, that expression may come to have a definite legal meaning. My opinion is that the term 'bonus' as applied to an oil lease has come to have a definite meaning, to-wit: a sum of money paid by a lessee to the lessor in consideration for the execution of a lease, as distinguished from the return or royalty reserved by the lessor to be paid by the lessee through the term of the lease. In this case, I am satisfied that the $2000.00 was a bonus and that the use to which that bonus was put cannot change its character. The fact that it was used to pay a commission, and that a part only went to the land owners, would still not change its character from that of a bonus."

We do not think it necessary to add anything to the opinion of the trial court, as what is there said disposes of the case. The allegations of the complaint show that the trial court had jurisdiction of the action.

The judgment is affirmed.

We concur: PULLEN, P. J.; R. L. THOMPSON, J.

130 Cal.App. 542

BULLARD v. ROSENBERG et al.

Civ. 839.

District Court of Appeal, Fourth District, California.

March 23, 1933.

1. Action 🔑28.
Attachment 🔑6.

That exchange agreement was induced by misrepresentations regarding value of realty did not entitle defrauded party to waive tort and sue on implied contract for money had and received; hence attachment writ was improperly issued and was void (Code Civ. Proc. § 537, subd. 1).

Code Civ. Proc. § 537, subd. 1, provides for issuance of writ of attachment on contract, express or implied, for direct payment of money.

2. Continuance 🔑7.

Denying continuance is within judge's discretion.

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Action by Allen F. Bullard against Jennie Rosenberg and others. Judgment for plaintiff, and defendants appeal.

Affirmed.

Goldman & Lieberman, of Los Angeles, for appellants.

Guy Knupp and William Ellis Lady, both of Los Angeles, for respondent.

CAMPBELL, Justice pro tem.

This is an action brought to quiet the title of plaintiff to certain real property situate in the county of Tulare and also to certain real property situate in the county of Los Angeles. The complaint is in the usual form of such actions. The answer of defendant Jennie Rosenberg contains a general denial of the title of plaintiff and alleges in general terms that said defendant owns an interest in the property superior to any right, title, or interest of the plaintiff. As a separate defense, the answer alleged that the right, title, and interest of plaintiff is subject to the lien of a writ of attachment issued out of the county of Los Angeles, state of California, in an action wherein the defendant and appellant here is plaintiff and one Kate A. Bullard is defendant, and alleges that at the date of the levy of the writ said Kate A. Bullard had an interest in the property superior to that of the plaintiff. The plaintiff relies, in proof of his title, upon a deed executed and delivered subsequent to the levy of the writ of attachment.

Two questions are involved in the appeal: (1) Whether a good and valid lien on the property is shown by the evidence introduced by appellant at the trial; and (2) did the trial court abuse its discretion in refusing to grant a continuance of the trial.

[1] Plaintiff and respondent offered the deed conveying the property to him, and appellant makes no contention that the evidence is not sufficient to establish allegations of the complaint with respect to the title of respondent. Appellant's only assertion is that the property is subject to the lien of attachment issued out of the superior court of Los Angeles county. In support of this position, appellant offered in evidence (1) a certified copy of the complaint in the Los Angeles action; (2) the affidavit for attachment; (3) writ of attachment and sheriff's return thereon; (4) the undertaking on attachment. The affidavit for attachment reads as follows: "I am the Plaintiff herein; that the Defendant herein is indebted to me in the sum of $27,850.00, Gold Coin of the United States, over and above all legal setoffs and counterclaims, upon an implied contract, for the direct payment of money, to-wit: For monies had and

received by defendant for the use and benefit for plaintiff, and that such contract was made or is payable in this State, and that the payment of the same has not been secured by any mortgage or lien upon real estate or personal property, or any pledge of personal property."

It is the evident purpose of appellant to bring herself within the provisions of subdivision 1 of section 537 of the Code of Civil Procedure, which provides for the issuance of a writ of attachment upon a contract express or implied for the direct payment of money. The question then to be decided here is whether the action is one upon a contract, express or implied. Turning to the complaint in the Los Angeles action, upon which the writ of attachment is based, we find it to be in six counts. The first four causes of action are for damages alleged to have been suffered by the plaintiff by reason of perjury and fraud on the part of the defendant; such perjury and fraud relating to a false affidavit that service had been made upon the plaintiff in a prior foreclosure suit. It is clear that the first four causes of action are for a tort. The fifth cause of action is for damages for fraud and misrepresentation and is likewise plainly a cause of action ex delicto. The sixth cause of action, which is the basis, apparently, of the affidavit for the writ of attachment, after repeating all of the allegations of the first five causes of action, sets up a common count for money had and received for the use and benefit of the plaintiff in the sum of $27,850. It is clear that this is but another way of pleading the cause of action set up in the fifth cause of action. Appellant concedes that the sixth cause of action is but a restatement, in another form, of the facts set forth in the fifth cause of action, and argues that under the facts stated in the fifth cause of action, the action for money had and received in the sixth cause of action is the same; it being true that the two causes of action are based on a single transaction, to wit, a written agreement for the exchange of real property which the appellant contends was induced by false and fraudulent representations as to the value of the property which she was to receive in the exchange, and it is then legally possible for the appellant to waive the tort and sue upon an implied contract for money had and received. Appellant asserts that this may be done, and cites in support thereof Minor v. Baldridge, 123 Cal. 187, 55 P. 783. The rule, however, has well-recognized limitations. In 3 Cal. Jur. p. 379, the limitation of the rule as to waiver of tort is thus expressed: "The rule that the owner of personal property may waive the tort and sue in assumpsit does not extend to a case where he has voluntarily parted with his property in exchange for something received by him in return, since no contract will be implied by law as against an express contract not disavowed by either party. Thus, the fact that the exchange of property was induced by fraud will not give the party defrauded a cause of action based on the theory that the property surrendered was sold to the wrongdoer for an agreed sum of money."

The court in Bechtel v. Chase, 156 Cal. 707, 106 P. 81, 83, makes the basis for this limitation very clear. It is said there:

"The plaintiff seeks to bring the case within the rule that, where personal property is wrongfully converted, the injured party may 'waive the tort and sue in assumpsit.' In many jurisdictions this doctrine is limited to cases where the wrongdoer has sold the property or otherwise converted it into money, in which event the plaintiff may maintain an action for the proceeds. 4 Cyc. 332. In this state, however, as in a number of others, a broader rule enables one whose goods are wrongfully taken and used by another to sue in assumpsit for their value as for goods sold and delivered. Roberts v. Evans, 43 Cal. 380; Lehmann v. Schmidt, 87 Cal. 15, 25 P. 161; Chittenden v. Pratt, 89 Cal. 178, 26 P. 626. But the application of this rule, even in its more liberal form, cannot be extended to a case where plaintiff has voluntarily parted with his property in exchange for something received by him in return. The very basis of the 'waiver of tort' is that plaintiff consents to the taking of his property and affirms the act of the wrongdoer. He treats it as a sale, and recovers the value, due him under an implied contract of sale. But where he has actually agreed to an exchange, which is executed, his affirmance of the transaction is an affirmance of it as a whole. Having parted with his property for an agreed consideration, he cannot, while relying upon his transfer as one made pursuant to contract, hold the defendant to the payment of any other consideration than the one agreed upon. No contract will be implied by the law as against an express contract not disavowed by either party. So long as plaintiff treats the transfer of the notes to Foster as valid, his only remedy for the fraud alleged by him is by means of an action in tort to recover damages therefor."

It is true that the case of Minor v. Baldridge, supra, is authority for a generally recognized rule, but such rule is limited in its application, and the case before this court is within the limitation rather than the rule. In the recent case of San Francisco Iron & Metal Co. v. Abraham et al., 211 Cal. 552, 296 P. 82, 83, the court, in quoting the opinion of the District Court of Appeal, said:

"The plaintiff's complaint is in two counts. The first count specifically pleads a cause of action as for deceit. The second count pleads a cause of action as for moneys had and received. It was stipulated at the trial that both counts are but different methods of pleading one transaction. It nowhere appears that the plaintiff rescinded the partnership contract, offered to rescind it, nor even at this time, offers to place the defendant in statu quo.

"The foregoing facts show that the plaintiff's grievance is a tort and under our statute it was not entitled to an attachment. Code Civ. Proc. § 537; Hallidie v. Enginger, 175 Cal. 505, 509, 166 P. 1. Moreover, searching the entire record, nothing appears showing any contract under which the defendant became indebted to the plaintiff '* * * upon a contract express or implied, for the direct payment of money. * * *' Code Civ. Proc. § 537; Willett & Burr v. Alpert, 181 Cal. 652, 662, 185 P. 976; * * * Cal. Packing Corp. v. Kato, 45 Cal. App. 491, 493, 188 P. 57.

"The plaintiff points to the count as for money had and received, asserts that that count sounds in contract, and therefore claims that in any event it was entitled to take out a writ of attachment. In making this claim it is assuming that the court is passing on a demurrer, whereas the proceeding before the court is a motion to dissolve an attachment. The question is not what the plaintiff has pleaded but what in truth and in fact is its grievance. The count for moneys had and received was evidence on the issue before the court, but no more conclusive than any other item of evidence before the court.

"The plaintiff's complaint on the hearing of the motion before the court stood as an affidavit. Jacobs, Malcolm & Burtt v. Railway Co., 71 Cal. App. 42, 44, 234 P. 328. That is, the hearing on the motion before the court was similar to a hearing on a motion to dissolve an injunction. That the plaintiff's verified pleading stands as an affidavit on a motion to dissolve an injunction, is made clear by the authorities. Falkinburg v. Lucy, 35 Cal. 52, 60, 61, 95 Am. Dec. 76; Hefflon v. Bowers, 72 Cal. 270–272, 13 P. 690; Hiller v. Collins, 63 Cal. 235, 237; Christopher v. Condogeorge, 128 Cal. 581, 585, 61 P. 174.

"Moreover, by pleading the count in assumpsit the plaintiff waived the tort and affirmed the original contract. But, by the terms of that contract the defendant never bound himself to repay to the plaintiff the amount of its expenditures. Bechtel v. Chase, 156 Cal. 707, 711, 712, 106 P. 81. Therefore, it was not entitled to a writ of attachment."

The action commenced by appellant Jennie Rosenberg v. Kate A. Bullard, in the superior court of Los Angeles county, was not one in which the issuance of a writ of attachment was authorized. The writ was not irregularly issued, but it was improperly issued, and is therefore void. Mudge v. Steinhart, 78 Cal. 34, 20 P. 147, 12 Am. St. Rep. 17; Talcott Land Co. v. Hershiser, 184 Cal. 748, 195 P. 653.

[2] We have examined the record, and find nothing therein upon which might be predicated any showing justifying a continuance. There are no affidavits on file setting forth facts upon which the court might have granted a continuance. It is clear that the court did not abuse its discretion in refusing to grant the continuance.

"It is a settled rule of practice that an application for a continuance is addressed to the sound discretion of the trial court, and its ruling will not be reviewed except for the most cogent reasons. The trial court is apprised of all the circumstances of the case and the previous proceedings, and is, therefore, better able to decide upon the propriety of granting the application than an appellate court; and when it exercises a reasonable, and not an arbitrary discretion, its action will not be disturbed." 5 Cal. Jur. p. 968.

The judgment is affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

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130 Cal.App. 521

MOONEY v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al.

Civ. 9058.

District Court of Appeal, First District, Division 1, California.

March 23, 1933.

1. Criminal law 🔑264, 636(1).

Generally, defendant in felony case should be present when arraigned and at subsequent stages of trial.

2. Criminal law 🔑636(3).

Defendant's presence in felony case is not necessary at preliminary or formal proceedings, when no matters affecting guilt or innocence are presented.

3. Criminal law 🔑1152(1).

Any error in setting case for trial in defendant's absence is reviewable on appeal.

4. Mandamus 🔑61.

Where defendant in felony case was represented by counsel, alleged error in not permitting defendant to appear in court at time fixed for setting case for trial *held* not ground for mandamus to compel such permission.

Proceeding on the petition of Thomas J. Mooney for an alternative writ of mandate, directed to the Superior Court in and for the City and County of San Francisco, Hon. Louis H. Ward, Judge, to permit the appearance of petitioner in court.

Petition denied.

Frank P. Walsh, of San Francisco, and Leo Gallagher, of Los Angeles, for petitioner.

PER CURIAM.

The petition for an alternative writ of mandate filed in the above-entitled matter is hereby denied.

[1-4] It is the general rule that a defendant in a felony case should be present when he is arraigned and at every subsequent stage of the trial. 16 Cor. Jur. "Criminal Law," § 2066, p. 813. His presence, however, is not necessary at proceedings which are merely preliminary or formal and no matters affecting his guilt or innocence are presented. People v. Morrell, 28 Cal. App. 729, 153 P. 977; 16 Cor. Jur. § 2068, p. 815. While a defendant's right to be present at the time fixed for setting the case for trial was impliedly recognized in People v. Rader, 136 Cal. 253, 68 P. 707, in People v. Melandrez, 4 Cal. App. 396, 88 P. 372, it was held that such an order made in his absence, where his attorney was present and ample time was given to prepare for trial, was not erroneous. Any error in this connection is of course reviewable on appeal, but is not a ground for the issuance of the writ here demanded.

The rule followed in the cases last cited appears to be the correct one, and supports the conclusion that a defendant who is represented by counsel, which is the case here, is not entitled as a matter of right to be present when the case is set for trial.

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130 Cal.App. 442

PEOPLE v. GOLDSMITH.

Cr. 2306.

District Court of Appeal, Second District, Division 1, California.

March 17, 1933.

1. Rape 🔑14.

That victim desisted from further resistance because of accused's violence and threats to kill, with apparent power of execution, did not prevent verdict of rape (Pen. Code, § 261, subd. 4).

2. Rape 🔑57(3).

Generally, whether prosecutrix made required resistance is question of fact to be determined by jury (Pen. Code, § 261, subd. 4).

3. Criminal law 🔑742(1).

Whether testimony of prosecutrix in rape case is true in essential particulars is for jury (Pen. Code, § 261, subd. 4).

4. Criminal law 🔑742(1).
Rape 🔑57(3).

Truth of prosecutrix' testimony and sufficiency of resistance in rape case are for court where sufficiency of evidence to establish either corpus delicti or guilt of defendant or inherent improbability of prosecutrix' testimony is in question (Pen. Code, § 261, subd. 4).

5. Rape 🔑51(1).

Evidence *held* sufficient to sustain conviction of rape (Pen. Code, § 261, subd. 4).

Appeal from Superior Court, Los Angeles County; Wilber F. Downs, Judge.

Huel Goldsmith was convicted of rape, and he appeals.

Affirmed.

Robert E. O'Neill, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Lionel Browne, Deputy Atty. Gen., for the People.

HOUSER, Justice.

From a judgment of conviction on each of two counts contained in an information wherein he was charged with the commission of the crime of rape, as well as from an order by which his motion for a new trial was denied, defendant has appealed to this court.

Although appellant has divided his point into many different parts and by each of them has urged a reason couched in language different from either or all the others, the sum and substance of the several grounds thus presented for reversal of the judgment and the order herein is that the evidence is insufficient to support the judgment.

An examination of the record discloses the fact that a period of two days only intervened between the alleged attack made by defendant on his first victim and the similar attack made by him on the second. As he did not see fit to be sworn as a witness in his own behalf, the testimony of the prosecuting witness in each of the counts of the information must furnish the sole source relating to the immediate facts. In the main, it appears that the method of attack employed by him in the commission of the offense of which he was charged was identical one case with the other. In short, at about 8 o'clock in the morning, he drove his automobile along or upon a bus route, and upon seeing the prosecutrix apparently waiting for an opportunity to become a passenger on such conveyance, stopped his automobile and invited the prosecutrix to ride with him. The invitation having been accepted, instead of continuing on the way to the intended destination of the prosecutrix, defendant drove his automobile at a rapid rate of speed into a lonely place among willow trees and bushes, and then and there, by means of threats of great bodily injury to the prosecutrix, or even of taking her life, unless she consented to the act—which threats were actually preceded by physical violence in the form of choking the prosecutrix—he succeeding in quieting her physical resistance and thereupon proceeded to and did accomplish his purpose.

[1] The contention of appellant is that because by the evidence it appears that continuously and up to the very instant when copulation occurred between defendant and the prosecutrix, she failed to make every resistance within her power to prevent the consummation of the act—no crime was committed. In that connection, in effect the evidence was that, because of the immediately previous violence suffered by the prosecutrix at the hands of defendant, together with his threats to take her life unless she acceded to his demands, coupled with the apparent power in the defendant of execution of his threats, the prosecutrix desisted from her former resistance of defendant's attack upon her, and thereupon in apparent acquiescence permitted defendant to carry out his desires. In such circumstances, the ruling in the thoroughly considered case of People v. Bonzani, 24 Cal. App. 549, 141 P. 1062, wherein the detailed facts resembled those herein, is a complete answer to and refutation of appellant's contention. Subdivision 4 of section 261 of the Penal Code provides that the crime of rape may be committed where "she [the victim thereof] is prevented from resisting by threats of great and immediate bodily harm, accompanied by apparent power of execution. * * *" On each of the occasions, and at the time specified in the information, it appears from the evidence that, aside from, and in addition to, the fact that in defendant's favor a physical and muscular difference existed between him and the prosecutrix, he particularly threatened that, with a wrench which lay on the floor of the automobile, he would take her life unless she ceased in her physical efforts to frustrate the attack upon her and to plead for the preservation of her life and her virtue. As is said in the cited case (24 Cal. App. 549, 558, 559, 141 P. 1062, 1066):

"* * * It is obviously true and is often the fact, as the jury by the evidence was authorized to believe was so in this case, that a person, when enveloped by appalling circumstances, will lose his courage and with it his normal strength, and so become practically helpless in the hands of one who may have a criminal or sinister design which may be the more readily executed when his victim is reduced to that condition. * * * And the proposition may be said to be particularly true in cases of rape, where the assaulted party is of the weaker sex. So in all such cases, of which this is typical, since there is evidence in the record tending to show that the prosecutrix was much frightened and terrified, it is always with the jury to say, where there is some credible evidence of the fact, whether the female was, at the time of the assault, possessed of such fear as would likely have the effect of impairing, if not altogether destroying, her ability to so resist her assailant as to prevent actual intercourse."

See, also, People v. Holmes, 71 Cal. App. 59, 63, 234 P. 332; People v. Murphy, 53 Cal. App. 474, 480, 200 P. 484. In the well-considered case of People v. Cline, 117 Cal. App. 181, 184, 3 P.(2d) 575, 576, in effect the rule is announced that the resistance made by the victim of the attack "need only be such as to make nonconsent and actual resistance reasonably manifest; * * * [or] until resistance becomes so useless as to warrant its cessation."

[2-5] Ordinarily, the question of whether the prosecutrix made the required resistance is one of fact to be determined by the jury from the evidence adduced on the trial of the action. Likewise, the further question as to whether her narration of the facts in connection with the commission of the alleged offense is true in its essential particulars. Such questions are for the consideration of the court on the one hand, when presented on the theory that the assumed facts are insufficient to establish either the corpus delicti, or the guilt of the defendant in the action; or, on the other hand, that the testimony given by the prosecutrix is so inherently improbable of being the truth that necessarily it must fall of its own weight. In the instant case, although within the several points presented by appellant may be found such a specification of error or errors arising from the accusation against the defendant and the evidence adduced against him, nevertheless, without here detailing the numerous facts which appear in the testimony given on the trial of the action, it may suffice to state, first, that in the opinion of this court, which is supported especially by the later adjudications of the appellate tribunals of this state, the evidence presented against defendant was not only sufficient to support the judgment, but that it pointed so conclusively to his guilt that no doubt with reference thereto could conscientiously abide within the mind of a reasonable man; and, secondly, with reference to the story of the prosecutrix relating generally to the details of the commission of the offense, and particularly to her own acts, conduct, and declarations in connection with the resistance offered by her to the demands, threats, and physical violence

of defendant in the premises, in its substance and effect we discern no such incongruity between it and the dictates of common sense as would indicate that the judicial brand of falsity should be impressed upon such testimony.

The judgment as to each count of the information and the order therein by which the motion for a new trial was denied are affirmed.

We concur: CONREY, P. J.; YORK, J.

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130 Cal.App. 311

BOCKWICH v. GARLOW.

Civ. 4739.

District Court of Appeal, Third District, California.

March 10, 1933.

1. Mortgages ⟹**319(1), 464.**

Introduction of note and mortgage, coupled with stipulation of execution by defendant, established prima facie case, and created presumption that debt had not been paid.

2. Mortgages ⟹**319(1).**

While presumption of nonpayment arising from proof of note and mortgage and stipulation as to execution is disputable, it is evidence and sufficient even against positive testimony of witnesses to contrary (Code Civ. Proc. § 1844).

3. Appeal and error ⟹**1012(1).**

Appellate court cannot interfere with trial court's finding that prima facie case established by plaintiff was not overcome by direct evidence of defendant and his witnesses.

4. Mortgages ⟹**319(3).**

Evidence *held* to sustain finding that nothing had been paid on mortgage indebtedness other than the sum of $1,000.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by A. Robert Bockwich, administrator of the estate of Frank B. Morris, deceased, against George A. Garlow. From judgment for plaintiff, defendant appeals.

Affirmed.

George C. Watson, of Los Angeles, for appellant.

C. F. Culver, of Los Angeles, for respondent.

BURROUGHS, Justice pro tem., delivered the opinion of the court.

This is an action by the administrator of the estate of Frank B. Morris, deceased, to foreclose a mortgage. The decree of foreclosure was regularly entered, and the defendant, George A. Garlow, has appealed therefrom.

The only question presented for the consideration of the court is the sufficiency of the evidence to support the court's finding of fact: "That it is not true that the defendant, George A. Garlow, paid the principal sum of $1500.00 or accrued interest from November 1, 1928, to the said Frank B. Morris, on or about the 18th day of April, 1929, or otherwise, and nothing has been paid on account of said promissory note except the said sum of $1000.00 and the interest to November 1, 1928."

In support of the action, plaintiff produced and introduced in evidence a promissory note in the principal sum of $2,500, and a real estate mortgage securing the same. Both were signed "George A. Garlow," and were made in favor of Frank B. Morris. The execution of both instruments by the plaintiff was admitted. The payment of the sum of $1,000 on the principal thereof, together with interest on the whole sum to May 1, 1928, was admitted by the plaintiff, who thereupon rested his case.

The appellant testified in his own behalf that he paid Frank B. Morris the balance of $1,500 due on said note, with the accrued interest then due, in cash on April 18, 1929, three days before the death of Mr. Morris. He detailed the circumstances of the payment as follows: "Mr. Morris was down there visiting my son and his wife. My son lives on the same block with me. When he came home, he came in to see me, through the back door, the kitchen door. I was washing dishes in the kitchen. When I got through we went in the dining room and I went and paid him. I said, 'Morris, I intended to pay you on the first of May and I have cash and I will pay you,' and I paid him. He said in a day or two he would lay off from his labor and have the mortgage released and returned. I made a notation of that on the old receipt, and he accepted it. Mr. Morris was very peculiar about writing any papers. He was a very peculiar man. He was a very ignorant man and did not understand business matters. He said, 'Why not put it on the old receipt?' So I went and got the old receipt and put it on the old receipt. Q. Did you write it on the old receipt in his presence? A. Yes, I did."

The defendant further testified that he had many business deals with Mr. Morris, and that some were handled by cash and some by checks; that it was his habit to keep considerable sums of money on hand; that the payment of $1,000 which he had previously made on the note was by check, and that he took a receipt. There was testimony by two other witnesses that they had seen defendant with some currency in his possession, but neither of them knew the amount.

John Yates, a witness called on behalf of appellant, testified that he had been well acquainted with Morris for about twenty-five years, and that the night before Morris died the witness met him on the street, and they had a conversation as follows: "A. Why, he asked me to come up to-night—up to his house; he said he was going to have a hell of a time. He had a little schnaps and Mr. Garlow had paid him $1,500.00. I said, 'Frank, I am very sorry, but I can't go up, I am tired out.' He said—I said, 'Who is going to be there?' and he told me the nurse was going to be there and he wanted me to be there." This is the substance of the evidence offered by the defendant.

In rebuttal, Mrs. Sue H. Keller, who was a clerk in the office of C. F. Culver, the attorney for the plaintiff, testified that the defendant, George A. Garlow, visited the office of her employer some time in July, 1929, and that he showed them a receipt which he claimed was a receipt from Morris when he made his final payment on the $2,500 note in controversy. She further testified that it was a straight receipt for a certain sum of money, that there was no insertion in the receipt, and it was not in the form of the old receipt to which the defendant testified as above set forth.

A. Robert Bockwich, the administrator of the estate of the decedent, testified that he visited the home of the deceased the morning following his death, but was unable to obtain admission. Believing that something was wrong, he, with others, broke into the house and found the dead body of Morris; that there was no money on his person, and later a thorough search was made of the house and no money was found therein; that the deceased kept accounts in two banks, and that there had been no deposit of the money which the defendant claimed to have paid to him; in fact, there had been an investigation carried on with the utmost diligence and care, and no money had been discovered. This constituted the substance of the evidence offered on the question of payment.

It is contended by the appellant that this case comes within section 1844, Code of Civil Procedure, which provides that: "The direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact, except perjury and treason." From this section he argues that as the only direct evidence is that of the appellant, who testified to the payment of the note, supported by the evidence of the witness Yates, as to the admission made by Morris, there can be no question but that the above-mentioned finding is not only not supported by the evidence, but is contrary to it. However, appellant has overlooked well-established principles of law which sustain the findings of the court and the judgment in this case.

[1, 2] When the plaintiff introduced the note and mortgage, with the stipulation that it had been executed by defendant, he established a prima facie case. The presumption then arose that the debt had not been paid. Griffith v. Lewin, 125 Cal. 618, 58 P. 205; Collins v. Maude, 144 Cal. 289, 77 P. 945. While this presumption is disputable, it is evidence, and is sufficient, even against the positive testimony of witnesses.

In Smellie v. Southern Pacific Co., 212 Cal. 540, 299 P. 529, 532, it is said: "That a presumption is evidence and may in certain cases outweigh positive evidence adduced against it has long been the settled law of this state."

In the case of Sarraille v. Calmon, 142 Cal. 651, 76 P. 497, it is held: "The possession of the notes by the plaintiff is presumptive evidence of nonpayment which may outweigh positive testimony in reference to payment, and produces a sufficient conflict in the evidence to support a finding of nonpayment in favor of the plaintiff." It is further said in this case: "We cannot put ourselves in the shoes of the judge who had the witnesses before him; we cannot say to what extent he discovered what he thought were inherent improbabilities in the statements of witnesses; nor can we say how far the witnesses, by their manner of testifying, may have given rise to doubts of their sincerity, or may have impressed the judge with their having given a wrong coloring to material facts."

[3, 4] In view of the evidence above set forth and the rules of law above referred to, it is clear that the plaintiff made a prima facie case, and, if the trial court, in the exercise of the power vested in it, concluded that the direct evidence of the defendant and his witnesses was overcome by such prima facie showing, or by other circumstances connected with the case, we are not in a position to question the conclusion of the trial court. The story of the defendant himself seems on its face somewhat improbable. It is very unusual for a man to carry around such large sums of money, or to pay without taking a receipt. Further, the testimony of Mrs. Keller that the defendant produced a receipt, or what he claimed to be a receipt for the payment of the money, given at the time of the settlement of the note, and his subsequent denial of having such a receipt, would tend to throw discredit on his testimony. However, these were matters for the trial court, and we must conclude that it acted upon sufficient evidence, and the judgment must be affirmed. It is so ordered.

We concur: **PLUMMER**, Acting **P. J.**; **R. L. THOMPSON, J.**

130 Cal.App. 580

BENNIS v. YOUNG (two cases).

Civ. 7648, 7649.

District Court of Appeal, Second District, Division 2, California.

March 24, 1933.

Hearing Denied by Supreme Court May 22, 1933.

1. **Automobiles 🔑245(14).**

Whether plaintiff, driver of automobile which collided with defendant's automobile at highway intersection, was guilty of contributory negligence *held* question for jury.

2. **Automobiles 🔑244(36).**

Evidence *held* to support verdict finding that negligence of defendant was proximate cause of collision with plaintiffs' automobile at highway intersection.

Appeals from Superior Court, Los Angeles County; L. W. Fulkerth, Judge.

Separate actions by Karl V. Bennis and by Nine Bennis, against T. E. Young. Judgments in favor of the plaintiffs, and the defendant appeals from each judgment.

Judgments affirmed.

George L. Greer, of Los Angeles, for appellant.

Fred J. Furman and A. J. Verheyen, both of Los Angeles, for respondents.

WORKS, Presiding Justice.

These two causes were tried together and they may be properly disposed of by a single opinion here. The respective plaintiffs are husband and wife. They sue defendant for damages resulting from an automobile collision which occurred at a street intersection. Plaintiffs were in their car together, the husband driving. Defendant was driving his car. The two vehicles approached the intersection at right angles to each other, and the occupants of each car could see the other as they approached the intersection for a distance of more than 200 feet. Appellant says the distance may have been as much as 500 feet. A separate judgment went for each plaintiff, and defendant appeals separately from each.

[1, 2] Appellant confesses negligence on his part, but contends that the evidence shows without contradiction that respondent driver was guilty of contributory negligence which was the proximate cause of the catastrophe. Appellant considers the incident as one in which he and Bennis were engaged in a speed contest to determine which car could be propelled across the intersection before the other. Appellant strikingly says: "Can such a race (in law) be left to a game of chance, and may a jury be the sole judges of such a speed contest?"

Bennis was traveling upon a paved highway and Young upon a graveled, oiled road. There was evidence to the effect that Young made his approach to the intersection at the rate of about 40 miles the hour, and maintained that rate of speed until the instant of the collision. There is also conflicting evidence that he approached the intersection at the rate of 18 or 20 miles the hour and that he could stop his car within 6 or 7 feet from a speed of 20 to 25 miles per hour. There is testimony that Bennis approached the intersection at a speed of from 30 to 35 miles, and also that he slowed to about 20 before negotiating the intersection, as well as other evidence that he did not alter his speed at all. With this evidence, and with the further consideration that Bennis had the right of way by two sanctions, viz., having entered the intersection first and being on the right as the two approached the intersection, it seems clear to us that the jury had ample evidence before it from which it could reasonably conclude that Bennis drove his car with all of the care which the law required him to exercise in the premises. The jury's conclusion that Young's negligence was the proximate cause of the collision is sustained by the evidence.

The judgments are affirmed.

We concur: CRAIG, J.; STEPHENS, J.

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130 Cal.App. 582

PEOPLE v. JENNINGS.

Cr. 2322.

District Court of Appeal, Second District, Division 2, California.

March 24, 1933.

1. **Criminal law 🔑24.**

Statutory presumption that person intends ordinary consequences of his voluntary act amounts to evidence (Code Civ. Proc. § 1963, subd. 3).

2. **Assault and battery 🔑92.**

Evidence that pistol was pointed by defendant at witness and actually fired, wounding witness, supported conviction for assault with deadly weapon.

Appeal from Superior Court, Los Angeles County; Elliott Craig, Judge.

Emmett Jennings was convicted of assault with a deadly weapon, and he appeals.

Affirmed.

Gladys Towles Root, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Alberta Belford, Deputy Atty. Gen., for the People.

ARCHBALD, Justice pro tem.

Appellant was tried before the court, sitting without a jury, on the charge of assault with a deadly weapon. From a judgment of conviction he has appealed.

[1, 2] The only contention made by appellant is that the judgment is contrary to the law and the evidence, in that there is no proof of intent.

The complaining witness testified that he was living with his wife at the home of his brother-in-law when the incident happened; that he heard that the defendant, who was not living at the house, was there, and that complaining witness took his brother-in-law's gun, went into the kitchen where appellant was, with the gun in his hand and at his side, and pointing toward the door, said to appellant, "Jennings, I don't want to see you here. I don't intend to discuss any matters with you here and you are not going to see her, so get out." That immediately appellant threw his hand back to his hip pocket, pulled his gun, and fired at complaining witness, the bullet grazing his cheek, causing the blood to flow. The witness also testified that, as soon as appellant reached for his gun, he raised his own gun and pointed it at appellant, and attempted to fire the same, but that it would not fire. Appellant testified that he fired into the wall and had no intention of hitting complaining witness, but did it "to bring the man to his normal senses." Such evidence was entirely by way of excuse or defense, and was for the consideration of the trial court. That court heard the evidence and saw the witnesses and decided against the defense urged. There is no question but that the evidence shows all the material elements of the crime charged. The pistol was not only pointed, but actually fired, wounding the complaining witness. That the weapon used was deadly, and that the act amounted to an assault, in the light of plaintiff's evidence, would seem to be unquestioned. There is a presumption, which amounts to evidence, "that a person intends the ordinary consequences of his voluntary act." Section 1963 subd. 3, Code Civ. Proc. The trial court, deciding against the claim of self-defense on conflicting evidence, must have determined that the act was voluntary, and the evidence supports such a conclusion. The evidence is sufficient to support the judgment as well as the order denying the motion for a new trial, from which, however, there seems to be no appeal.

Judgment affirmed.

We concur: WORKS, P. J.; STEPHENS, J.

130 Cal.App. 578

ALHADEFF v. ALHADEFF.

Civ. 7528.

District Court of Appeal, Second District, Division 2, California.
March 24, 1933.

1. Appeal and error 🔑1011(1).

On conflicting evidence, trial judge's findings are conclusive.

2. Trial 🔑397(1).

No finding was necessary on withdrawn defense (Code Civ. Proc. § 632).

Appeal from Superior Court, Los Angeles County; Harry A. Hollzer, Judge.

Action by Jack M. Alhadeff against Jack Alhadeff, sometimes known as Jack Aldeff. From a judgment in favor of plaintiff, defendant appeals.

Affirmed.

Charles W. Humphreys, of Los Angeles, for appellant.

Henry Cohen, of Los Angeles, for respondent.

ARCHBALD, Justice pro tem.

This action was brought to recover the sum of $2,075 on a post-dated check in favor of plaintiff, executed by defendant. From a judgment against him, defendant has appealed.

Appellant contends that the findings are not supported by the evidence. The fact of the issuance and delivery of the check dated January 3, 1929, on or about the 5th day of December, 1928, is admitted by appellant, as is also the fact that prior to the time it was given respondent had loaned him $1,975, and at the time the check was given the parties agreed upon the sum of $100 as interest, making the amount for which the check was given. It was stipulated that the check was deposited for payment on January 3, 1929, but that nothing had been paid on it. With this prima facie case, the plaintiff rested. Appellant set up as an affirmative defense that the loan was made for use in defendant's cleaning and tailoring business "to be repaid therefrom at some future, undetermined date, depending upon the ability of the said business to pay the said sum," and that on or about December 5, 1928, "plaintiff falsely and fraudulently stated and asserted to defendant as follows: 'Give me a post-dated check. I will hold it until you tell me to deposit it. I won't press you for payment,' and that appellant relying upon said statement and believing it to be true executed and delivered said check." It is to be noted that such defense shows that such promise was made after the money was loaned, and that there was no consideration for it. Evidently plaintiff waited, however, until the date of the check, January 3, 1929, when it was deposited for payment.

[1] Such check was introduced in evidence by plaintiff. On its face, under the admitted facts concerning its issuance, a prima facie case was made, entirely inconsistent with the affirmative defense so alleged, sufficient to make a conflict in the evidence, even assuming that the defense alleged was sufficient as a matter of law. In such a case the decision of the trial judge who heard the evidence is binding upon the appellate court, and we must assume he rejected the evidence given by defendant. Anglo-Californian Bank v. Cerf, 147 Cal. 393, 81 P. 1081.

[2] Appellant's second defense alleged that a note was given by him in satisfaction of the claim on said check, and that the trial court erred in not making a finding thereon. The findings of fact recite that such affirmative defense was withdrawn, and the reporter's transcript contains no evidence in support thereof. Findings of fact are only required "upon the trial of a question of fact." Section 632, Code Civ. Proc. That assumes that evidence will be introduced on the issues raised by the pleadings. If any issue is withdrawn or evidence is not introduced in support thereof, no finding is necessary thereon.

Judgment affirmed.

We concur: CRAIG, Acting P. J.; STEPHENS, J.

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130 Cal.App. 427

JACKSON v. MILLER.

BENTLEY v. SAME.

Civ. 4831, 4832.

District Court of Appeal, Third District, California.

March 16, 1933.

1. Automobiles 🔑207.

Contributory negligence, in head-on collision with defendant motorist on wrong side of road, could not be predicated on plaintiff's failure to clear defendant's path.

2. Automobiles 🔑246(47).

Where evidence conflicted as to whether head-on automobile collision occurred on plaintiff's or defendant's side of road, issue raised was one of sole negligence, and there was no issue of contributory negligence.

3. Trial 🔑260(8).

Refused instruction precluding recovery on finding that head-on automobile collision was proximately caused by any negligence, however slight, on plaintiff's part, *held* sufficiently covered by instruction given.

> Instruction given required plaintiff to travel on the right-hand side of the highway and close to the right-hand edge or curb of the highway, unless obstructed, and charged that, if plaintiff was not complying with this requirement, he was negligent, and that, if such negligence proximately caused or contributed, even in the slightest degree, to the happening of the accident, plaintiff could not recover.

4. Automobiles 🔑246(25).
Trial 🔑260(8).

Instruction precluding recovery for injuries from head-on automobile collision on finding that plaintiff neglected to avoid collision by stopping or pulling over, thus proximately contributing to collision, *held* properly refused, since inaccurate and sufficiently covered by instruction given.

> Instruction given required operator of motor vehicle to keep his machine always under control so as to avoid collisions, and denied motorist right to assume that road was clear, but required him under all circumstances and at all times to be vigilant and to anticipate and expect the presence of others, and charged that, if jury found that at the time of and immediately before collision defendant or plaintiff did not keep his machine under control so as to avoid collisions with others using the highway, such person was negligent.

5. Negligence 🔑138(2).

Refused instruction that plaintiffs must show that head-on automobile collision occurred by reason of negligence of defendant, from which plaintiffs were themselves free, *held* erroneous.

Appeals from Superior Court, Solano County; W. T. O'Donnell, Judge.

Actions by William P. Jackson and by Hilda Bentley against William Edgar Miller, which were consolidated. Judgments for plaintiffs, and defendant appeals.

Affirmed.

Clark, Nichols & Eltse, of Berkeley, for appellant.

Augustin Donovan and James R. Agee, both of Oakland, for respondents.

PARKER, Justice pro tem., delivered the opinion of the court.

In each of the actions entitled the plaintiff sought damages for injuries alleged to have resulted through the negligence of defendant.

The cases involved but one happening, and therefore an order of consolidation was entered in the court below and the proceedings were carried on through but one trial. A jury was impaneled and verdict returned in favor of each plaintiff. Motion for new trial was denied, and judgments entered upon the verdicts. This appeal follows.

The main ground of the appeal is that plaintiff Jackson was guilty of contributory negligence to an extent barring any recovery, and that such negligence is imputed to plaintiff Bentley, likewise destroying any right of action in her.

The claimed negligence and injury arise out of an automobile accident.

The respective plaintiffs were occupants of one car and defendant Miller the occupant of the other car involved. Another person was with Miller as a guest and appeared as a witness at the trial, though not a party to the action.

[1] The accident happened after dark upon a public highway. This highway was twenty-two feet wide, with a white stripe running approximately in the center.

It was the claim of plaintiffs that defendant was over the stripe on the wrong side of the road. It was defendant's claim at the trial that he was at all times, up to and including the actual impact, all of two feet to the right of the white line and on his proper side of the road. The conflict in testimony then resulted. The verdict of the jury resolved the question in favor of the plaintiffs. Upon the appeal defendant accepts the finding of the jury and argues from the finding.

The point made is that the driver of the plaintiffs' car, according to his own testimony, saw the car of defendant when the latter was still some six hundred yards distant. At that point defendant was on the wrong side of the road and heading directly for a collision. That plaintiffs' driver admitted that he recognized danger of impact at a point while still some forty to sixty feet distant from defendant's car, and that there was still plenty of time for plaintiff to turn with safety by yielding his right of way and also ample room for him to clear defendant's path. That plaintiff driver did not yield as much as a foot with the resulting disaster. This contention of appellant is stated in the language of appellant. Having thus laid his factual predicate, appellant contends plaintiff to be guilty of contributory negligence as a matter of law.

The evidence, on the other hand, presents a somewhat different set-up. The night was dark, and both cars traveling with lights. When plaintiffs' driver first saw defendant, the latter was in the center of the road, and then about a quarter of a mile away. The highway was comparatively narrow, twenty-two feet; meaning narrow as distinguished from the three and four-lane routes now becoming more common throughout the state.

At this point there was surely no warning of danger, nor was there anything unusual or hazardous in observing an approaching car over the center line. Defendant's car continued its approach until at a point where the cars were about one hundred feet apart the defendant was wholly on plaintiffs' side.

Plaintiffs' driver still thought defendant would pull back to his own side. It was when the cars were between forty and sixty feet apart that plaintiffs' driver realized that, if defendant failed to pull over, a collision would be inevitable. It was then plaintiffs' driver applied his brakes, but all too late. Further, there was some evidence that the general condition of the territory was such as to make it hazardous to attempt to get off the highway, and finally it may be noted that the car of defendant was not entirely over the stripe until about one hundred feet from plaintiffs.

The speed of defendant was generally given as around forty-five miles per hour.

Baldly stated, we are asked to determine that there can be no such thing as relative or mutual rights on a public highway; that whosoever has the temerity or recklessness to usurp the entire highway is entitled thereto. We are asked to glorify the road hog and place a premium on murder; to make shambles of the Camino Real and change the white stripe to a full width of red. The claim is too absurd to merit discussion.

Appellant urges as further grounds for a reversal the action of the court below in refusing to give three instructions requested by him. It is the contention of the appellant that the refusal to give said instructions resulted in the court entirely ignoring the defense of contributory negligence which was pleaded.

[2] We are not convinced from the record that appellant was entitled to have any instructions given on the subject of contributory negligence, inasmuch as there is no evidence to support such a defense.

The issues presented to the jury were clear-cut. Plaintiffs' testimony showed that, while plaintiffs were at all times on their own side of the road, the car of defendant almost deliberately, or at least without excuse, left the proper side and came over the stripe.

Defendant's testimony was that his car was at all times two feet over on his own side, and never at any time across the stripe; that both cars were in positions of safety until within fourteen feet of each other, at which point the plaintiffs' car swerved over and made the impact unavoidable.

Thus the issue was drawn. Taking either view, there was no contributory negligence. If plaintiff's version is correct, he was not guilty of negligence. If defendant's version should be accepted, then the accident resulted solely from the negligence of plaintiff, which negligence was in no sense contributory. Notwithstanding this view of the case, we will consider the complaint of appellant.

[3] The first instruction refused is as follows: "You are instructed that if you find that the accident was proximately caused by any negligence whatever, however slight, upon the part of Jackson then, notwithstanding the fact that you also find that defendant was negligent and that defendant's negligence was greater in proportion than that of Jackson, still you must find for the defendant and if you further find that Jackson was driving said automobile purely on the business of the plaintiff, Bentley, then plaintiff Bentley cannot recover from defendant."

Sufficient answer may be found in the instruction which was given, viz: "You are instructed that the law of this state at the time of the happening of this accident required plaintiff, Jackson, to travel on the right hand side of the highway and close to the right hand edge or curb of such highway unless such right hand side was obstructed, and, if you find that at the time of this accident, plaintiff, Jackson, was not traveling upon the highway as provided by law, then he was negligent, and if you further find that such negligence proximately caused or contributed, even in the slightest degree, to the happening of the said accident, then plaintiff, Jackson, can recover nothing from this defendant on account of injuries to said Jackson, if any."

[4] The next instruction which the court refused to give at appellant's request is as follows: "You are instructed that it is the law that the driver of an automobile must at all times exercise ordinary care to avoid injury to himself as well as injury to others and in this case you are instructed that even though you find that the automobile of defendant, Miller, was on the wrong side of the highway and such act contributed to the collision, still if you further find that Jackson saw the Miller car approaching him in sufficient time to appreciate that there was danger of a collision with the Miller car and Jackson at that time had the opportunity to avoid said collision by stopping or pulling his car further to his right hand side of the highway, and you further find that notwithstanding such knowledge and opportunity, if any, he, Jackson, continued to drive his car toward the Miller car without making an effort to avoid it, then he, Jackson, is guilty of negligence, and if you further find such negligence proximately contributed to the happening of the said collision in the slightest degree, then the plaintiff, Jackson, cannot recover from the defendant, and if you further find that under all the foregoing circumstances the said Jackson was driving his automobile upon the business of plaintiff, Bentley, then the negligence, if any, of plaintiff, Jackson, is imputed to the said plaintiff, Bentley, and she can recover nothing from the defendant."

This is not an accurate statement of the law, and for that reason the court's action was proper. The instruction given was sufficient, and reads as follows: "It is part of the duty of the operator of a motor vehicle to keep his machine always under control so as to avoid collisions with other persons using the highway. He has no right to assume that the road is clear, but under all circumstances and at all times he must be vigilant and must anticipate and expect the presence of others. This rule of law applied to the conduct of the defendant Miller and plaintiff Jackson in the operation of the automobiles they were driving, and if you believe from the evidence that at the time of and immediately before the collision in question said defendant or said plaintiff did not keep his machine under control so as to avoid collisions with other persons using the highway, then and in that event I instruct you that such person, if you so find, was negligent."

[5] The next refused instruction urged as a basis for reversal is as follows: "The jury is instructed that in this case it is not sufficient for the plaintiffs to show that the accident occurred and that injury resulted to them but they must also show that the accident occurred by reason of the negligence of the defendant, William Edgar Miller, from which plaintiffs were themselves free."

The last portion thereof does not state the law. On the point that the mere happening of an accident raises no presumption of negligence, the jury was fully instructed on three different occasions.

A complete review of the instructions given shows the jury to have been fully and fairly advised on the law applicable.

The foregoing disposes of both cases, inasmuch as the attack upon the Bentley judgment is based upon the theory of imputed negligence. We deem it unnecessary to determine whether the relationship between the plaintiffs was such as to impute the negligence of one to the other, for the obvious reason that, if Jackson is held free from negligence, there would be none to impute to Bentley.

Judgments affirmed.

We concur: PLUMMER, Acting P. J.; R. L. THOMPSON, J.

130 Cal.App. 465

ALBERT v. ALBERT.

Civ. 8672.

District Court of Appeal, First District, Division 2, California.

March 21, 1933.

1. **Divorce** ⚷184(10).

Appellate court cannot retry question of wife's desertion where evidence is conflicting and is ample to support trial court's finding.

2. **Divorce** ⚷127(4).

Evidence *held* to corroborate husband's testimony that wife willfully deserted him.

3. **Divorce** ⚷37(7).

Husband's consent to wife's visit was not consent to separation where husband did not know of wife's secret intention not to return.

4. **Divorce** ⚷127(3).

If husband's testimony in divorce proceeding is sufficiently corroborated in his case in chief, corroboration of his rebuttal testimony is not essential.

Appeal from Superior Court, Los Angeles County; William Hazlett, Judge.

Divorce proceeding by Philip Albert against Rose Albert. From interlocutory decree for plaintiff, defendant appeals.

Affirmed.

Harry G. Sadicoff, of Los Angeles, for appellant.

Nathan O. Freedman and A. Wm. Christlieb, both of Los Angeles, for respondent.

DOOLING, Justice pro tem.

In this appeal from an interlocutory decree of divorce granted on the ground of defendant's willful desertion, two points are urged for reversal: (1) That there was no proof of the jurisdictional facts of plaintiff's residence in the state and the county in which the action was commenced; and (2) that there was not sufficient corroboration of plaintiff's evidence of defendant's desertion.

The jurisdictional facts of plaintiff's residence were alleged in the complaint and these allegations were not denied in the answer. This, under the settled rule, did not dispense with proof of these allegations, but it did lend color to respondent's claim in this court that the failure to offer more definite proof on the subject than appeared in the record was due to respondent's oversight. Respondent made a motion to take additional testimony in support of the finding of residence which this court granted. Code Civ. Proc., § 956a. This evidence is now before us and shows without conflict that respondent was a resident of the state of California and the county of San Bernardino at the time this action was commenced by him in that county and for many years continuously prior thereto.

[1, 2] Appellant's claim that there was not sufficient corroboration of the fact of appellant's desertion requires a consideration of the evidence offered by respondent on that subject. Preliminary to that examination it is proper to state that the evidence on that subject was sharply in conflict, the proof offered by appellant being amply sufficient, if believed by the trial court, to establish the fact that respondent deserted appellant by refusing to permit her to return to his home after she had paid a visit to her brother. With such conflict this court cannot concern itself. "Appellate courts are powerless to interfere with the findings of fact, where the evidence is conflicting. This rule applies to divorce cases as well as to any other, with the single exception that, before a divorce can be granted, the testimony of the plaintiff must be corroborated." Percy v. Percy, 188 Cal. 765, 767, 207 P. 369. We shall accordingly confine our consideration to the evidence presented by respondent, and to the sole question whether sufficient corroboration is found therein of the finding that appellant was guilty of willful desertion.

It appears from such evidence, amply corroborated, that at the time of the inception of the claimed desertion the parties were living in the home of respondent's parents in Redlands; that on October 21, 1928, appellant left this home with Florence Albert, a sister of respondent, to go to Los Angeles to visit appellant's brother there; that the two women went in Florence Albert's automobile and appellant took with her two suitcases and a box, saying that she was taking some of her clothes to Los Angeles to have them cleaned; that at the time of her departure appellant stated to respondent that she intended to return with Florence Albert in her automobile the following Thursday; and that on Thursday Florence Albert returned from Los Angeles without appellant and that appellant never thereafter came back to the home of her husband.

A maid who was at that time working at the home in which appellant and respondent were living testified that within an hour after appellant left for Los Angeles she discovered that all of appellant's personal belongings, consisting of clothes and household linens, had been taken away. Respondent's mother and sister testified that at a somewhat later time they searched appellant's room and likewise found that all of her personal belongings were gone. Respondent testified that on the Saturday after his sister returned from Los Angeles he telephoned to appellant and asked her when she intended to return and that she promised to come home the following Monday. In this he was corroborated by his mother to the extent that the mother testified that she was present on the Saturday when respondent telephoned to appellant and that she heard respondent ask appellant over the telephone why she had not returned with Florence. Respondent testified, without any direct corroboration, that on the succeeding Friday he again telephoned to appellant and at that time she told him that she would never return to him. Florence Albert testified that on the Wednesday before she returned from Los Angeles she telephoned to appellant and that appellant told her she was not ready to go home the next day. There was some other incidental testimony not necessary to relate.

From this evidence we are satisfied that the court was justified in finding that when appellant left with Florence Albert she did so with the intention not to return and that the ensuing separation was not with the consent of respondent.

The testimony that appellant took with her two suitcases and a box when she went to Los Angeles with Florence Albert and that shortly thereafter it was discovered that none of her personal effects remained in the house would justify the trial court in finding that when she left she took with her all of her personal property, and this fact, coupled with her failure to return, would properly support an inference that when she left she had formed an intention not to return. In these facts is found sufficient corroboration of respondent's testimony that appellant over the telephone at a later date flatly refused to return to him.

[3] The fact that respondent consented to appellant's making the trip to Los Angeles did not amount to an agreement for a separation since he could not have been aware at that time of her secret intention not to return, and his telephoning her a week later in the presence of his mother furnishes evidence with corroboration that at that time he wished her to come back and was not aware that she did not intend to do so.

[4] Some appearance of color is lent to appellant's claim that corroboration of respondent's case is lacking by the fact that appellant's testimony and that of her witnesses is contradicted directly only by the testimony of respondent. But rebuttal testimony is not required to be corroborated in divorce proceedings, the requirement being satisfied if there is sufficient corroboration of the plaintiff's case in chief. In other words if plaintiff's evidence at the close of his case in chief would support a decree granting him a divorce if defendant failed to introduce any evidence it will support a decree, if believed, even though evidence is introduced by defendant which, if believed, would lead to a contrary conclusion.

The decree appealed from is affirmed.

STURTEVANT, Acting P. J.
I concur.

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130 Cal.App. 497

HAGEN v. METZGER.

Civ. 8900.

District Court of Appeal, First District, Division 2, California.
March 22, 1933.

1. Automobiles ⚷245(24).

Whether driver of automobile was guilty of gross negligence, giving rise to liability to guest, is question of fact for jury (St. 1923, p. 517, § 141¾, as added by St. 1929, p. 1580).

2. Automobiles ⚷244(20).

In action for injuries to guest, evidence *held* to sustain finding that automobile driver, in attempting to make turn on highway with automobile approaching, was grossly negligent (St. 1923, p. 517, § 141¾, as added by St. 1929, p. 1580).

3. Automobiles ⚷224(3).

Guest, riding in automobile, is not bound to assume that driver will act negligently and warn him accordingly.

Appeal from Superior Court, Tehama County; John F. Pullen, Judge.

Action by Margaret Hagen against D. J. Metzger. From a judgment in favor of the plaintiff, the defendant appeals.

Affirmed.

McCoy & Wetter and Wetter & Rankin, all of Red Bluff, for appellant.

Jesse W. Carter, of Redding, and Fred C. Pugh, of Red Bluff (Glenn D. Newton, of Redding, of counsel), for respondent.

STURTEVANT, Justice.

In an action brought to recover damages for alleged personal injuries the trial court made findings in favor of the plaintiff, and from the judgment entered thereon the defendant has appealed.

On the evening of November 2, 1929, a party was held at Mrs. Cone's home near Red Bluff. Some rode with Mr. Naccari and some rode with the defendant. The Cone ranch is southeast of Red Bluff on the east side of the Sacramento river. The house is located on the east side of the highway. When the party arrived at the ranch, Mr. Naccari parked his car on the east side of the highway about twenty feet north from the gate and the defendant did the same thing except his car was parked about twenty feet south of the gate. Both cars were facing south. When the party broke up the guests went out together. Those who had gone down in the Naccari car returned to it and those who had gone in the defendant's car returned to it. The latter included Mr. and Mrs. Wall, Miss Hagen, the plaintiff, and Mr. and Mrs. Metzger. When all of his passengers had taken their seats, the defendant started up his car in low gear and, continuing in that gear, commenced to make a right-hand circular turn to drive north on the highway. While parked, his car had been about twenty feet east of the paved portion of the highway, which is about fifteen feet wide. As the defendant moved forward and when about fifteen feet from the highway, he looked to the north and saw an automobile approaching at a considerable distance. To the north the highway is straight and one can see a mile or more. To the south, and a short distance from the place where the defendant was attempting to make his turn, the highway dips and furthermore there is a turn in it. Having observed the car to the north, the defendant turned his eyes to the south and kept his outlook in that direction as he continued to make the turn. When he had proceeded to the west so that the front part of his car was on the west side of the highway and his rear wheels were about two feet to the east from the westerly line of the highway and on the traveled portion thereof, and before the turn was half completed, the automobile which he had seen to the north of him came down at a speed of thirty-eight miles per hour and hit the defendant's car on the right-hand rear door thereof. The latter car was driven by Mr. Grissom, but he was not made a party defendant. In the meantime Mr. Naccari had started to back and turn to the north. In doing so he saw the Grissom car approaching from the north and therefore moved forward until the Grissom car had passed. There was testimony that there was at times considerable traffic on the highway. Before the party left the Cone residence there was some talk of going south to Los Molinos before returning to Red Bluff. The plaintiff testified that before the accident happened she did not know the defendant was going to make the circular turn. She also testified that when she saw the movement that was being made she looked to the north to see conditions and as she did so the Grissom car was immediately to her right and the collision occurred an instant later. Much is contained in the record about whisky in the Grissom car, but he was not a party to this action and there is no claim being made that the defendant knew the car which he saw approaching from the north was being operated by a drunken driver. That factor was, therefore, a false issue in this case.

[1, 2] The defendant claims that the evidence does not support the finding that he was guilty of gross negligence. California Vehicle Act, Stats. 1929, chap. 787, p. 1580. He points to the fact that the record shows he looked to the north and saw the Grissom car and then he looked to the south and continued looking in that direction and he claims such acts showed slight care at least. But those very facts have another aspect. The plaintiff might well contend that when the defendant was in a place of safety he saw a car approaching from the north; that it was midnight and his powers of vision and measuring distances were thus greatly limited; and that notwithstanding these circumstances he intentionally and deliberately turned his eyes from the on-coming car and looked in the opposite direction, and, keeping his outlook in that direction, proceeded in low gear to make the turn and in doing so drove into the path of the on-coming car without again looking to see how close it was. It is settled law that the issue whether a party has been guilty of gross negligence is a question of fact for the determination of the trier of the facts (Taylor v. Cockrell, 116 Cal. App. 596, 3 P.(2d) 16) and, considering each and all of the foregoing circumstances, it may not be said that the finding on that issue against the defendant is not sustained by the evidence. Kastel v. Stieber, 215 Cal. 37, 8 P.(2d) 474.

[3] The defendant also claims that the plaintiff was guilty of contributory negligence. As we understand the argument, it is that this plaintiff should have ascertained the fact and should have told the defendant a car was approaching from the north. But, as recited above, she understood the defendant intended to drive south and she did not know, until the instant of the impact, that he was going to attempt to turn to the north. Nor until that instant did she know of the approach of the Grissom car. Furthermore, she was not bound to assume that the defendant would act negligently and warn him accordingly. Aungst v. Central California Trac. Co., 115 Cal. App. 113, 118, 1 P.(2d) 56; Cate v. Fresno Traction Co., 213 Cal. 190, 201, 2 P.(2d) 364.

The defendant also complains of the amount of the verdict. In effect he complains that the plaintiff is a malingerer. On the other hand, the plaintiff introduced proof to the effect that she is by profession a trained nurse and earns her living by being on her feet many hours in the day and by doing a considerable amount of lifting. She introduced evidence to the effect that her right hip bone was broken; that the bone has not made a union; and that she has become permanently afflicted. The evidence was decidedly conflicting as to the nature of the injury. However, if the trial court believed the testimony produced by the plaintiff and from its findings we must assume that it did, the verdict was not excessive because under the theory of the plaintiff her health has been greatly impaired and she has been incapacitated, to a considerable extent, from rendering the services required of one in her profession.

The judgment is affirmed.

I concur: SPENCE, J.

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130 Cal.App. 455

CONSOLIDATED IRR. DIST. v. CRAWSHAW.

Civ. 834.

District Court of Appeal, Fourth District, California.

March 20, 1933.

Hearing Denied by Supreme Court May 18, 1933.

1. Waters and water courses 🔑258.

Irrigation district's suit to foreclose lien on landowner's property was equitable action, and verdict of jury was advisory only.

2. Waters and water courses 🔑258.

Landowner's cross-complaint for failure to furnish water in irrigation district's suit to foreclose lien *held* action at law wherein verdict of jury had effect as in any other action at law.

3. Waters and water courses 🔑257(1).

Landowner's covenant to pay $75 yearly on October 1st *held* not concurrent with nor dependent on irrigation district's covenant, in consideration of $10, to furnish water, so that failure to furnish water was no defense to action for yearly sums.

4. Evidence 🔑471(29).

Question whether landowner had received all water he was entitled to *held* improper, where water rights of many appropriators, contractual rights, and many questions of fact were involved.

5. Appeal and error 🔑1052(5).

Admission of incompetent testimony material only in meeting party's case under his cross-complaint was harmless, where verdict was for him under cross-complaint.

6. Waters and water courses 🔑258.

Where irrigation district's right to yearly sums could not be defeated in whole or part by its failure to furnish water, refusal of landowner's instructions to contrary was not error.

7. Trial 🔑388(2).

Findings of fact are necessary only on equitable issues involved; verdict taking place of findings on legal issues.

8. Trial 🔑393(1).

Incorporation of findings in decree of foreclosure without separate findings is permissible.

9. Trial 🔑404(1).

Finding that sums sued for were due was inferential finding that alleged parol modification of written contract was not made.

10. Appeal and error 🔑1071(6).

Failure to find upon issue is not ground for reversal, where finding if made would have been adverse to appellant.

Appeal from Superior Court, Kings County; K. Van Zante, Judge.

Action by the Consolidated Irrigation District against J. A. Crawshaw, who filed cross-complaint. From judgment rendered, defendant appeals.

Modified and affirmed.

H. Scott Jacobs and John G. Covert, both of Hanford, for appellant.

Harris, Willey, Griffith & Harris, of Fresno, and Sidney W. Sharp, of Hanford, for respondent.

MARKS, Justice.

Respondent is an irrigation district, organized under the Irrigation District Act of the state of California, and engaged in delivering irrigating water through its canals to irrigable lands within its boundaries. This water is taken from the Kings river in Fresno county. Appellant is the owner of land in what is known as Island No. 3 irrigation district, which was to be furnished with irrigating water through what is known as the Centerville and Kingsburg canal of respondent.

The predecessors in interest of the parties hereto entered into a contract, and a modification thereof, for furnishing irrigating water from the Kings river to lands which included those of appellant. Under these agreements, the predecessor of respondent, in consideration of $10, contracted to furnish the predecessor of appellant "all the water that may be required, not exceeding two cubic feet of water measured and flowing per second for each quarter section of land hereafter described, or a prorata proportion thereof for subdivisions of less than quarter sections." The contract provided for the construction of canals of sufficient size and capacity to deliver water onto or near the lands to be irrigated. The land owners agreed to construct ditches from the gates in the canals and to maintain and keep them in repair under the control of the irrigation district. The water to be furnished was to form a part of the appurtenances to the land, and could be transferred only with the land. The landowner agreed to pay to the irrigation district on the 1st day of October of each year the sum of 75 cents per acre for each acre of the land to be irrigated. The contract specified that this provision should serve as a notice of and demand for such payment in each year, and in case of default the agreements might be terminated at the option of the irrigation district. The payments were made a lien upon the land, and the landowner agreed to pay a reasonable attorney's fee in any suit brought to enforce collection of any amount unpaid. The irrigation district was released from liability for any loss occasioned by a deficiency of the water because of drought, insufficient water, adverse appropriations, hostile diversions, and other causes not necessary to specify. In case of a water shortage, the deficiency was to be prorated among the landowners. The contracts were made subject to all "existing rights, contracts, agreements, judgments or decrees affecting the right to use water from the said Kings River."

The complaint alleged that appellant failed to make the payments of $75 per year, due on the 1st day of October for the years 1924, 1925, 1926, 1927, and respondent sought to foreclose the lien on appellant's land for $300 principal, interest, attorneys' fees, and costs. The answer of appellant denied most of the material allegations of the complaint, and alleged that an executed oral agreement had reduced the amount of the annual payments. He also alleged a failure on the part of respondent to deliver irrigating water during the time covered by the complaint, and filed a cross-complaint seeking damages for failure to deliver water during the four years in question. The allegations of this pleading were denied, and the case went to trial before a jury upon the issues thus framed.

The jury returned a verdict in favor of respondent in the sum of $300, and in favor of appellant on his cross-complaint in the sum of $228. The court fixed attorneys' fees for respondent at $75, accrued interest at $73.50, and costs in the sum of $84.05. Appellant's costs were allowed in the sum of $168.10. This would leave a balance due from appellant to respondent in the principal sum of $52.40, plus $84.05, costs. The decree of foreclosure fixed the amount unpaid at $220.50. Respondent admits this amount is erroneous, and that it should be reduced to $52.40.

[1, 2] The suit to foreclose the lien upon appellant's property was an equitable action, and the verdict of the jury was advisory only on the equitable issues presented. The cause of action stated in the cross-complaint was based on breach of contract, and was an action at law. On the issues presented by this pleading, the verdict of the jury had the same force and effect as in any other action at law.

The case is before us on a bill of exceptions in which some forty errors are specified. It will, however, be necessary for us to consider but few of them. The issue upon which this decision must turn is the construction of the water contracts between the predecessors of the parties now before this court. We must determine whether the covenant of the landowner to make the annual payments specified in the contract is dependent upon and concurrent with the covenant of the irrigation district to furnish the irrigating water. Respondent relies upon the case of Fresno Canal & Irrigation Co. v. Perrin, 170 Cal. 411, 149 P. 805, 807, wherein it was held that the covenants of a similar contract were not dependent or concurrent. Appellant relies with equal confidence upon the case of the Madera Canal & Irrigation Co. v. K. Arakelian, Inc., 103 Cal. App. 592, 284 P. 971, in which a somewhat similar contract was before the court for interpretation, and where it was held that the plaintiff could not recover the annual payment for a year during which it might have but did not furnish irrigating water to the landowner. In the Arakelian Case a hearing in the Supreme Court was denied.

A study of the two opinions last referred to did not reveal to us a sufficient difference between the contracts to make them easily distinguishable. Therefore we have obtained and have made a careful study of the original records in both appeals, and find there are sufficient differences in the two contracts so that a satisfactory reason for each decision is apparent to us.

The contracts in the Perrin Case, the Arakelian Case, and the case before us are so similar in general structure and in the verbiage in numerous paragraphs that it is apparent that a common form was used for the preparation of all three of them. Their main differences occur in the covenants particularly applicable to the circumstances of the case in which they were used.

The Perrin contract was made in consideration of the sum of $5 paid to the Fresno Canal & Irrigation Company. The annual payment was fixed at the sum of $100 per year, and was to be made on the first Monday in September. It was not specified that this payment should be regarded as an annual water rate or payment for the water furnished. It would seem to have been the intention of the parties that this annual payment included payment for all of the services rendered by the Fresno Canal & Irrigation Company, of which the delivery of water to the lands to be irrigated was only a part.

The contract in the instant case was made in consideration of the sum of $10 paid to the irrigation district, with the annual payment of 75 cents per acre to be made on the 1st day of October of each year. This contract follows very closely the contract in the Perrin Case, and the two would seem to be subject to the same general construction.

The Arakelian contract was made upon a consideration of $2,000 paid to the Madera Canal Irrigation Company. The annual payments were to be made on the 1st day of September of each year, and we find expressions not contained in either of the other two agreements. We quote them as follows: "But the exercise of such option should not operate to prevent said first named corporation from recovering any balance that may be due or unpaid *for water furnished* upon said land under this agreement." "From recovering either at law or in equity any amount already due and unpaid *for water furnished* under this agreement." "That such *annual water rate*." "The *annual water rate* herein provided for." (Italics ours.)

From the above quotations it is evident that the District Court of Appeal, in deciding the case of Madera Canal & Irrigation Company v. K. Arakelian, Inc., supra, and the Supreme Court in denying the petition for hearing, must have concluded that the annual payment specified in that contract was a payment for water furnished each year. If this be true, the failure to furnish water for any one year would constitute a failure of consideration and relieve the landowner from the obligation to make the annual payment specified in the contract. We believe that this furnishes sufficient ground upon which the opinions in the cases of Fresno Canal & Irrigation Company v. Perrin, supra, and Madera Canal & Irrigation Company v. K. Arakelian, Inc., supra, may be reasonably distinguished. This conclusion is strengthened by the fact that in the Arakelian Case the respondent cited the Perrin Case in his brief and argued its effect at length.

[3] As the contract in the instant case follows closely the language of the contract in the Perrin Case, and contains no mention of a water charge or water rate as appears in the Arakelian Case, we believe the decision of the Supreme Court in the case of the Fresno Canal & Irrigation Company v. Perrin, supra, is controlling here. It was said by the Supreme Court in that case: "But the covenants are not dependent or concurrent. The water was to be furnished, when wanted, continuously from February 19, 1897, to February 16, 1921, while the payments were to be made annually as aforesaid. The furnishing of the water for the first six months could not be dependent upon or concurrent with the payment to be made in the following September. The same would be true of each succeeding year, upon the plaintiff's election not to terminate the agreements by reason of the failure of the defendant to pay. Where the covenants of the respective parties are to be performed at different times they are held to be independent and the breach by one party of his covenant does not excuse the performance by the other of his covenant or relieve him of liability for damages for a breach thereof. Southern Pac. R. Co. v. Allen, 112 Cal. 461, 44 P. 796; Front St. M. & O. R. R. Co. v. Butler, 50 Cal. 577; Bank of Woodland v. Duncan, 117 Cal. 412, 49 P. 414; Deacon v. Blodget, 111 Cal. 418, 44 P. 159. Upon these facts, the most that the plaintiff can claim on account of the failure of the defendant to make the payments is the right to recover the same and to have the amount thereof set off pro tanto against such damage as the defendant has shown from the failure of the plaintiff to deliver water." Applying this rule to the facts of the case before us, the conclusion is inevitable that, as the sum of $75 per year for the years 1924 to 1927, inclusive, was not paid by appellant, respondent was entitled to judgment for the aggregate amount of $300, together with its costs and attorneys' fees. See, also, Transmarine Corp. v. R. W. Kinney Co., 123 Cal. App. 411, 11 P.(2d) 877.

Appellant urges that the written contract under which he was required to make his annual payments was modified by an executed oral agreement to the extent that his payments were reduced to $60 a year. The trial court refused to admit in evidence two checks for $60 given by appellant to respondent's predecessor, and struck out some of appellant's testimony supporting this theory. The stricken and rejected evidence, together with that remaining in the record, falls short of showing an executed oral agreement modifying the written contract. Little more is indicated than that there was a compromise of a past-due account and that there were some other incomplete negotiations looking to a reduction of the annual payments.

[4, 5] Appellant complains of the ruling of the trial court in overruling his objection to the following question: "Mr. Harris: Q. Could you say that, being familiar with the run-off of Kings River and familiar with the rights of the Centerville and Kingsburg ditch, irrigation ditch company, to divert water from the Kings River, and with the record showing the distribution of the water so appropriated, whether or not the water, the proportionate amount of water to which Island No. 3 should receive under the contract marked Exhibit 2 has been so delivered?" We think the objection should have been sustained. There were many appropriators entitled to take water from the Kings river, the flow of which was, under contract, apportioned among them by a water master

whom they employed. The question involved not only an interpretation of the water contracts between the predecessors in interest of the parties here, but also of the contract apportioning the waters of the Kings river between those entitled thereto, and a proper division of those waters by the water master. It involved, too, many questions of law and of fact not shown to have been within the knowledge of the witness. However, we do not consider the error prejudicial. Under the theory of Fresno Canal & Irrigation Co. v. Perrin, supra, respondent did not have to prove delivery of the water to recover. Performance was only material in meeting appellant's case under his cross-complaint. There is ample evidence in support of the allegations of this pleading which was accepted by the jury, as is shown by its verdict awarding damages to appellant.

[6] Appellant complains of an instruction given by the trial court and of the refusal to give instructions which he proposed. These instructions presented the question of the necessity of proving performance of the contract by the respondent. As the contract was neither concurrent nor mutual (Fresno Canal & Irrigation Company v. Perrin, supra), the action of the trial court upon these instructions was correct.

[7] Appellant complains because there were no findings of fact filed. Findings of fact were necessary on the equitable issues involved and unnecessary on the legal issues involved, the verdict of the jury taking the place of findings on the latter.

[8-10] There were no separate findings filed; they being incorporated in the decree of foreclosure. While this is not the usual practice, it is permissible. Locke v. Klunker, 123 Cal. 231, 55 P. 993; Hopkins v. Warner, 109 Cal. 133, 41 P. 868; Covell v. Lee, 69 Cal. App. 1, 230 P. 208. The trial court found "that all the allegations of plaintiff's amended complaint are true," that $75 was due and unpaid on the 1st day of October, 1924, 1925, 1926, and 1927, with interest at 7 per cent. per annum from the several dates amounting to $73.50, and fixed the attorneys' fees at $75. This disposed of all the equitable issues except the affirmative defense of the modification of the written contract by an executed oral agreement which is inferentially found against appellant by the express finding that the amount specified in the contract was due. If this be regarded as insufficient as a finding on this defense, a direct finding upon the issue would have been adverse to appellant under the evidence before us. A failure to find upon an issue is not ground for a reversal of a judgment when such a finding, if made, would be adverse to appellant. Hulen v. Stuart, 191 Cal. 562, 217 P. 750; Estate of Henderson, 196 Cal. 623, 238 P. 938.

The judgment is reduced from $220.50, principal, to $52.40, so that the plaintiff recovers judgment for $52.40, principal, and $84.05, costs. The judgment as so reduced is affirmed. Each party will pay his own costs on appeal.

We concur: BARNARD, P. J.; JENNINGS, J.

130 Cal.App. 463

CONSOLIDATED IRRIGATION DISTRICT (a Corporation), Plaintiff and Respondent, v. John Allen CRAWSHAW, Jr., Defendant and Appellant.

Civ. 835.

District Court of Appeal, Fourth District, California.

March 20, 1933.

Hearing Denied by Supreme Court May 18, 1933.

Appeal from Superior Court, Kings County; K. Van Zante, Judge.

H. Scott Jacobs and John G. Covert, both of Hanford, for appellant.

Harris, Willey, Griffith & Harris, of Fresno, and Sidney W. Sharp, of Hanford, for respondent.

MARKS, Justice.

This is a companion appeal to the one entitled Consolidated Irrigation District, a Corporation, v. J. A. Crawshaw (Cal. App.) 20 P.(2d) 119, the opinion in which is this day filed. The two cases were tried together. This appeal is presented upon a bill of exceptions and the briefs in the case of Consolidated Irrigation District v. J. A. Crawshaw. Reference is made to the opinion in that case for a statement of facts and a decision upon the questions involved.

John Allen Crawshaw, Jr., owned two lots adjoining those of J. A. Crawshaw, his father, in Island No. 3 irrigation district. The action against this appellant was to recover the sum of $120. The pleadings in the two cases were identical except in the description of the properties and the amounts involved. John Allen Crawshaw, Jr., did not file a cross-complaint, but set up a counterclaim for $94, which he alleged was the cost of procuring water from other sources for the irrigation of his land. We find no evidence in the transcript that this appellant incurred any such expense.

The judgment is affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

130 Cal.App. 356

ST. JOHN et al. v. KING et al.

Civ. 8591.

District Court of Appeal, First District, Division 1, California.

March 14, 1933.

Rehearing Denied April 13, 1933.

Hearing Denied by Supreme Court May 11, 1933.

1. Municipal corporations 🔑269(2).

Improvements under statute may be constructed only on public streets (St. 1911, p. 732, § 1, as amended by St. 1927, p. 601; St. 1911, p. 745, § 26, as amended by St. 1923, p. 117).

2. Municipal corporations 🔑269(2).

Statute authorizing improvements only on public streets is satisfied if allegedly private land is lawfully dedicated before judgment in action attacking improvements because on private land (St. 1911, p. 732, § 1, as amended by St. 1927, p. 601; St. 1911, p. 745, § 26, as amended by St. 1923, p. 117).

3. Municipal corporations 🔑513(7).

Finding that alleged streets involved in improvement proceeding were public *held* supported (St. 1911, p. 732, § 1, as amended by St. 1927, p. 601).

4. Dedication 🔑19(2).

Recording map referring to alleged streets as "graded road" *held* implied offer of dedication.

5. Municipal corporations 🔑657(1).

That portion of fences between private land and alleged streets was destroyed and not replaced did not impair prescriptive rights which had ripened into perfection through long public use.

6. Appeal and error 🔑1011(1).

Finding on conflicting evidence cannot be disturbed on appeal.

7. Dedication 🔑35(2).

That ordinances changing names, establishing grades, and contemplating improvements referred to alleged streets as streets *held* acceptance of dedication (Code Civ. Proc. § 1903).

8. Municipal corporations 🔑513(8).

Landowners attacking validity of street improvement proceedings could not complain if other land not involved in proceedings was previously utilized for streets through affected owners' acquiescence.

9. Municipal corporations 🔑303(2).

That ordinances establishing street grades did not become effective until two days after passage of "resolution of intention" did not invalidate improvement proceedings (St. 1911, p. 733, § 3, as amended by St. 1929, p. 1652).

> A "resolution of intention" in a street improvement proceeding is the primary or fundamental declaration by the governing body of the city that it will presently cause to be performed through the taking of a successive series of further jurisdictional steps or acts, a given work of improvement which must therein be adequately described.
>
> [Ed. Note.—For other definitions of "Resolution of Intention," see Words and Phrases.]

10. Municipal corporations 🔑294(3).

Respecting validity of resolution of intention in street improvement proceedings involving only parts of two streets, referendum *held* inapplicable to ordinances establishing street grades.

11. Municipal corporations 🔑265.

Nature and extent of improvements having been committed by Legislature to city council's sound discretion, council's decision is ordinarily conclusive.

12. Constitutional law 🔑290(1).

Street improvement proceedings *held* not invalidated or due process denied because council required lateral sewer connections at 50-foot intervals necessitating 10 connections fronting on unsubdivided tract whose owners had no immediate intention of subdividing.

> It appeared that city in question was advantageously located in proximity to metropolis, and that it might expect in near future to have substantial growth in population as result of completion of certain bridge then in process of construction.

13. Municipal corporations 🔑450(2).

Street improvement proceedings *held* not invalidated because property whose owners had previously constructed similar improvements at their own expense was omitted from assessment district.

14. Municipal corporations 🔑330(3).

That foreign products were more expensive justified specification requiring asphalt for street improvement to be California product as against contention that specification restricted competition.

15. Municipal corporations 🔑513(7).

Finding that specification limiting asphalt for street improvement to California product did not unduly restrict competition *held* supported.

> It was shown that bitumens are found in great quantities throughout California; that many firms dealt in California asphalt; that practically all similar pavements in state were constructed of such asphalts; and that there was no monopoly in its use.

16. Municipal corporations 🔑330(3).

Specifications for grades of rock known locally as Nos. 2 and 4 *held* not so uncertain as to invalidate street improvement proceedings because restricting competition.

Testimony showed that classifications in question related merely to size of rock as established by openings in screens generally used in the locality, and that size of such screens was easy of ascertainment without expense, and that no contractor or property owner was misled as to what was intended thereby.

17. Municipal corporations ⚿330(3).

Specification that "gratings" for street improvement should be of good gray cast iron, similar to standard 18″x18″ grating manufactured by named company, and specifying minimum weight, *held* sufficiently certain, and did not unduly restrict competition.

It was shown that named company's grating was not patented design, and that name of such company was used merely for convenient description, and that any 18x18 grating, weighing at least 130 pounds, of good gray cast iron, would comply with specification, inasmuch as size and weight were given and use of word "grating" implied openings.

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Action by Helen St. John and another against G. B. King and others. Judgment for defendants, and plaintiffs appeal.

Affirmed.

Alfred J. Harwood, of San Francisco (R. L. Chamberlain and W. R. Augustine, both of San Francisco, of counsel), for appellants.

Jordan L. Martinelli, City Atty., of San Rafael, and Kirkbride, Wilson & Brooks, of San Mateo, for respondents.

ATTERIDGE, Justice pro tem.

Appellants, who were plaintiffs in the court below, attack the validity of certain street improvement proceedings of the council of the city of San Rafael, which had been taken under and pursuant to the Improvement Act of 1911 (St. 1911, p. 730 as amended) and the Improvement Bond Act of 1915 (St. 1915, p. 1441 as amended). By their action they sought to quiet their title to certain real property in the city of San Rafael against liens arising by virtue of the aforesaid proceedings in favor of certain named defendants on account of unpaid assessments for said improvement work, and also to prevent by injunction the issuance of bonds against the said assessment liens and property.

Aside from the contentions of plaintiffs hereinafter specifically considered and determined, plaintiffs make no other attack upon the regularity of the proceedings or the jurisdiction of the San Rafael city council to order and require the performance of street improvement work in question, which was fully performed in accordance with the contract therefor. It is unnecessary, therefore, to set forth any extended review of the proceedings as a whole.

[1-4] As their main contention of invalidity against the proceedings referred to, plaintiffs urge that two alleged streets (within the assessment district) upon which the work of improvement was performed were not public streets, and that the proceedings are for that ascribed reason void and invalid. It is, of course, essential under the Improvement Act of 1911 that the works of improvement therein provided for be constructed only upon streets or other similar public rights of way which are either owned by a municipality and "open or dedicated" to public use at the inception of the proceedings, "or which may [t]hereafter be opened or dedicated to public use." (Section 1 of the Improvement Act of 1911, as amended by St. 1927, p. 601). In the latter alternative the requirements of the statute are sufficiently met if the land, asserted to be privately owned, is lawfully dedicated or acquired prior to the entry of a judgment in any given action attacking the validity of the proceeding on that ground. Section 26 of the Act of 1911, St. 1923, p. 117; Rice v. Hanrahan Company, 210 Cal. 625, 629, 293 P. 57. Here, however, the trial court directly found against the contentions of plaintiffs to the contrary, that Fifth avenue and Scenic avenue, the streets in question, in so far as they were "improved" in these proceedings, "were and now are *open public streets*, avenues and ways of land in said City of San Rafael, and *open to public use* with duly established official grades and widths, which grades and widths and the curb lines and pavement and sidewalk areas of said streets had, prior to the passage of the resolution of intention [in said proceedings] hereinafter mentioned, been duly fixed, established and defined by the city council." (Italics ours.) (Finding No. V in relation to section or paragraph V of the answer.)

Our review of the record discloses that the foregoing finding is amply supported by the evidence. As early as 1882 a map had been recorded by the then owners of the tract of land embracing these streets at the locus of the improvements in question, which delineated these streets with such sufficient certainty as to thēreby indicate an intention that the same should be devoted to street or highway purposes. While it is true that the said map in outlining said streets refers to them merely by the legend "graded road," that circumstance should militate but slightly against the effectiveness of the map as an implied offer to dedicate the portion of land so delineated to public use—especially when (as is the case here) other weighty evidence of such an intent on the part of succeeding owners of the land was manifested and developed during the long period of years that ensued after the filing of the map, and while the effect of the same as an implied offer to dedicate remained unaffected by any attempted act of revocation. For, in addition to the evidence of an offer to dedicate that may be implied from the filing and continued recorded existence of the map, there was in evidence that the portions of the land taken by the city of San Rafael for public street purposes had been *fenced on both sides thereof* for a long period of years, and remained throughout all of said period, and up to and including the inception of these proceedings, *open* to and actually in extensive public use. The evidentiary significance of these additional circumstances is made apparent in the case of Sherwood v. Ahart, 35 Cal. App. 84, 169 P. 240.

[5, 6] In claimed avoidance of their said effect, appellants, however, stress upon the fact that, after the fences had been in continued existence for a great many years, a storm destroyed a portion thereof in 1921, and that thereafter the same was not replaced; and also upon the further fact that one of the appellants, in her testimony, locates the original line of a part of said fencing directly upon a portion of the land utilized for street purposes. In response to the former claim, it will suffice to state that with respect to such prescriptive rights in favor of the public as may have ripened into a perfection thereof, throughout the long and extensive public use of the land lying *between* the remaining fenced-off portions of land under private ownership prior to the date of the said destruction of a part of the fences by the elements, such rights would not be impaired through mere negative inaction with respect to the replacement thereof after that date. As to the actual location of the fence at earlier dates, the evidence is conflicting, and under familiar rules of appellate practice we are, of course, bound to uphold the determination thereof as made by the trial court, which was against plaintiffs.

Lending some additional support to the foregoing quoted finding is the further fact that appellants, of their own volition and at their own expense, had placed curbs and gutters along a portion of the line of the proposed improvement. The remaining portion of the curb (provided for in the resolution of intention and by the plans and specifications under review) was but a prolongation of the work previously placed by appellants themselves. These first referred to curbs and gutters were constructed according to grades given appellants at their request by the city engineer on the location. The trial court could properly consider the circumstances last herein referred to, along with the other evidence, as indicative of some recognition on the part of appellants of the public character of the streets about to be improved, inasmuch as owners of real property do not ordinarily place concrete curbs and gutters in dislocated sections along private roads.

[7] Upon the question of an acceptance of the dedication of the streets in question there is abundant evidence. First (as previously pointed out) there was evidence of long and continuous usage by the public of these streets, which tended to establish that they had been open, traveled streets for at least twenty-two years. Secondly, on May 4, 1925, the city council passed an ordinance specifically identifying these streets by their then existing names and therein officially changing them to their present names. Subsequently, on June 15th, it passed an ordinance establishing their official grades, and on August 3d it adopted the plans and specifications for their improvement, wherein they were shown as and referred to as streets. The recitals in these ordinances and resolutions show and refer to these avenues as *streets*. This in effect was an acceptance of, and a declaration by the city of their public character, for "the recitals in a public statute are conclusive evidence of the facts recited for the purpose of carrying it into effect. * * *" Section 1903, Code Civ. Proc.

In thus affirming the sufficiency of the evidence to support the finding under attack, it has not been necessary to attach controlling importance to any particular one of the foregoing recited evidentiary factors, because from the date of the filing of the map (earlier herein referred to) each successive circumstance in turn supplements the others in giving strength to the finding, so that their cumulative force and effect is to satisfactorily establish a dedication of land to public use to that high degree of unequivocableness made requisite by the long line of California decisions upon the subject. Illuminative, however, of their entire sufficiency in this respect is the following recent pertinent declaration by the United States Circuit Court of Appeals, Ninth Circuit, while construing an Arizona street improvement statute which, in so far as the matters now under consideration are concerned, is in all respects identical with the California statute (section 1 of the Improvement Act of 1911) involved on the present appeal:

"The opening of a street is usually held to be an offer to dedicate it to the public. In order to complete the dedication and constitute the open street a public street, there must be an acceptance of the proposed dedication. This may usually be implied from mere user thereof by the public. If a street were open with the knowledge and consent of the owner and after such opening the authorities of the city enacted ordinances for its improvement, their enactment would, we think, constitute an acceptance of the dedication and ipso facto constitute the street a public street. See San Francisco S. Co. v. Contra Costa County, 207 Cal. 1, 6, 276 P. 570. * * * The Arizona statute * * * is taken bodily from the Vrooman Act of California (St. Cal. 1885, p. 147, § 1)."

Our quotation is from Collins v. City of Phœnix (C. C. A.) 54 F.(2d) 770, 776.

[8] It should be further mentioned that appellants, in claiming that the evidence is insufficient to show a dedication of the land shown on the map of 1882 to public use, place considerable stress upon the circumstance that the streets in question as now laid out do not in all respects follow the contour lines as shown on said map. This, however, is a comparatively unimportant circumstance, as all the land utilized by the city for public street purposes, which was actually involved in the proceedings in question, and for whose improvement alone appellants are assessed, is shown definitely by the evidence (relied upon by the trial court) to be within the boundaries of land found by it to be dedicated to public use. Appellants would not, therefore, be injured, nor can they complain, if other land (not involved in these proceedings) outside the boundaries of the "old graded road" was at an earlier date improved and utilized for public street purposes through the consent and acquiescence of the owners of property on the opposite side of the street, who were alone affected thereby.

[9] As their second major ground of objection to the validity of the proceedings, appellants urge that the assessment is void upon the alleged ground that the official grades of the streets about to be improved had not been finally established at the date of the passage of the resolution of intention. One of their arguments of invalidity in this respect is based upon an alleged insufficient sequence of the time intervening between the passage on July 6, 1925, of two certain ordinances establishing the official grades of the two streets involved, and the passage of the resolution of intention on August 3, 1925. It appears that, although said first referred to ordinances were passed on July 6th, the date of their going *into effect* was suspended by virtue of their own provisions in that respect as well as the requirements of the charter of the city of San Rafael, for the period of thirty days, which would make their first effective date August 5th, and which date, it will be observed, is two days later than the passage of the resolution of intention. However, on August 3d, after first adopting plans and specifications for the work, upon which the line and grade of the work were shown in detail, the city council adopted its "resolution of *intention*" to have the work "done to the existing established grades * * * heretofore adopted by said City Council *and shown on and described in said plans and specifications.*" (Italics ours.) Conceding that the date of the passage of the "resolution of *intention*" was two days in advance of the effective dates of the earlier *ordinances* establishing by distinct legislative fiat the official grades of the street, we are unable to perceive how that circumstance could in any degree substantially affect any of the rights of owners of property within the assessment district, or deprive them of any of the "due process of law" requirements assured them by virtue of the statute in question. A "resolution of intention" in a street improvement proceeding is the primary or fundamental declaration by the governing body of the city that it will presently cause to be performed through the taking of a successive series of further jurisdictional steps or acts a given work of improvement which must therein be adequately described.

With respect to grades, section 3 of the Improvement Act of 1911 (as amended by St. 1929, p. 1652) provides: "The grade to which any work shall be done or improvement made *shall be such as may be shown on the plans or profiles therefor* or it may be done on such a grade as may have been formally established by the city council." (Italics ours.)

Accordingly, therefore, the act of the city council in adopting plans upon which the grade of the work of improvement was shown in detail, and in thereafter incorporating the same by reference into its "resolution of intention," was under the statute itself a sufficient compliance with the statute with respect to the matter of establishing grades. However, it so happens here that the grades established on the plans coincide with those stated in the ordinances officially establishing grades, which in any event became effective two days after the passage of the resolution of intention, which, it is to be remembered, is one of "intention." Furthermore, if afforded sufficient opportunity to protest, appellants would not be injured through failure to establish grades at any time preceding the passage of a resolution ordering the work (as provided for in section 3 of the act), which may only be done after a period of at least fifteen days has been afforded all property owners within the district to protest or "show cause why said proposed improvement should not be carried out," and to then and there ascertain on inquiry, if in doubt on the subject, just what grades, if any, had been established. In the present case a protest period of twenty-four days was afforded. During all this period appellants had full and complete notice of the grade to which the work was to be done as the same was to them and all others shown by the plans and specifications on file.

It should be further observed that appellants' argument upon the invalidity of the proceedings with respect to their alleged failure to establish grades is based upon City of Napa v. Easterby, 61 Cal. 509, and certain other kindred cases, all of which involved street improvement statutes antedating the Improvement Act of 1911, and no one of which said statutes contained an alternative method of establishing grades such as is provided by section 3 of the Improvement Act of 1911. Since the enactment of this provision into the last-mentioned statute, our courts have had but slight, if any, occasion to invalidate proceedings by reason of a deficient establishment of grades. The only practical purpose subserved through the establishment of grades is to fix the vertical position of the proposed work so as to thereby indicate and regulate the amount of excavation and fill involved. Obviously this purpose can be as well achieved by placing the grade elevations on the plans as it could by reciting them in an ordinance, and, since section 3 of the Improvement Act directly provides (alternatively) for this method of establishing grades, we hold that the proceedings are not defective in the particulars advanced to us by appellants in this respect.

[10] In view of our determination in this respect (based upon the conformity of the proceedings with section 3 of the Improvement Act of 1911), it has become unnecessary for us to discuss at length a further claim advanced by appellants that the separate ordinances (earlier referred to) establishing grades were subject to referendum action on the part of the electors of the city of San Rafael, and that by reason thereof no grades had been legally established at the date of the passage of the resolution of intention. Having in view, however, the fact that these proceedings involved only portions of two streets within an assessment district of definitely limited area, and that the entire costs of the improvement were borne by and spread against such property only as was embraced within the district, we are unable to perceive how such proceedings could in any appreciable degree become matters of legislative or financial concern to the electors of the city *as a whole*. It has been repeatedly held that the referendum does not apply to acts of the character in question. Chase v. Kalber, 28 Cal. App. 561, 153 P. 397; Dwyer v. City Council, 200 Cal. 505, 518, 253 P. 932; Newsom v. Board of Supervisors, 205 Cal. 262, 271, 270 P. 676; Hyde v. Wilde, 51 Cal. App. 82, 196 P. 118; Starbuck v. City of Fullerton, 34 Cal. App. 683, 168 P. 583. Moreover, it has also been held that the curative clause in the Improvement Bond Act of 1915 (which was adopted as an integral part of these proceedings) will apply so as to remedy slight deficiencies in similar proceedings relating to the time when ordinances establishing grades became effective. Hall v. Fairchild-Gilmore-Wilton Co., 66 Cal. App. 615, 227 P. 649.

Appellants also object that the width of the streets improved was not established. The record does not sustain this claim. The width of the roadway is clearly shown on the plans (which were a part of the resolution of intention). On Scenic avenue (one of the streets) curbs were already in on both sides of the street, and the roadway covered the full width of the street. Some of the pavement (specifically excepted in the resolution of intention) was already constructed, and the said resolution provided for the balance thereof. On the other street (Fifth avenue) there was a curb on both sides for about eighty feet north of Scenic avenue, and additional curbing on one side thereof for the remaining balance of the street; and it was this gap in the curbing (earlier herein referred to as a prolongation thereof) that was provided for in these proceedings. The question of the width of a street where the same is definitely shown on the plans can only become important when it is claimed that some of the work to be done lies outside of the lines of what in fact is public property. Otherwise the only purpose of showing widths is to locate the work so that property owners may have notice of the extent of the contemplated work. In the present case all the work done was definitely within the lines of what the evidence shows, and what we have already affirmed was public property dedicated to the public use.

[11, 12] As a further alleged separate ground of invalidity appellants contend that the inclusion of ten side sewer connections in the work of improvement fronting on their property and the consequent assessment therefor was an act at once so arbitrary and unreasonable in its nature as will result in depriving them of their property without due process of law. This claim is based upon the fact that the property owned by them and subject to this assessment is now held by them in one large unsubdivided parcel, of which they have no immediate intention of subdividing into lots requiring the sewerage facilities in question, and on that account they maintain that the city council's action in thus requiring them at this time to pay for facilities for which they have no immediate use is arbitrary, and will result in compelling them to pay an unwarrantedly large sum of money therefor. Upon examination, however, we find that less than 5 per cent. of appellants' total assessment, or $278, is attributable to the inclusion of these sewers. Moreover, the nature and extent of proposed works of improvement is one which has been by the Legislature committed to the sound discretion of the city council, and its decision in such respects is ordinarily conclusive. Duncan v. Ramish, 142 Cal. 686, 76 P. 661.

We are of the opinion that it may not be fairly held as a matter of law that the act of a city council in requiring sewer connections at intervals of fifty feet along an improved street in a city so advantageously located to the nearby metropolis of San Francisco as is San Rafael, and which will undoubtedly in the near future derive a substantial growth in population as a result of the construction of the "Golden Gate Bridge" (definitely contemplated at the date of these proceedings but now in active course of construction), spanning San Francisco Bay and linking the two cities by direct rail connection, is on its face arbitrary and oppressive. By ordering the immediate construction of these sewers, the council, of course, avoided the necessity of having its streets torn up on some future occasion when the need for their construction would be pressing. In speaking of the powers of a similar board to order the construction of sewers, our Supreme Court said: "It is their province to determine whether sewers are needed, and what districts will be benefited thereby. Upon these points their judgment is ordinarily final. And there may have been, in the judgment of the board, *other reasons why this sewer should be thus constructed, although it would not be at once utilized.*" Harney v. Benson, 113 Cal. 314, at page 317, 45 P. 687. (Italics ours.)

[13] Another claim of alleged invalidity advanced by appellants against the proceedings is the failure of the city council to include within the assessment district certain property adjacent to the said improved streets but situated on sides thereof opposite to the property of plaintiffs. This claim is without merit. It sufficiently appears that the property owners so situated had previously at their own expense constructed in front of their property improvements which were of the nature of those provided for on the opposite sides of the street in the instant resolution of intention. Naturally they received the benefit of exclusion from assessment in the present proceedings. Such exclusions (on account of work previously done and paid for) are matters of frequent occurrence in street work proceedings. Moreover, it has been repeatedly held that, in the absence of fraud, the boundaries of an assessment district are a matter to be determined exclusively by officials of the city under authority delegated to them by the Legislature. Beale v. City of Santa Barbara, 32 Cal. App. 235, 242, 162 P. 657; Harney v. Benson, supra; Duncan v. Ramish, supra. Appellants in the present case did not charge fraud; nor did they contend that their property was not benefited by the work; nor is there any evidence that the charge for the work is excessive when compared to the value of the property assessed (of which there is no substantial evidence).

[14, 15] A still further ground of objection urged by appellants is that a certain specification limiting the asphalt required in the performance of the work to a California product thereby unduly restricted competition. This claim was advanced in the trial court, which permitted evidence to be received on the issue, and which determined it adversely to appellants' contention. It was there shown that bitumens are found in great quantities throughout this state, and that many firms dealt in California asphalt. An expert testified that practically all similar pavements in this state were constructed of such asphalts, and there was no monopoly in its use. It was further shown that the use of foreign products would be more expensive (which alone would justify the specification). This evidence was entirely sufficient to establish that competition had not been restricted by reason of the limitation, and that the cost of the work had not been increased thereby. The trial court's reception of such testimony on the determination of an issue of this character was a course tacitly approved by the reviewing court in Thoits v. Byxbee, 34 Cal. App. 226, 232, 167 P. 166, in its disposition of a similar matter.

[16] Of a similar nature to appellants' last above considered claim are their further claims that certain specifications calling for grades of rock "known locally as Nos. 2 and 4" were so uncertain as to restrict competition and thereby increase the cost of the work. Upon these issues the trial court again took testimony showing that these classifications relate merely to the size of the rock as established by the openings in screens generally used in the locality, and the size of such screens was a matter easy of ascertainment without expense. This evidence was not contradicted; nor did it appear that any contractor or property owner was misled as to what was intended thereby. Contractors are deemed to bid with some knowledge of local conditions. In Shepherd v. Chapin, 45 Cal. App. 645, 649, 188 P. 571, a specification was held sufficiently certain that provided for "sound trap rock or granite composition equal to the gravel found in the San Joaquin River"—which was obviously less easy of ascertainment than the simple matter of finding out the size of a screen in general use locally, which was alone involved in complying with the instant specifications.

[17] Of similar import to appellants' last reviewed claims are their objections to a specification providing that "The gratings shall be of good gray cast iron, similar to the standard 18"x18" grating manufactured by the P. David Company, and shall weigh not less than 130 pounds." It was shown on the trial that the P. David grating was *not* a patented design, that a blueprint of the same was on file with the city engineer, and that,

while the words "P. David Co." were merely those of convenient description, as the same had been used generally in San Rafael, nevertheless any 18x18 grating, weighing 130 pounds, of good gray cast iron, would comply with the specification. This, because the size and weight are given, and the use of the word "grating" implies openings. Any variation in the number of openings would not affect the cost, the weight of the metal being given. Although we hold the specification itself sufficiently certain, and that the same did not result in increasing the cost of the work or restrict competition, it would seem that the practice of referring in such specification to a product by its trade-name (unless it be a patented article offered equally under the usual license agreements, at a uniform price to all contractors) is subject to the just criticism that it savors of an attempt on the part of city employees to indirectly favor the manufacturer thereof by giving undue prominence to his product.

Having carefully considered each of the several objections made by appellants to the street improvement proceedings in question, and finding no one of them of such substantial merit as would warrant a reversal of the decree entered in the court below, the judgment appealed from should be affirmed, and it is so ordered.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

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130 Cal.App. 510

POTVIN v. PACIFIC GREYHOUND LINES, Inc., et al.

Civ. 700.

District Court of Appeal, Fourth District, California.

March 22, 1933.

Hearing Denied by Supreme Court May 18, 1933.

1. Appeal and error 🔑82(3).

Appealability of order vacating judgment depends on finality of judgment (Code Civ. Proc. § 963).

2. Judgment 🔑203, 217.

There can be but one final judgment in action, and such judgment is one which ends suit in court wherein entered and finally determines parties' rights.

> "Final judgment" has been defined as one disposing of matters in litigation between all parties before court when judgment is rendered.
>
> [Ed. Note.—For other definitions of "Final Decree or Judgment," see Words and Phrases.]

3. Appeal and error 🔑78(3).

Judgment rendered on sustaining demurrer to one of six causes of action stated in complaint, without leave to amend, was not final judgment entitling defendants to appeal from order vacating it (Code Civ. Proc. § 963).

4. Pleading 🔑53(2).

Widow, suing for husband's death, may charge defendant's negligence in separate counts as occurring in as many ways as she believes evidence will show and recover if any well-pleaded count is supported by sufficient evidence.

5. Appeal and error 🔑82(3).

Order vacating judgment against plaintiff on amendment to amended complaint after sustaining demurrer to one of six causes of action stated, without leave to amend, *held* not appealable (Code Civ. Proc. § 963).

Appeal from Superior Court, Orange County; G. K. Scovel, Judge.

Action by Elsie Potvin, administratrix of the estate of Leo A. Potvin, deceased, against the Pacific Greyhound Lines, Inc., and another. From an order vacating a judgment against plaintiff on her amendment to the first amended complaint, defendants appeal. On plaintiff's motion to dismiss the appeal. Appeal dismissed.

Lasher B. Gallagher, of Los Angeles, for appellants.

Robert C. Thaxton and Fred A. Steiner, both of San Diego, for respondent.

JENNINGS, Justice.

This is a motion by plaintiff to dismiss an appeal taken by the defendants from an order vacating a judgment whereby it was decreed that plaintiff take nothing by reason of her amendment to the first amended complaint. The judgment which was vacated by the order from which the appeal has been taken was rendered by the court after a demurrer both general and special had been sustained to the amendment to the first amended complaint without leave to amend. The motion to dismiss the appeal is made pursuant to the provisions of section 3 of rule V of the Rules for the Supreme Court and for the District Courts of Appeal. The grounds of the motion are that the appeal has been taken merely for delay, and that the question on which the decision of the cause depends is so unsubstantial as to require no further argument.

The principal contention presented in support of the motion to dismiss the appeal is that the order from which the appeal has been taken is not an appealable order, and that the attempted appeal is therefore ineffectual.

The complaint whereby respondent seeks to recover damages for the alleged wrongful death of her husband contains six causes of action. In each cause of action respondent alleges specifically some act of negligence committed by appellants which she claims entitles her to recover damages for her husband's death. A demurrer which was directed particularly to the fifth cause of action was sustained by the court, and a judgment was rendered in favor of appellants as to said fifth cause of action. This judgment was vacated by order of the court upon stipulation of the parties, and permission was granted to respondent to file an amendment to the fifth cause of action of the first amended complaint. The proposed amendment was duly filed, and a demurrer to it was interposed by appellants. The demurrer was sustained without leave to amend, and judgment was thereupon rendered in favor of appellants as to said fifth cause of action. The motion to vacate the judgment was then made by respondent and granted by the court.

[1] In the final analysis, the single material question presented by this motion depends on the finality of the judgment rendered by the court upon the sustaining of the demurrer to the amendment of the fifth cause of action of the first amended complaint. This must be true, inasmuch as the order vacating the judgment is subject to appeal only by reason of the fact that it is a special order made after final judgment. Code Civ. Proc. § 963; Livermore v. Campbell, 52 Cal. 75; Kaufman v. Superior Court, 108 Cal. 446, 41 P. 476; Southern Cal. Ry. Co. v. Superior Court, 127 Cal. 417, 59 P. 789; Martin v. Miller, 65 Cal. App. 581, 224 P. 783.

[2, 3] A final judgment has been defined as "one which disposes of the matters in litigation between all the parties before the court, when the judgment is rendered." Gulf City St. Ry. & Real-Estate Co. v. Becker (Tex. Civ. App.) 23 S. W. 1015. As was said in Stockton, etc., Works v. Glens Falls Ins. Co., 98 Cal. 557, 577, 33 P. 633, 637: "There can be but one final judgment in an action, and that is one which in effect ends the suit in the court in which it is entered, and finally determines the rights of the parties in relation to the matter in controversy." The above language was quoted with approval in Nolan v. Smith, 137 Cal. 360, 70 P. 166. Our system of procedure contemplates that there shall be but one final judgment in a cause. Doudell v. Shoo, 159 Cal. 448, 114 P. 579. Since a final judgment in an action contemplates a complete adjudication of the rights of the parties and a final determination of the matter in controversy, it is apparent that the so-called judgment rendered upon the sustaining of a demurrer to one cause of action of a complaint without leave to amend, leaving five other causes of action unimpaired presenting matters to be litigated during a trial of the issues of fact, cannot be regarded as a final determination and disposal of the cause. It is not open to question that if, after the demurrer to the fifth cause of action was sustained without leave to amend, appellants had not, within the time permitted by law, answered the allegations contained in the five remaining causes of action, respondent would have been entitled to a judgment upon presenting to the court such proof as might be required in order to enable the court to determine the amount of damages proper to be awarded. Barber v. Cazalis, 30 Cal. 92.

[4] The action instituted by respondent is a single action for the recovery of damages for the alleged wrongful death of respondent's husband, caused by appellant's negligence. It was open to respondent to charge this negligence in separate counts as occurring in as many ways as she believed her evidence would show, and she is entitled to recover if any one well-pleaded count is supported by sufficient evidence. Froeming v. Stockton Electric R. Co., 171 Cal. 401, 404, 153 P. 712, Ann. Cas. 1918B, 408.

[5] We therefore entertain the opinion that the questions proposed to be presented upon the appeal are manifestly so unsubstantial as to require no further argument, for the reason that the appeal has been taken from an order which, under the circumstances herein appearing, is not an appealable order.

The appeal is therefore dismissed.

We concur: BARNARD, P. J.; MARKS, J.

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130 Cal.App. 376

LOS ANGELES ATHLETIC CLUB v. BOARD OF HARBOR COMMISSIONERS OF LOS ANGELES et al.

Civ. 8756.

District Court of Appeal, First District, Division 1, California.

March 15, 1933.

Hearing Denied by Supreme Court May 13, 1933.

1. **Navigable waters** ⚷37(6).

City of Los Angeles' harbor board *held* not authorized to lease harbor land for yacht harbor, effective date of which was to be delayed until board had opportunity to fill in parcel and make it ready for occupancy (St. 1913, p. 1642, § 183, subd. d).

The old charter of city of Los Angeles (St. 1913, p. 1642, § 183, subd. d) provided that grant of water front, tide lands, submerged lands, or appurtenances should be made only on condition, whether expressed therein or not, of construction that works provided for therein should, if not already constructed, be commenced within 90 days from date of grant, and be prosecuted diligently to completion under such further terms and conditions as might be prescribed therein. The expression "date of such grant" therein referred to date of instrument creating grant, not to estate granted.

2. Navigable waters ⇨37(6).

Lease of submerged lands to club for yacht harbor by harbor board of city of Los Angeles *held* not void ab initio for omitting proviso that construction of improvements provided for should be commenced within 90 days from date thereof; statute requiring such proviso becoming part of contract by operation of law (St. 1913, p. 1642, § 183, subd. d).

3. Navigable waters ⇨37(6).

City's leasing of harbor lands to club for yacht harbor *held* exercise of proprietary, not governmental, function; hence lease must be construed according to principles applicable to leases between private parties (St. 1911, p. 1256; St. 1913, p. 1642, § 183).

4. Navigable waters ⇨37(6).

Statutory conditions incorporated in city's lease of harbor lands by operation of law providing that lessee's construction of improvements must be commenced within 90 days from date of lease *held* "condition subsequent," and city could not declare lease forfeited for lessee's failure to perform without giving agreed notice (St. 1913, p. 1642, § 183; Civ. Code, §§ 1438, 1442).

The condition was a "condition subsequent," which is a qualification annexed to an estate by grantor upon the happening of which the estate granted is enlarged or defeated, and mere breach of such condition did not work forfeiture, in view of agreement in lease to effect that, on lessee's failure or refusal to comply with conditions of lease after 30 days' notice and demand in writing by city's board of harbor commissioners to comply therewith, commissioners might declare lease forfeited, and exclude lessee from further use of premises.

[Ed. Note.—For other definitions of "Condition Subsequent," see Words and Phrases.]

5. Navigable waters ⇨37(6).

City harbor board's acceptance of rents under lease of harbor lands for yacht harbor after expiration of period for commencing construction of improvements, acquiescence in lessee's construction of wharf, and amendment of previous order excusing lessee from making further improvements, waived right to declare forfeiture for lessee's breach of contract (St. 1913, p. 1642, § 183).

The evidence disclosed that lessee club acted in entire good faith under its lease, and that any failure on its part to comply with terms thereof was due to acts of harbor board in failing to have property filled in as contracted, and in opposing lessee's application for permit from engineer of United States War Department to construct breakwater as contemplated by lease.

6. Trial ⇨396(7).

Findings contrary to stipulated facts of parties should be disregarded by appellate court.

7. Stipulations ⇨18(7).

Parties' stipulation of fact was binding on parties as to material facts.

Appeal from Superior Court, Los Angeles County; Leon R. Yankwich, Judge.

Action by the Los Angeles Athletic Club, a corporation, against the Board of Harbor Commissioners of the City of Los Angeles and others. From an adverse judgment, plaintiff appeals.

Affirmed in part, and reversed in part, with directions.

Hearing Denied by Supreme Court SHENK, CURTIS, and LANGDON, JJ., dissenting.

Hunsaker & Cosgrove, of Los Angeles, for appellant.

Erwin P. Werner, City Atty., and Frederick Von Schrader and Loren A. Butts, Asst. City Attys., all of Los Angeles, for respondents.

GEARY, Justice pro tem.

Appellant herein commenced its action against the above-named defendants to quiet its title to a leasehold estate derived from respondent city of Los Angeles; to remove a cloud from its title to said leasehold estate consisting of an order of respondent board of harbor commissioners declaring appellant's lease forfeited; and for declaratory relief. From the judgment of the trial court denying appellant the relief prayed for, and quieting the title of the city against appellant, the latter prosecutes this appeal.

Appellant herein is a California corporation with its principal place of business in the city of Los Angeles. Prior to November 27, 1920, appellant applied to respondent board of harbor commissioners for a lease of a yacht harbor. On November 27, 1920, the respondent board of harbor commissioners passed its order No. 571, approving said application, and transmitted the same to the city council of Los Angeles, where it was approved and embodied in Ordinance No. 41220 (N. S.). Thereafter said ordinance was approved by the mayor of the city, duly published as required by law, and its operation was not suspended by the referendum provision of the charter of Los Angeles. Said order No. 571 and its terms were accepted by appellant in the time and manner therein provided. The order of the board of harbor commissioners and the ordinance above mentioned will be hereafter referred to as order No. 571, and the board of harbor commissioners as respondent board or board, unless otherwise expressly stated.

By its terms, order No. 571 purported to grant to appellant a 30-year lease on certain harbor lands on the seaward side of Terminal Island in said harbor, parcel 1 thereof to be used by appellant for the erection thereon of a clubhouse and buildings of similar nature, and parcel 2 thereof for the mooring of yachts. At the time order No. 571 was granted and the ordinance approving the same passed, parcel 1 was under water. In the order it was provided that the respondent board would fill parcel 1 and bring it to grade behind a seawall or jetty, which it was to construct, and it was further provided therein that the work of constructing the improvements above mentioned to be erected thereon by appellant should be commenced within 90 days from and after the date the respondent board notified appellant that parcel 1 was filled and ready for occupancy. The order further provided that appellant should spend not less than $50,000 upon all improvements within three years from and after said date. The respondent board obligated itself in said order to dredge parcel 2 to a depth of 10 feet below mean lower low water, and appellant upon its part was required at its own cost and expense to enclose parcel 2 by a good and substantial breakwater sufficient to insure quiet water within parcel 2. Rental was fixed at $300 per quarter for the first 10 years, and appellant was required within 15 days after the effective date of the ordinance to pay the rental in advance for the first three months after service of notice by the board that the premises were ready for occupancy. This rental was properly paid by appellant. After the granting of the order the work of filling parcel 1—to be performed by the respondent board—progressed slowly. Frequent letters were written by appellant to the board urging completion of the fill agreed upon, but as the actual work of filling was to be done by the contractor for the United States government, control of the project was not actually in the board. The board did, however, raise and repair the seawall or jetty, and the same was completed in November, 1925. Thereupon, on November 12, 1925, the board notified appellant that the seawall was completed and called upon appellant to commence the construction of the breakwater and other improvements. It was stipulated that this notice was intended to be the notice specified in order No. 571, by the terms of which the 90-day period was to start, in which appellant should commence the erection of the improvements to be constructed by it. Appellant, upon receipt of the aforesaid notice, took the position that the same was premature, in that parcel 1 had not been filled to grade, and hence was not ready for occupancy. Appellant offered to permit rental to begin, but objected to the construction of its clubhouse on parcel 1 until such time as parcel 1 had been properly filled. Appellant likewise agreed to proceed with the construction of its wharf on parcel 2, to which reference will be hereafter made. Appellant thereafter made application to the district engineer, United States War Department, in charge of federal government work in Los Angeles harbor, for a permit to construct the rock-filled breakwater in parcel 2 in conformity with order No. 571, subdivision 2 of section 2 thereof. Objection to the granting of this application was made by respondent board, the effect of which was to prevent appellant from complying with this requirement of order No. 571. Reference will likewise hereafter be made to certain facts in regard to this matter. As the construction of the breakwater and the dredging of parcel 2 were more or less dependent one upon the other, respondents have not performed the dredging provided for in order No. 571. As a result of the board's opposition to the construction of the breakwater by appellant, on August 25, 1926, the board duly passed its order No. 1059, the effect of which was to amend its order No. 571 by relieving appellant of its obligation under the earlier order to spend the sum of $50,000 for improvements within three years after November 12, 1925. At the same time the board adopted its order No. 1060, granting to appellant temporary use of an anchorage behind the rock jetty in the harbor. It is apparent that it was the purpose of said orders to relieve appellant of its obligation to construct the breakwater and at the same time afford it a temporary anchorage until such time as the respondents could determine when and whether the United States would construct a breakwater. Nothing further occurred with reference to the construction work on parcels 1 and 2 by either of the parties thereto. On November 24, 1926, respondent board leased a parcel of water frontage some 675 feet distant from parcel 1 to Ocean Products Corporation for the purpose of erecting and operating thereon a fish fertilizer plant. The plant was erected and its operation commenced, which naturally (according to the testimony) resulted in the creation of a stench, which was carried, at least to some extent, across parcel 1. This lease was later surrendered and a new lease made of the water frontage and fertilizer plant to another corporation; the board reserving therein the right to cease the operation thereof in the event objectionable odors were disseminated.

On or about December 28, 1928, the respondent board, without previous notice to appellant, passed a resolution that its order No. 571 be declared forfeited by reason of appellant's failure to comply with the terms thereof. Upon appellant's objection the matter was continued, but on February 6, 1929, the board passed its order No. 1164, declaring the lease to appellant forfeited by reason of appellant's failure to erect a clubhouse upon the premises, or to use any part of the premises for the operation of a clubhouse thereon. Thereupon appellant brought this action.

The complaint is in three counts. In the first count there is alleged the passage of the ordinance approving order No. 571 and appellant's ownership of the leasehold; the performance by it of all conditions precedent including payment of rent, the matters in excuse, waiver and avoidance of its failure to erect a clubhouse and breakwater, and the prayer that appellant's title be quieted. In the second count the cloud upon appellant's title resulting from respondent board's order No. 1164 is asked to be removed; and in the third count appellant asks that its damages resulting from the odors from the fertilizing plant be determined, and, when so determined, that they be offsets against rents due and to become due. Subsequently, appellant by an amendment to its complaint alleged that respondent board had never served the 30-day notice mentioned in order No. 571, which by the terms of said order was the first requirement in declaring a forfeiture. It was stipulated at the trial that no such notice was ever served upon appellant.

At the time the order No. 571 of respondent board and ordinance No. 41220 (N. S.) were adopted, section 183, subdivisions (a) and (d), of the old charter of the city of Los Angeles provided (St. 1913, p. 1642): "Sec. 183. (a) It shall be unlawful to grant, sell, convey, alienate, transfer or otherwise dispose of, except as hereinafter provided, any part of, or any interest in, the water front, tidelands, submerged lands, or appurtenances thereunto belonging, owned, possessed, controlled or held by the city of Los Angeles. * * * Such franchises, leases, privileges and permits shall be granted subject to such terms and conditions as may be prescribed therein, and to the limitations, conditions, restrictions and reservations in this section contained, but no such franchise, lease, privilege or permit shall be valid or binding upon the city until the same is approved by the council by ordinance. * * * (d) * * * In case of any such grant, the same shall be made only upon the condition, *whether expressed therein or not*, that the construction of the wharves, docks, warehouses or other works or structures provided for therein shall, if the same be not already constructed, be commenced *within ninety days from the date of such grant*, and be prosecuted diligently to completion under such further terms and conditions as may be prescribed therein." (Italics ours.)

Two questions are presented for determination herein: Was the permit or lease granted to appellant by the respondent board and duly and regularly approved by the city council of Los Angeles in violation of the foregoing terms of the charter so as to render the same void ab initio? Has the lease to appellant been lawfully terminated?

[1] It appears from an examination of order No. 571 that it was the intent of the parties thereto to create a lease, the effective date of which was to be delayed or postponed until respondent board had the opportunity to fill parcel 1 so as to render the same ready for occupancy by appellant and had given appellant the notice thereof provided for in paragraph 3 of said order. However, the authority of the respondent harbor board is expressly limited by the above language of section 183, subdivision (d), of the charter, wherein it is stated that the construction of the improvements "in case of any such grant" therein provided for shall be commenced within ninety days "from the date of such grant." It will be noted that the charter provision does not read "from the *effective* date of such grant." That the expression "date of such grant" refers to the date of the instrument creating the same, and not to the estate granted as contended by appellant, is too obvious to be open to doubt. Aside from the language of the section and of the grant to the city of the harbor lands in question clearly dictating this construction, to hold otherwise would be in utter disregard of the policy long established in this state, that a lease of harbor lands should be made "with proper *restrictions of time* and proper regard to public and quasi public use * * * so that private enterprise and capital may build up the commerce of our seaport cities." (Italics ours.) San Pedro, etc., R. Co. v. Hamilton, 161 Cal. 610, 620, 119 P. 1073, 1077, 37 L. R. A. (N. S.) 686; City of Oakland v. Larue Wharf, etc., Co., 179 Cal. 207, 215, 176 P. 361.

[2] Is the grant to appellant herein void by reason of the failure of order No. 571 to contain the charter proviso that the construction of the improvements therein provided for shall be commenced within 90 days from the date thereof? Every legal step so far as the mere mechanics of the law are concerned was duly observed in the granting of order No. 571 and its approval by the city council. The "mode" was entirely proper. Had section 183, subdivision (d) of the charter, simply declared that any grant should be made only upon the condition that the improvements therein provided for should be commenced within 90 days from the date thereof, since order No. 571 contains no such condition, the same would be ultra vires and void ab initio. Zottman v.

City and County of San Francisco, 20 Cal. 96, 102, 81 Am. Dec. 96; Times Publishing Co. v. Weatherby, 139 Cal. 618, 73 P. 465; Shaw v. City and County of San Francisco, 13 Cal. App. 547, 549, 110 P. 149; Wichmann v. City of Placerville, 147 Cal. 162, 164, 81 P. 537; Foxen v. City of Santa Barbara, 166 Cal. 77, 81, 82, 134 P. 1142. However, the section and subdivision thereof of the charter do not so provide. The provision set forth therein goes much further, in that it declares that the condition mentioned shall be a part of any grant "*whether expressed therein or not.*" (Italics ours.) Thus, any one dealing with the respondent board was given notice by the very terms of the charter that, regardless of the views of the members of the respondent board as to the desirability of such a condition in a given case, such condition was necessarily included in any grant made by the board. "In determining the extent and limitations of the contract, the terms of the statute under which the proceedings were taken must be taken into consideration. *The provisions of the statute were a part of the contract and must be held to have been personally known to every elector* whose approval was sought and registered at the election." (Italics ours.) Los Angeles County Flood Control District v. Wright, 213 Cal. 335, 349, 2 P.(2d) 168.

So in the case of Chapman v. Jocelyn, 182 Cal. 294, at page 297, 187 P. 962, 963, our Supreme Court states: "A street assessment is a contract, and *the provisions of the statute in force at the time prescribing the manner of its enforcement are a part of such contract*". (Italics ours.) Harter v. San Jose, 141 Cal. 659, 667, 75 P. 344; Kennedy v. City of Gustine, 210 Cal. 18, 20, 290 P. 38; 6 Cal. Jur. 310, 311. The condition in question as set forth in section 183, subdivision (d) of the charter, must therefore be held to be included in the lease to appellant as a matter of law. Hence the grant of the lease to appellant was not void ab initio, but a valid lease containing as a condition the provisions of section 183, subdivision (d) of the charter.

[3] The ordinance approving order No. 571 became effective February 3, 1921, so that by the aforementioned condition contained in the order appellant was to commence the construction of the improvements therein mentioned within 90 days from and after that date. This condition was not complied with by appellant. Does the failure of appellant to meet this condition automatically terminate the lease? Before disposing of this question it becomes necessary and proper to ascertain in what capacity the respondent city was acting when the lease was made; whether the lease was a governmental function of the city, or the act of the corporation in its private or proprietary capacity. Respondent city received title to the harbor lands involved herein by grant from the Legislature of this state. St. 1911, p. 1256. The statute granting same provides, in part: "(a) That said lands shall be used by said city, and by its successors, solely for the establishment, improvement and conduct of a harbor, and for the construction, maintenance and operation thereon of wharves, docks, piers, slips, quays and other utilities, structures and appliances necessary or convenient for the promotion and accommodation of commerce and navigation, and said city, or its successors, shall not, at any time, grant, convey, give or alien said lands, or any part thereof, to any individual, firm or corporation for any purpose whatsoever; *provided*, that said city, or its successors, may grant franchises thereon for limited periods, for wharves and other public uses and purposes, *and may lease said lands or any part thereof for limited periods, for purposes consistent with the trusts upon which said lands are held by the State of California*, and with the requirements of commerce or navigation at said harbor." (Italics ours.)

While it is true that the development and control of a harbor are of great benefit to a community and the merchants and citizens thereof, can it be held that the powers and duties of a municipality in regard thereto are in their essence governmental? The decision of our Supreme Court in Chafor v. City of Long Beach, 174 Cal. 478, 163 P. 670, L. R. A. 1917E, 685, Ann. Cas. 1918D, 106, determines this question in the negative. This determination must be held to apply herein at least as regards the powers of the city with reference to the *leasing* of harbor lands. It will be observed that in the grant of harbor lands to respondent city by the state the right given the city to *lease* is clearly an enlargement of the right granted in the preceding clause authorizing the city to grant franchises for wharves and other public uses. If by any chance the use of the term "public uses" can render the grant of a franchise thereunder a "governmental function," the same is not applicable where leases are made by a city to private parties. "A city or town is not liable to a private citizen for an injury caused by any defect or want of repair in a city or town hall or other public building erected and used solely for municipal purposes, or for negligence of its agents in the management of such buildings. This is because it is not liable to private actions for omission or neglect to perform a corporate duty imposed by general laws upon all cities and towns alike, from the performance of which it derives no compensation. But when a city or town does not devote such building exclusively to municipal uses, *but lets it, or a part of it, for its own advantage and emolument*, by receiving rents, *or otherwise, it is liable while it is so let in the same manner as a private owner would be.*" (Italics ours.) Worden v. New Bedford, 131 Mass. 23, 41 Am. Rep. 185, at page 186; Pacific Coast S. S. Co. v. Kimball, 114 Cal.

414, 417, 46 P. 275, 276. It being thus determined that in the lease to appellant respondent city was not exercising a governmental function but a private or proprietary one, it follows that the lease granted must be construed according to the same principles of construction as apply to a lease between any private parties. "As the city had a right to lease a wharf for private use, the grant must be judged like any other, and we cannot put a condition upon the estate which is not expressed or clearly implied." Pacific Coast S. S. Co. v. Kimball, supra. "It is well settled that the contracts of a municipal corporation, when exercising other than its governmental functions, and within the limits of its charter powers, are construed by the same laws that govern the contracts of private parties. Thus the doctrine of estoppel in such a contract may be invoked on behalf of or against a municipality." Brown v. Town of Sebastopol, 153 Cal. 704, 709, 96 P. 363, 365, 19 L. R. A. (N. S.) 178; McQuillin, Municipal Corporations, vol. 3, § 1370; 18 Cal. Jur. p. 1037.

[4] The condition set forth in section 183, subdivision (d) of the charter, and made a part of order No. 571 by operation of law, providing in effect that the construction of improvements must be commenced within 90 days from the date of grant was a condition subsequent. "A condition subsequent is one referring to a future event, upon the happening of which the obligation becomes no longer binding upon the other party, *if he chooses to avail himself of the condition.*" (Italics ours.) Civ. Code, § 1438. It is a qualification annexed to an estate by the grantor, upon the happening of which the estate granted is enlarged or defeated. Pedro v. Potter, 197 Cal. 751, 758, 242 P. 926, 42 A. L. R. 1165; Knight v. Black, 19 Cal. App. 518, 522, 126 P. 512; 15 Cal. Jur. p. 631. The condition set forth in the charter can be waived by the grantor. Los Angeles, etc., Land Co. v. Marr, 187 Cal. 126, 133, 200 P. 1051; Brown v. Wrightman, 5 Cal. App. 391, 393, 90 P. 467; Quatman v. McCray, 128 Cal. 285, 292, 60 P. 855; 9 Cal. Jur. p. 377. "The mere breach of conditions subsequent does not ipso facto effect a reverter of the title until the proper steps are taken to consummate the forfeiture." 9 Cal. Jur. p. 369. "Whether a breach of conditions, by the grantee of a franchise, works a forfeiture ipso facto depends on the language of the grant or the governing statute * * * if the statute provides that failure to complete the work within the time specified by the municipality 'works a forfeiture,' the statute is self-executing, and failure to complete the work within the time specified * * * ipso facto forfeits its franchise. * * *" McQuillin, Municipal Corporations, vol. 4, § 1796; Los Angeles R. Co. v. City of Los Angeles, 152 Cal. 242, 245, 92 P. 490, 15 L. R. A. (N. S.) 1269, 125 Am. St. Rep. 54. There is no "*self-executing*" provision in either the charter or order No. 571 ipso facto terminating the lease on breach of the condition in question. On the contrary, the parties thereto have agreed as to the precise manner in which the same shall be terminated upon breach of condition. Order No. 571 by section 3 thereof provides: "That upon the neglect, failure or refusal by the grantee to comply with any of the terms *or conditions* of this permit, *after thirty* (30) *days' notice and demand in writing* by the Board of Harbor Commissioners to comply with any such terms *or conditions*, the said Board of Harbor Commissioners may thereupon declare this permit forfeited, and may exclude said grantee from further use of said premises * * * and said grantee shall thereupon and immediately surrender all rights in and to the same, and this permit shall be deemed to be, and shall remain, null, void and of no effect." (Italics ours.)

It was stipulated at the trial hereof that no such notice as in section 3 provided for was ever served upon appellant. In order to terminate its lease it was necessary that respondents comply with the condition set forth in section 3 of order No. 571 and serve appellant with the 30-day notice therein mentioned. Until this is done no forfeiture can be declared. "A condition involving a forfeiture must be strictly interpreted against the party for whose benefit it is created." Civ. Code, § 1442; Jameson v. Chanslor-Canfield M. Oil Co., 176 Cal. 1, 5, 6, 167 P. 369; Taylor v. Hamilton, 194 Cal. 768, 776, 230 P. 656. The lease to appellant has not therefore been legally terminated.

[5] There is a further reason why the lease to appellant herein has not been lawfully terminated. In order to properly present this phase of the case it will be necessary to disclose in more detail certain stipulated facts regarding the transactions between the parties. On February 6, 1929, respondent Board adopted its order No. 1164, wherein it is declared: "* * * Order No. 571 * * * is hereby declared forfeited for failure of the grantee of said permit to comply with the terms and conditions thereof in this, *that said grantee has not constructed a clubhouse upon the premises described in said permit, and has failed to use, and is not now using, said premises, or any part thereof, for the purpose of maintaining and operating thereon a clubhouse.*" (Italics ours.)

Subsequent to the receipt of the communication of November 12, 1925, wherein appellant was advised that the retaining wall and fill had been completed by respondent board, appellant communicated with respondent board and objected that the work of filling parcel 1 had not been completed within the terms of the lease. This matter was referred to the engineer for the board. His report thereon to the board, dated December 1, 1925, not only admits that appellant's objection was well taken, but also reveals a possible explanation of respondents' subsequent conduct with reference to its order No. 571. The report states in part: "* * * *It is also a fact, as Mr. Garbutt* [vice-president of appellant] *states, that the fill has not been entirely completed back of the retaining wall. This has not been done* because it would be very expensive to make this fill until such time as the suction dredging work was done in front of the wall just completed, and it was thought that until such time as the Los Angeles Athletic Club desired to use this area, that this improvement should not be made. * * * *It has always seemed to the undersigned that the location of the above lease is not a desirable one as far as the Harbor Department is concerned because of the possible future development in this district. The rental too is entirely too low for the amount of space which they have leased.*" (Italics ours.)

However, following negotiations between the parties, appellant on February 5, 1926, paid rental to respondents in accordance with the terms of order No. 571, and thereafter regularly paid the rental stipulated up to and including the rental due on or about December 1, 1928, which payments respondents accepted. Thereafter appellant has properly tendered the stipulated rental, which respondents have refused by reason of the purported termination of the lease.

On February 5, 1926, appellant commenced the construction of a wharf on parcel 2, which was an improvement contemplated by order No. 571, and the plans for improvement submitted pursuant thereto. The location of the wharf was changed from that shown in the original plan therefor, but the change in plan was regularly approved by respondent board. The construction of the wharf by appellant was completed without objection at a cost of approximately $6,000-$7,000. On February 4, 1926, appellant applied to the district engineer of the United States War Department for a permit to construct the breakwater to be constructed by it in accordance with the terms of order No. 571. Thereupon, after the recommendation of its harbor engineer so to do, respondent board directed its engineer to appear at the hearing of appellant's application before the district engineer and oppose the granting of same. The recommendation of the harbor engineer to respondent board contains the following language: "*Although the lessee is required to build a breakwater according to the lease granted by a former Board, I believe we should vigorously protect this proposed improvement, which contemplates the rock-fill bulkhead, for the reason that it is a great detriment to the Harbor.*" (Italics ours.)

Thereafter appellant, in view of the opposition of respondent board to the granting of the permit authorizing the construction of the breakwater, withdrew its application therefor.

On May 27, 1926, appellant addressed a communication to respondent board with reference to the lease. Therein appellant declared that the condition of the lease was unsatisfactory in that, by reason of the opposition of the board to the granting of the permit for the construction of the breakwater, appellant was placed in the position where it was impracticable for it to utilize the premises leased. Appellant suggested a modification of the lease upon the following terms: "1. *We continue to pay rent in accordance with our contract;* 2. That you *waive the further expenditure of money by us* in improving this site *until you have made it accessible and completed the filling and given us further notice thereof* and until we are enabled to build a breakwater or until the Government breakwater is under construction sufficient to protect this area. 3. That in view of our paying rent before this is done that you give us a temporary lease for the use of all of the water behind the jetty already erected for such period of time as this remains unfilled and until you need it for some commercial purpose, you to have the right to cancel this lease on any reasonable notice which you may now designate. * * *"

Respondent board thereupon referred said communication to a committee, composed of its general manager, its engineer, and its attorney, for investigation and report. This committee on August 3, 1926, made its report to respondent board, wherein it is stated in part: "When the Club accepted the board's order and commenced to pay rent last November it protested that the work of filling done by the city was not complete enough to permit it going ahead with the permanent land improvements which it desired to make *and that fact, coupled with the objection to the breakwater as proposed, places the Club in a position where it is paying rent under the permit but is unable to proceed with improvements it contemplates making,* while at the same time *it is faced with the obligation of making an expenditure of at least $50,000 on improvements within* three years from last November *with no definite assurance as to when it may be permitted to proceed in accordance with its permit.* * * * After consideration of the matter your committee wishes to recommend that the water area shown on the map be assigned to the Los Angeles Athletic Club under temporary permission, revocable on six months' notice, to be used for anchorage purposes *and that the 30 year permit held by the Club under Order 571 be amended in such particulars as may be necessary* [to] *relieve the Club from the obligation of expending not less than $50,000 'from and after the date the Board of Harbor Commissioners notifies the grantee in writing that Parcel No. 1 is filled and ready for oc-*

cupancy', which time commenced to run in November, 1925."

Thereafter the respondent board, on August 25, 1926, adopted its order No. 1059, wherein by the terms thereof subdivision 3 of section 2 of order No. 571 was amended by eliminating therefrom the following clause: "And the grantee shall expend not less than $50,000 upon all improvements proposed to be made under authority of this permit within three (3) years from and after said date." This amendment to order No. 571 was regularly approved by the city council of Los Angeles on December 29, 1926. At or about the same time the board adopted its order No. 1060 (August 25, 1926), wherein appellant was granted a temporary yacht anchorage behind the harbor jetty, revocable upon six months' notice. Regardless of the question whether order No. 1059 was in violation of section 183, subdivision (d) of the Los Angeles charter, in that it waived the provision thereof requiring that the construction of improvements "be prosecuted diligently to completion," which need not be determined herein, the adoption of that order and of order No. 1060 may properly be considered in so far as the same reveals the conduct of the parties under the lease. As we have previously pointed out, under the provisions of section 183, subdivision (d) of the charter, respondent board had the privilege of terminating the lease to appellant by the service of the proper notice demanding that appellant comply with the provisions of the charter therein contained. This respondent board failed to do. Not only did respondent board fail to serve this notice, but on November 12, 1925, they gave to appellant the notice hereinbefore mentioned, resulting in the construction of the wharf by appellant at considerable expense and the payment of rental at regular intervals thereafter. The rental was paid by appellant and accepted by respondent from February, 1926, almost up to the very date when respondent board purported to cancel the lease. Whether the amendment of order No. 571 by order No. 1059 on August 25, 1926, was effective or otherwise, it, together with order No. 1060, certainly indicated to appellant an intent on the part of respondent board to waive any forfeiture under the lease. The stipulated evidence indicates that at all times appellant herein has acted in entire good faith under its lease, and that any failure upon its part to comply with the terms thereof has been due entirely to the acts of respondent board. Under such circumstances, can respondents' conduct be permitted to defeat the rights of appellant under the lease? The answer must be an emphatic negative. The conduct of respondents in so far as the same forms the basis of a forfeiture of appellant's rights under the lease is repugnant to those principles of equity and fair dealing which should characterize transactions between men. As heretofore pointed out, respondent, in the lease to appellant, acted in its proprietary capacity. Therefore the lease must be construed in the same manner as a lease between any private parties. For the same reason the conduct of the parties in regard thereto must be viewed in a like manner. The fact that one of the parties to the lease is the agent of a municipal corporation does not relieve it of either its legal or moral obligations thereunder, nor should it do so. Indeed, it would not be wholly unnatural for one to look to his government to recognize its apparent obligations even more readily than an individual. The acts of respondent board hereinbefore mentioned must be deemed to constitute a waiver and estoppel. This is true whether the duties of appellant under its lease be considered as a continuing condition or otherwise. For a covenant or condition continuing in its nature may be waived quite as well as a condition not of a continuing nature. The distinction between the two in determining whether a waiver has occurred is in the proof, for both must be said to rest upon the *intent* of the parties. "* * * In the application of this rule there is a distinct difference between a covenant or condition which is of a continuing nature and one not of that nature. While the unconditional acceptance by the landlord of moneys as rent, which rent has accrued after the time a tenant should have surrendered possession, will constitute strong evidence of the landlord's waiver of his notice to quit, *nevertheless the question of waiver is one of intent.* Waiver is the intentional relinquishment of a known right after knowledge of the facts. *To establish such waiver the evidence must indicate a meeting of minds and the intentional forbearance to enforce a right.* Alden v. Mayfield 164 Cal. 6, at p. 11, 127 P. 45. Where the general course of dealing between parties has led one of them to believe that a strict compliance with the terms of a condition binding him will not be required, the other party may be estopped from claiming the forfeiture." Myers v. Herskowitz, 33 Cal. App. 581, 583, 584, 165 P. 1031, 1033; Kern Sunset Oil Co. v. Good Roads Oil Co., 214 Cal. 435, 6 P.(2d) 71, 80 A. L. R. 453.

In the instant case the amendment of order No. 571 by order No. 1059, the acceptance of rental for the entire period from February, 1926, to February, 1929, and the acquiescence in the construction of the wharf, by appellant, all indicated an intent upon the part of respondent board to waive further construction by appellant under the lease until the premises leased were rendered suitable by respondent board for appellant's purposes.

[6, 7] The findings of the trial court herein are uniformly contrary to the evidence hereinbefore stated. However, such evidence as is referred to or stated herein is founded upon the stipulation of the parties. The stipulation was binding upon the parties as to material facts. Under such circumstances, find-

ings contrary thereto should be disregarded. J. Dewing Co. v. Thompson, 19 Cal. App. 85, 87, 124 P. 1035; Lambert v. Lambert, 1 Cal. App. 114, 115, 81 P. 715; Crawford v. Imperial Irrigation Dist., 200 Cal. 318, 335, 253 P. 726, 24 Cal. Jur. 984.

By reason of the stipulated facts herein with reference to appellant's first and second causes of action and the law properly applicable thereto, the judgment as to appellant's first and second causes of action is reversed, and the trial court is directed to enter judgment thereon as herein indicated.

As regards appellant's third cause of action, no stipulation was made as to the granting of the lease for, and the operation upon the premises leased of, a fish fertilizer factory. There is practically no dispute in the evidence as to the effect of the odor emitted therefrom; namely, that it is nauseous, and such as to render the use of the leased premises by appellant entirely impracticable. It does not appear from the evidence, however, that appellant's failure to use the premises was due to the location of the fish fertilizer factory in the locality of appellant's leasehold, but rather to the physical condition of parcels 1 and 2, which prevent appellant from utilizing the same for the purposes intended. Therefore, this court cannot hold that appellant has been damaged in the manner alleged in its third cause of action.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

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129 Cal.App.(Supp.) 795

SHERMAN v. HIBERNIA SAVINGS & LOAN SOC.

C. A. 265.

Appellate Department, Superior Court, City and County of San Francisco, California.

Feb. 1, 1933.

1. Trusts ⚷34(1).

Validity of trust in savings bank deposits in depositor's name subject to depositor's order during his lifetime, *held* not affected by depositor's right of withdrawal and retention of bank book (Civ. Code, § 2280).

2. Trusts ⚷39.

It is not essential to validity of trust in savings bank deposits that beneficiary be informed of trust or express acceptance thereof.

3. Trusts ⚷61(2).

Where account was opened in depositor's name alone but with declaration that deposits were to be held in trust for another subject to depositor's order during his lifetime and on depositor's death money was to be paid to beneficiary, absolute trust in deposits was created which was not terminated because beneficiary predeceased depositor (Civ. Code, § 2280).

4. Trusts ⚷372(1).

In action by heir of trust beneficiary against depositor's administrator to determine right to trust deposits, burden of showing termination of trust devolved on administrator after heir proved opening of account and declaration of trust (Civ. Code § 2280).

Appeal from Municipal Court, City and County of San Francisco; Alden Ames, Judge.

Action by Lillian R. Sherman against the Hibernia Savings & Loan Society, in which J. C. McGovern, administrator of the estate of Charles M. Jackson, deceased, was substituted as party defendant. From the judgment, plaintiff appeals.

Reversed, and remanded for entry of judgment in favor of plaintiff.

McCutchen, Olney, Mannon & Greene, John W. Parker, and Charles G. Heimerdinger, all of San Francisco, for appellant.

Edmund Scott, of Redwood City, for respondent.

JOHNSON, Presiding Judge.

This action was brought to determine the right to money on deposit in a savings bank in the name of the depositor, and made payable under a formal declaration of trust to a designated beneficiary upon the death of the depositor, who survived the beneficiary.

The controversy is between plaintiff as the sole heir of the designated beneficiary and the administrator of the estate of the deceased depositor.

On February 15, 1926, Charles M. Jackson opened a savings account No. 571489 in the Hibernia Bank with a deposit of $1,972.76. At the same time he executed a declaration of trust in the following terms:

"571 489 Feb. 15, 1926

"I hereby certify and declare that the money deposited by me in account #571 489 and all future deposits to be made therein, are held by me in trust for the benefit of Clifford W. Sherman.

"The said money and all accruals thereto to be payable upon my order during my lifetime, and at my death it is to be payable to the above named beneficiary.

"[Signed] Charles M. $\underset{\text{Mark}}{\overset{\text{His}}{\text{X}}}$ Jackson

"Witness G. D. Sanderson."

Thereafter Jackson made certain deposits in the account and certain withdrawals therefrom: and when he died intestate on June 5, 1930, there was a balance in the account of $1,340.97. So far as is known, Jackson left no heirs.

The litigation arises out of the fact that the beneficiary named in the declaration of trust, Clifford W. Sherman, had predeceased Jackson, having died intestate on February 16, 1930. The plaintiff, Lillian R. Sherman, being his sole heir, became the distributee of his estate, including whatever rights attached to the money in bank under the declaration of trust.

The bank having originally been the sole defendant, and having renounced any claim to the money in dispute, J. C. McGovern, the administrator of the estate of Jackson, was brought in and substituted as defendant, in the bank's stead, and he contests plaintiff's right to any of the money. His contention is that the evidence is insufficient to show an intention to create an absolute trust; and that, in any event, there was but a tentative trust which terminated on the death of Sherman before that of Jackson.

The trial judge was of the opinion that the trust declared was only a tentative trust, and that the burden was on plaintiff to show that the trust was not terminated by Sherman's death, rather than upon Jackson's administrator to show that it was terminated.

There are several cases in our reports where the deposits have been made in the joint names of the depositor and another, and where for the purpose of giving effect to the intention manifested, it has been held that, upon the death of the depositor, the amount in bank became payable to the survivor as the beneficiary of a trust. The leading case on this subject is Booth v. Oakland Bank of Savings, 122 Cal. 19, 54 P. 370. In Kuck v. Raftery, 117 Cal. App. 755, 4 P.(2d) 552, the question was presented in a different form in relation to a deposit opened in the name of "John D. Siemers, Trustee for Catherine Raftery," and under the circumstances of that case it was held on appeal that a valid trust was created.

[1, 2] In the present case, the account was opened in Jackson's name alone, but he delivered to the bank a plain, unambiguous declaration that all moneys deposited, or to be deposited, in the account were held by him in trust for Clifford W. Sherman, subject to his own order during his life, and that on his death the money was to be payable to Sherman. Since under section 2280 of the Civil Code, as it read at the time of the declaration, reservation of power to revoke the trust was permissible, the right of withdrawal by Jackson did not affect the validity of the trust, nor did the retention of the bank book. Booth v. Oakland Bank of Savings, 122 Cal. 19, 54 P. 370; Carr v. Carr, 15 Cal. App. 480, 115 P. 261; Drinkhouse v. German, S. & L. Soc., 17 Cal. App. 162, 118 P. 953. See, also, American Bible Soc. v. Mortgage Guarantee Co. (Cal. Sup.) 17 P.(2d) 105.

And as is held in the Booth Case, it is not essential that the beneficiary should be informed of the trust or should express an acceptance of it.

If Sherman had survived Jackson, there can be no doubt under our law that the money remaining in bank would have vested in him on Jackson's death; and, if the trust did not terminate on Sherman's death, the beneficial interest therein passed to his heir. Keating v. Smith, 154 Cal. 186, 193, 97 P. 300; Boone v. Davis, 64 Miss. 133, 140, 8 So. 202.

As is pointed out in Kuck v. Raftery, supra, in reference to a deposit standing merely in the name of the depositor "in trust for" another, there are two lines of authority, differing not as to the validity of the trust, but as to the sufficiency of the evidence of the depositor's intention to make himself a trustee. There is on the one side the Massachusetts rule, on the other the New York rule. In Massachusetts the mere fact of a deposit in such form, coupled with retention of the bank book, does not, without other evidence of intent, entitle the beneficiary to the deposit on the death of the depositor. The rule prevailing in New York as stated in the Matter of Totten, 179 N. Y. 112, 71 N. E. 748, 752, 70 L. R. A. 711, 1 Ann. Cas. 900, is as follows: "A deposit by one person of his own money in his own name as trustee for another, standing alone, does not establish an irrevocable trust during the lifetime of the depositor. It is a tentative trust merely, revocable at will, until the depositor dies or completes the gift in his lifetime by some unequivocal act or declaration, such as delivery of the passbook or notice to the beneficiary. In case the depositor dies before the beneficiary without revocation, or some decisive act or declaration of disaffirmance, the presumption arises that an absolute trust was created as to the balance on hand at the death of the depositor."

Since in New York a deposit in the name of the depositor, "in trust for" another, and not accompanied by anything more to indicate the intention, is regarded as only a tentative trust during the life of the depositor, it follows as a corollary to that rule that, under such character of deposit standing alone, the death of the beneficiary during the life of the depositor terminates the tentative trust ipso facto. One of several cases so declaring is Matter of United States Trust Co., 117 App. Div. 178, 102 N. Y. S. 271, affirmed in memo. 189 N. Y. 500, 81 N. E. 1177.

Such, however, has not been the view expressed when the deposit does not stand alone, but is accompanied by a formally expressed declaration that the account is held in trust for a beneficiary named. The principal case in support of a trust so declared is Robinson v. Appleby, 69 App. Div. 509, 75 N. Y. S. 1, affirmed in memo. 173 N. Y. 626, 66 N. E. 1115. In that case there had been an account in the name of "Helen C. Pratt, in Trust for Freddie Hemenway Robinson." Later the designation was changed to read "Helen C. Pratt, in Trust for Freddie H. Robinson. Note. Not to be paid to F. H. R. until he is 30 years of age." At the time of such change, Mrs. Pratt signed a declaration reading: "I desire to open an account with the Riverhead Savings Bank in my name, in trust for Freddie H. Robinson. Said account to be governed by the by-laws, rules and regulations of the said institution. After my death, the balance then due on said account is not to be payable to said Freddie H. Robinson until he is 30 years of age."

Robinson, who was Mr. Pratt's grandson, died before Mrs. Pratt, and four days later she withdrew the entire balance of the account. Upon her death, the representative of Robinson's estate was held entitled to recover the amount from the executors of Mrs. Pratt. In other words the trust was treated not as a tentative, but as an absolute trust expressed in unqualified terms showing definitely the intention of the depositor.

Thus a distinction is drawn between cases where there is merely a deposit "in trust" standing alone, and one accompanied by an express declaration furnishing independent evidence of the true intent. In Hemmerich v. Union Dime Sav. Inst., 205 N. Y. 366, 98 N. E. 499, 500, Ann. Cas. 1913E, 514, the court said: "The intention of the donor being the controlling factor, it is difficult to make general rules as a guide in the consideration of such trusts. In such cases the only writing generally existing * * * is found in the few words connected with the name of the depositor on the pass book. It is the failure by depositors to express their intention in writing that makes the disputes so common."

And in O'Brien v. Williamsburg Savings Bank, 101 App. Div. 108, 91 N. Y. S. 908, the court pointed out the distinction between the Totten Case and one where the deposit does not stand alone, but is accompanied by evidence, even though slight, of intention, unequivocally expressed, to create a trust for a beneficiary named.

Again, in Re King's Will, 51 Misc. 375, 101 N. Y. S. 279, 282, it is said: "Where there is evidence other than the form of the deposit showing an intention to create a trust, the Totten Case does not limit the trust to a tentative one; but, when the facts warrant it, the trust should be construed as irrevocable."

[3] Neither in any of the cases in this state dealing with bank accounts in joint names, nor in Kuck v. Raftery, supra, dealing with an account "in trust," has there been an adoption of the theory of a tentative trust; nor is anything said by us to be deemed as suggestive of the applicability of that theory to the law of trusts as administered in this state. However, since the case has been earnestly argued on that theory by the defendant, we have carefully considered the New York cases and the distinctions incident to their varying circumstances. After such a review it is our conclusion that the case comes within the rule of Robinson v. Appleby, supra; and that as there was an express trust unequivocally declared in a separate writing by Jackson, with no revocation even after Sherman's death, the trust became enforceable by the plaintiff, as Sherman's sole heir, upon the death of Jackson.

[4] As to the proof of Jackson's intention, we are of the opinion that plaintiff sustained the burden resting upon her by proof of the opening of the account and Jackson's written declaration of trust. Having shown the creation of a valid trust, she was under no duty to go forward and show that it had not been terminated. It devolved upon the defendant to produce evidence of any facts or circumstances inconsistent with the declared intention of Jackson or showing revocation on his part. There was nothing tentative or indefinite in his declaration, and in our judgment the case comes clearly within the rule applied in Robinson v. Appleby, supra.

Accordingly the judgment for the defendant must be reversed, and the case remanded to the trial court for entry of judgment in favor of plaintiff.

CONLAN and GOODELL, JJ., concur.

LE CLERG et al. v. CITY OF SAN DIEGO et al. *

S. F. 14761.

Supreme Court of California.

March 27, 1933.

Rehearing Granted April 25, 1933.

1. **Pleading** 🔑214(1).

Demurrer to petition admits all facts.

2. **Mandamus** 🔑111.

Writ of mandate will not lie to compel payment of judgment against municipality prior to tax levy for such purpose (St. 1901, p. 794, § 3).

> Since city might incur liability greatly exceeding its income during year in which judgments against city were obtained, writ issued during fiscal year compelling payment of judgments out of operating funds on hand might impair operation of city.

3. **Municipal corporations** 🔑1038.

Where funds in treasury are raised for purposes other than payment of judgment against city, judgment creditor's remedy is under statute contemplating that tax levy include amount due on judgment (St. 1901, p. 794, § 3).

4. **Mandamus** 🔑172.

Question whether obligations on which judgments against city are based are statutory or contractual as regards debt limit, may be raised in proceeding by judgment creditors for writ of mandate compelling tax levy (St. 1901, p. 794, § 3; Const. art. 11, § 18).

5. **Municipal corporations** 🔑865(2).

Constitutional requirement that municipal indebtedness in any year must not exceed year's income cannot be avoided by stipulated judgment against city (St. 1901, p. 794, § 3; Const. art. 11, § 18).

In Bank.

Petition by Vernon Charles Le Clerg and others for a writ of mandate against the City of San Diego, G. F. Waterbury, and others, to compel the last-named respondent, as auditor and comptroller of the city, to issue warrants to petitioners for the full amount of judgments held by them against the city.

Demurrer to the petition sustained, and alternative writ discharged.

Sanders & Jacques, of San Diego, for petitioners.

C. L. Byers, City Atty., and Gilmore Tillman and H. B. Daniel, Assts. City Atty., both of San Diego, for respondents.

TYLER, Justice pro tem.

Petition for mandate to compel the auditor and comptroller of the city of San Diego to issue warrants to petitioners for the full amount of judgments held by them against said city. It is alleged in substance in the petition that on or about the 19th day of December, 1927, the San Diego common council duly passed an ordinance numbered 11497, providing for the employment of special deputy engineers in the operating department of said city, prescribing their duties and fixing their compensation; that this employment was created in order to perform a large volume of street improvement work. The ordinance creating these positions provided that the appointments be made from the eligible civil service list. Petitioners were thereafter duly appointed and certified to the positions held by them by the common council and their duties were designated by resolution of said council. It is then alleged that they performed the preliminary work leading up to the improvements, but before the same had progressed to award of contract therefor, the city, through its council, abandoned all of the proceedings. Thereafter, petitioners filed actions against the city for their compensation. Their complaints were demurred to and the demurrers were overruled. The city then answered.

Thereafter, the council passed a resolution wherein it was recited that the total amount sought to be recovered in said actions was $125,000; that the superior court had decided that plaintiffs were entitled to recover the reasonable value of their services; that the further defense by the city of said actions would entail great additional costs, and probably result in judgments against it in excess of $67,500; that the city deemed said sum to be a reasonable amount to pay the special engineers for their services. This resolution directed the city attorney to consent to the entry of judgments against the city for said sum of $67,500. It is then alleged that pursuant to said resolution the city attorney entered into a stipulation in said actions, consenting to the entry of judgments against the city in favor of petitioners herein, in respective sums aggregating the above amount. This stipulation provided that the judgments so entered should be as binding and effective as though entered by the court after a full trial of each of the actions on the merits, and that any right of the parties to appeal therefrom should be deemed waived. All the judgments were thereupon made and entered and they have become final.

Petitioners allege that the clerk of the court then filed with the council and the auditor of the city a certificate and audit of said judgments. Further allegations are to the effect that there is sufficient money in the city treasury to pay the judgments, but notwithstanding this fact the city refuses to pay and the auditor refuses to issue his warrant

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*For subsequent opinion see 24 P.2d 156.

therefor. The petition also recites that in incurring the obligation to pay petitioners compensation for their services out of the city treasury in conformity with the terms of the ordinance, the city did not incur any indebtedness or liability exceeding the income and revenue provided for the year in which said obligations were incurred. The judgments here involved are based upon obligations accruing variously in the fiscal years 1929—1930 and 1930—1931. In the instant case it is petitioners' theory that the obligations upon which the judgments are based are statutory in character and that section 18 of article 11 of the Constitution, limiting the power of legislative bodies of municipalities to incur indebtedness or liability in any manner or for any purpose exceeding in any year the income provided for such year, has application to contractual obligations alone and has no reference to obligations statutory in character. Conceding this to be true, the character of the obligations here involved is not controlling in this proceeding.

[1, 2] Respondents have demurred to the petition, thereby admitting all of the facts. In support of the demurrer, respondents contend that a writ of mandate will not lie to compel the payment of a judgment by a municipality prior to the levy of a tax for that specific purpose. We see no escape from this contention. The provisions of the act of the Legislature, approved March 23, 1901, entitled "An act to provide for the payment of judgments against counties, cities, cities and counties, and towns" (Stats. 1901, p. 794) provides: "Sec. 3. It shall be the duty of the auditor to examine and audit the final judgments so reported by the county clerk, and to certify the amount of such final judgments to the treasurer within five (5) days from the day on which such list of final judgments is filed with him. Thereupon, the board of supervisors, city council, town trustees, or other board of officers, as the case may be, having authority to levy taxes upon the taxable property of such county, city and county, city, or town, must include in the tax levy for the next fiscal year a rate or sum sufficient to pay all final judgments existing against such county, city and county, city, or town. The omission to include the amount of any existing final judgment in the tax levy for any year, shall not of itself invalidate the tax levy as made, but such omission or omissions must be included in the next tax levy; provided, that the board of supervisors or other board or officers having authority to levy taxes may provide for the payment of such final judgments when so audited by including in the tax levy for the next fiscal year an aliquot part or fraction of the amount of such judgments, and thereupon the treasurer shall pay to each judgment creditor a like aliquot part or fraction of the amount of the judgment of the creditor, and thereafter a like aliquot part or fraction of the amount of such judgments shall be levied and paid each successive year until the whole thereof shall be fully paid; but such fractional levy and payment shall in no case be less than one tenth (1/10) of the whole amount of such judgments."

[3-5] The plain intent of the statute is that the municipality after the rendition of a judgment shall have a proper time in which to raise the money by taxation for its payment. Prior thereto the funds of the city are to be used to pay statutory, necessary, and usual charges provided for in the budget. A writ issued during the fiscal year, compelling the payment of judgments out of the operating funds on hand, might impair the operation of the city for it is conceivable that a municipality might incur a liability far in excess of the amount of funds of the city's income during the year in which the judgments were obtained. The case of the City of Long Beach v. Lisenby, 180 Cal. 52, 179 P. 198, affords an example of just such a situation. The statute clearly contemplates that judgments against municipalities are not enforceable until after an annual tax has been levied and collected therefor. Frederick v. City of Gloversville, 112 App. Div. 146, 97 N. Y. S. 1105. Where the funds in a city treasury are raised for other purposes, the remedy of a judgment creditor against the city is to proceed under the statutory provision for the collection of judgments. Griswold v. Common Council of City of Ludington, 117 Mich. 317, 75 N. W. 609. This has been the practice followed in this state. Cary v. Long, 181 Cal. 443, 184 P. 857; Cook v. Supervisors, 99 Cal. App. 169, 277 P. 1064; Palace Hotel Co. v. Supervisors, 58 Cal. App. 742, 209 P. 256; Metropolitan Life Ins. Co. v. Deasy, 41 Cal. App. 667, 183 P. 243. Petitioners' remedy, therefore, is to see to it that the city officials levy a specific tax for the payment of the judgments. If they fail to do so, then petitioners may seek a writ of mandate to enforce their rights. In the event of the institution of such a proceeding, it may be well to state that the question as to the character of the obligations upon which the judgments are based is one that may be raised upon such proceeding. The judgments do not foreclose such inquiry, as such judgments do not preclude an investigation as to whether the obligation upon which they are based and the liability imposed thereby are statutory or contractual. Arthur v. City of Petaluma, 175 Cal. 216, 165 P. 698; Kennedy v. City of Gustine, 210 Cal. 18, 290 P. 38. Parties may not, by a stipulated judgment, take away the restriction upon municipalities imposed by the Constitution, that each year's income and revenues must pay each year's indebtedness and liability, and that no indebtedness or liability incurred in any one year shall be paid out of the income or revenue of any future year. Smith v. Broderick, 107 Cal. 644, 40 P. 1033, 48 Am. St. Rep. 167.

From what we have said it follows that the petition does not state facts sufficient to entitle petitioners to any relief. The demurrer is therefore sustained without leave to amend and the alternative writ of mandate heretofore issued out of this court is forthwith discharged.

We concur: WASTE, C. J.; SHENK, J.; LANGDON, J.; CURTIS, J.; SEAWELL, J.; PRESTON, J.

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217 Cal. 509

KENNEDY v. McINTURFF, Treasurer of Utility District.

L. A. 13919.

Supreme Court of California.

March 16, 1933.

1. Waters and water courses ⚷183½.

Stipulation that sufficient money remained from sale of utility district's bonds to pay broker's commission of $1,625 and unquestioned fact that warrant therefor was drawn on district's general fund established existence of surplus not exceeding $5,000, in such fund for payment of commission (St. 1921, p. 922, § 32).

2. Waters and water courses ⚷183½.

Payment of commission for producing purchaser of utility district's bonds at par and accrued interest from surplus in district's general fund *held* not prohibited as resulting in sale thereof for smaller amount (St. 1921, p. 922, § 32).

3. Waters and water courses ⚷183½.

Mode specified in statute for advertisement and sale of utility district bonds is mandatory (St. 1921, p. 906, as amended by St. 1923, p. 299).

4. Waters and water courses ⚷183½.

Public utility district's directors *held* authorized to employ and pay commission to broker producing purchaser of its waterworks bonds (St. 1921, § 30, subds 5, 10, pp. 918, 919, and §§ 32, 44, 45, pp. 922, 931).

In Bank.

Appeal from Superior Court, Kings County; K. Van Zante, Judge.

Mandamus proceeding by Elmer J. Kennedy, doing business under the firm name and style of the Elmer J. Kennedy Company, against H. McInturff, Treasurer of the Stratford Public Utility District, County of Kings. Judgment for respondent, and petitioner appeals.

Reversed.

For prior opinion, see (Cal. App.) 13 P.(2d) 781.

K. B. Kennicott, of Los Angeles, for appellant.

Clarence H. Wilson, Dist. Atty., of Hanford, for respondent.

SHENK, Justice.

This is an appeal from a judgment for the respondent in a mandamus proceeding brought to compel the treasurer of the Stratford public utility district in Kern county to pay a warrant in the sum of $1,625 drawn on the order of the board of directors of the district, and payable to the petitioner.

The cause was submitted to the trial court on an agreed statement of facts from which it appears that the Stratford public utility district was organized and is functioning under the act of 1921 (St. 1921, p. 906, as amended by St. 1923, p. 299). Under the act the respondent county treasurer is made the acting treasurer of the district and the custodian of its funds. The district is governed by a board of directors.

On August 11, 1930, the electors of the district authorized the issuance of bonds in the sum of $30,000 for the acquisition, construction and completion of a waterworks system for the distribution of water within the district. The board of directors made several unsuccessful attempts to sell the bonds. On October 10, 1930, the petitioner addressed a letter to the board of directors, wherein he offered to find a purchaser for said bonds at par and accrued interest. The offer was in consideration of the payment to him of a commission in the sum of $1,625. The offer was accepted by the board on the day of its receipt.

The petitioner produced a purchaser to whom the bonds were sold at par and accrued interest, and presented a demand for the commission. The board approved the demand and a warrant was drawn on the general fund of the district in payment thereof. The respondent county treasurer refused payment on the ground that the expenditure was not authorized by law.

It also appears from the agreed statement of facts that the work and improvement contemplated by the issuance of said bonds has been completed and has been paid for in full; that there still remains from the sale of said bonds sufficient money in the hands of the treasurer to pay said warrant; and that the amount demanded is a reasonable amount to be paid as commission if one be authorized.

[1] Section 32 of the act authorizing the creation of the district provides that the bonds of the district "may be sold by the board of directors at such times and in such manner as they shall determine, but shall not

be sold at less than par and accrued interest. * * * The proceeds from the sale of bonds shall be placed in the treasury to the credit of the proper fund, and shall be applied exclusively to the purposes and objects mentioned in the ordinance authorizing their issue until such objects are fully accomplished; after which, if any surplus remains, such surplus may be transferred to the general fund; except that if such surplus exceeds the sum of five thousand dollars, then such surplus and the whole thereof shall be transferred to the appropriate fund or funds to pay interest and maintain the sinking fund, or provide for the retirement of the bonded indebtedness in connection with which such surplus remains."

The exact amount of the surplus remaining after the completion of the work is not shown, but we think it appears by a reasonable, and in fact a necessary, inference from the stipulated fact that there still remains from the sale of said bonds sufficient money to pay said warrant, and from the unquestioned fact that the warrant is drawn on the general fund of the district, that there was a surplus and that the surplus was not more than $5,000. The presumption of official duty regularly performed would admit of no other conclusion, and since the purposes of the bond issue have been fully accomplished, the money sought to be expended to pay the warrant must be deemed to be a part of the general fund of the district.

[2] We are not impressed by the argument of counsel for the respondent that the payment of the commission under the circumstances here shown would result in a sale of the bonds at less than par and accrued interest. The entire proceeds from the sale of said bonds were available for the purposes of their issuance and the amount thereof was not diminished by reason of the contract to pay the commission. The transaction did not contemplate a commission or rebate to the purchaser of the bonds. Nor was it tainted with an overbid on the part of the contractor so as to bring the sale within the rule applied by the courts of this and other states to conduct amounting to a subterfuge to defeat the terms of the statute. Appeal of Whelen, 108 Pa. 162, 1 A. 88; Hunter v. County of Santa Barbara, 110 Cal. App. 698, 294 P. 1082; Ogg v. Dies (Tex. Civ. App.) 176 S. W. 638. The commission here sought to be enforced was to be paid to a third party who agreed to and did bring about a sale of the bonds at the lawful price.

[3, 4] The express powers of the board of directors in the premises are found in the following provisions of the act: Section 30 provides that any such public utility district shall have power "Fifth—To acquire, construct, own, operate, control or use * * * works for supplying the inhabitants of said district with light, water, power, heat, transportation; * * * and to do all things necessary or convenient to the full exercise of the powers herein granted. * * * Eighth—To borrow money and incur indebtedness, and to issue bonds or other evidences of such indebtedness. * * * Tenth—To make contracts, to employ labor, and to do all acts necessary and convenient for the full exercise of the powers herein in this act granted." Section 44 provides that: "The board of directors may from time to time contract for or employ any professional services required by the district, or by the board, or any officer of the district." And section 45 provides: "The board of directors or other officers of the district shall have no power to incur any debt or liability whatever, either by issuing bonds or otherwise, in excess of the express provisions of this act, and any debt or liability incurred in excess of such express provisions shall be and remain absolutely void."

It is the position of the respondent that the provisions of said section 45 foreclose the question against the petitioner for the reason that there is no express authority in the act for the employment of the petitioner or for incurring the liability for his services; and that the provisions of subdivisions "fifth" and "tenth" of section 30 of the act granting the board power "to do all acts necessary and convenient for the full exercise of the powers hereby granted" are not sufficient to repose such authority in the board. The respondent's principal reliance in this regard is the case of Smith v. County of Los Angeles, 99 Cal. 628, 34 P. 439. In that case it appeared that the board of supervisors of the county had employed the plaintiff to procure an acceptable bidder for bonds theretofore authorized by the electors of the county for the construction of a county courthouse. The services contracted for were performed by the plaintiff, payment therefor was refused and he sued for the conceded reasonable value thereof. The question was whether it was within the express power of the board of supervisors to sell the bonds, and if so whether the board had the additional power to contract for and pay the commission under the provisions of subdivision 35 of section 25 of the County Government Act as it then stood (Act of March 14, 1883; St. 1883, p. 299), providing that the board of supervisors should have power "to do and perform all other acts and things required by law not in this act enumerated, or which may be necessary to the full discharge of the duties of the legislative authority of the county government." The trial court entered judgment for the defendant county. The judgment was affirmed. It was properly held in that case that the board of supervisors had no express authority to sell the bonds. Indeed, the express power to sell them was conferred by statute on the county treasurer; consequently there was no power in or duty imposed on the board which could be aided by the above-quoted provision of the County Government Act.

Here the board of directors was granted the express power to sell the bonds. It is assumed that the operation of those portions of subdivisions "fifth" and "tenth" of section 30 of the act now before us vesting power in the board of directors "to do all things necessary or convenient to the full exercise of the powers hereby granted," should be confined to the exercise by the board of such powers as are otherwise expressly granted by the act. When so confined the action taken thereunder is in pursuance of express authority. In other words, the board had express authority to sell the bonds; the board had express authority to do all acts necessary and convenient for the full exercise of the power to sell; and the board had express authority to transfer the excess in this case to the general fund.

It may be reasonably inferred from the fact that the contract was made that the board of directors, after previous unsuccessful efforts to sell the bonds, were pressed with the necessity of disposing of the same at the earliest practicable time; that the efforts of the board of directors to sell the bonds without the aid of a broker had proved futile; and that such aid was necessary. The question of the reasonableness of the commission is removed from the case by the stipulation of facts.

Numerous cases in other states have approved the employment of a broker to negotiate the sale of public bonds where such employment appeared to be necessary and the agreement to pay the commission was executed in good faith by the public authority having the power and duty to sell the bonds. Mayor, etc., of N. Y. v. Sands, 105 N. Y. 210, 11 N. E. 820; Armstrong v. Village of Ft. Edward, 159 N. Y. 315, 53 N. E. 1116; Matter of Sage v. Broderick, 255 N. Y. 19, 173 N. E. 908. The last case cited referred to the case of Smith v. County of Los Angeles, 99 Cal. 628, 34 P. 439; and other cases relied upon by the respondent herein and held them inapplicable for the reason that it appeared that the statutory law was not followed. The cases approving the employment of a broker to sell public bonds limit the right to do so to instances where the power to sell the bonds is expressed in the statute and when there is no express provision against the employment, on the theory that the power to sell the bonds carries with it the implied power to do whatever is reasonably necessary to bring about the sale, including the employment of a broker. What is declared to be a necessarily implied power in other states, that is, the implied power to do all things necessary to carry out other powers expressly granted, is an express power under our statute. In Pennsylvania the statute specifically authorizes such employment (Appeal of Whelen, 108 Pa. 162, 1 A. 88), and when the statute specifies the mode of advertisement and sale such mode is mandatory. Consolidated School Dist. v. Union Trust Company, 124 Wash. 501, 215 P. 28.

We conclude that the power to pay the petitioner's commission under the facts of this case is included within the statute, and that the cases relied on by the respondent are not in point.

The judgment is reversed.

We concur: WASTE, C. J.; SEAWELL, J.; THOMPSON, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.

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217 Cal. 671

PEOPLE v. HEISE.

SAME v. ROBERTSON.

Cr. 3598, 3599.

Supreme Court of California.

April 3, 1933.

1. Assault and battery ⟹91.

Evidence *held* to support conclusion that water company employees used excessive force in removing stockholder's employee from company's diversion weir, warranting conviction for simple assault.

> Evidence disclosed that defendant employees by force expelled employee of stockholder from weir, and that one of defendants had an ax in his hand, although court below found that such defendant did not wield ax as deadly weapon.

2. Assault and battery ⟹48.

"Battery" is consummated assault.

[Ed. Note.—For other definitions of "Battery," see Words and Phrases.]

3. Assault and battery ⟹48.

Defendants convicted of simple assault could not complain that they were not charged with and convicted of offense of battery, since battery includes assault.

4. Assault and battery ⟹48.

When excessive force against trespasser is actually used or unlawfully attempted, assault is committed.

In Bank.

Appeals from Superior Court, Los Angeles County; William Frederickson, Judge.

Henry Heise and Raymond Robertson were convicted of simple assault, and they appeal.

Affirmed.

Prior opinion, 13 P.(2d) 796.

John C. Packard, Koenig & Brunton, and Victor H. Koenig, all of Los Angeles, for appellants.

U. S. Webb, Atty. Gen., and Alberta Belford, Deputy Atty. Gen., for the People.

PRESTON, Justice.

Defendants were charged with the crime of assault with a deadly weapon on the body of one Wyatt. The court sitting without a jury found them not guilty of assault with a deadly weapon but guilty merely of simple assault and imposed a fine of $50 each with the alternative of imprisonment for a period of twenty-five days. The excuse for the appeals of defendants is doubtless the bearing this decision might have upon the civil rights of the two corporations represented respectively by the defendants and the complaining witness Wyatt.

The fracas occurred at the diversion weir on Big Rock creek; defendants were employees of the Big Rock Creek Mutual Water Company, which owned a water right in the stream, the contiguous land and the diversion weir, while the complaining witness was an employee of the Rock Creek Water Company, which company was a stockholder of the company first mentioned. A dispute exists as to the quota of water to which the latter company is entitled. In the absence of the representative of one of these companies, the representative of the other would make changes in the boards of said weir, so as to vary the flow in accordance with the contention of his company.

[1] Defendants, by force, expelled Wyatt from the weir, defendant Robertson having in his hand an ax. But the court below by its decision found that said defendant did not wield the ax as a deadly weapon. For the purposes of this opinion we will assume that Wyatt was a trespasser and that defendants had the right to expel him, using the necessary amount of force so to do. This concession leaves open but one question: Was excessive force used? The trial court was of the opinion that it was and the evidence supports this conclusion. The manipulation of the ax alone against the unarmed man warrants this view.

[2-4] As defendants were not charged with battery, the court could not find them guilty of that offense, but it did find them guilty of the offense included within the major charge laid in the information, to wit: Simple assault. Battery includes assault; in fact, battery is a consummated assault. Assault is, therefore, necessarily included in battery. Defendants are in no position to complain that they were not charged with and convicted of the aggravated offense of battery. We see no difficulty in finding an assault to be committed when excessive force against a trespasser is either actually used or unlawfully attempted.

Both judgments are affirmed.

We concur: WASTE, C. J.; SHENK, J.; IRA F. THOMPSON, J; SEAWELL, J.; CURTIS, J.

217 Cal. 527

KIPP v. BILLINGHAM et al.

L. A. 13011.

Supreme Court of California.
March 22, 1933.

As Modified May 24, 1933.

1. **Taxation 🔑660.**

Purpose of statute requiring publication of notice before sale of property on failure to pay tax is to give taxpayer opportunity to pay before sale (Pol. Code, § 3767).

2. **Taxation 🔑658(3).**

Sale of property for taxes was not affected because of failure to state in notice place of sale, since place of sale is fixed by law (Pol. Code, § 3767).

3. **Taxation 🔑615.**

Law in force at time of sale of property for failure to pay taxes applies to all proceedings dependent thereon (Pol. Code, §§ 3771, 3771a, 3785b).

4. **Taxation 🔑744.**

Execution of deed to individual purchaser in 1924, upon sale of property for failure to pay taxes, was proper (Pol. Code, §§ 3771, 3771a, 3785b).

5. **Statutes 🔑190.**

Where legislative intent is clear, language of statute cannot be ignored or wrenched from plain meaning.

6. **Statutes 🔑174, 175.**

Interpretation given to statute should be consistent with sound sense and render statute operative.

In Bank.

Appeal from Superior Court, San Diego County; S. L. Strother, Judge.

Action by Sylvester Kipp against William R. Billingham and others. From judgment for defendant Alfred P. Hansen, plaintiff appeals.

Affirmed.

Virgil S. Kipp, of San Diego, for appellant.

Henry W. Hache and Westover & Miller, all of San Diego, for respondent.

THOMPSON, Justice.

This appeal is from a judgment quieting title in respondent to one of several parcels of property to which appellant sought to establish his own title. It appears that respondent's ownership was based upon a tax deed, which appellant asserts is fatally defective for two reasons: First, because the notice of the sale to the state failed to designate the place where the sale would take place; second, because on June 28, 1924, the date of the sale to the state, there was no statute authorizing the tax collector to execute a deed to the individual purchaser.

[1, 2] The notice by the tax collector does not designate the place where the sale to the state will occur, but it does recite that unless the delinquent taxes are paid prior to the sale date, the lands "will by operation of law be sold to the state of California on Saturday, the 28th day of June, 1924, at 9:30 o'clock a. m." Section 3767 of the Political Code reads as follows: "The publication must designate the day and hour when the property will, by operation of law, be sold to the state, which sale must not be less than twenty-one nor more than twenty-eight days from the time of the first publication, and the place shall be in the tax-collector's office." It is immediately observed that the section does not require the place to be designated any more than it requires the notice to contain the statement that "the sale must not be less than twenty-one nor more than twenty-eight days from the time of the first publication." The tax collector would have no right or authority to designate any other place than that fixed by law. The purpose of the notice is to give the taxpayer an opportunity to pay his taxes before the title, by operation of law, passes from him. Bank of Lemoore v. Fulgham, 151 Cal. 234, 90 P. 936. While we use an expression denoting that he is divested of title, it is not literally true where the deed is not to be issued until after five years have elapsed. It is said in Santa Barbara County v. Sav., etc., Society, 137 Cal. 463, 70 P. 457, 458: "Such sale vests an equitable title in the state, and at the expiration of five years, if the property is not redeemed in the meantime, the deed of the tax collector to the state vests in it the legal title, and the controller may then direct the tax collector to sell at public auction to the highest bidder, at a sum not less than all the delinquent taxes, penalties, and interest." There is no reason why the notice should specify the place where the sale to the state is to take place. Being advised of the time of sale, the law having fixed the place, the taxpayer is fully protected. Not only may he pay the delinquent assessment, at the tax collector's office at any time before the sale, but he has five years within which to redeem, before he is divested of legal title. Appellant relies upon the authority of Hinds v. Clark, 173 Cal. 49, 159 P. 153, 155, which involved an ordinance of the city of Bakersfield, requiring that "the publication must designate the day and hour when the property will, by operation of law, be sold to the city * * * and the place shall be at the city hall." Apparently following the argument presented by the briefs in that case, the court assumed the ordinance required the notice to state the place, and concluded that it could not be said, as a matter of law, that a notice designating the city hall as the place was insufficient. Nowhere in that case is there a determination that where the place is specifically fixed by law, as in the case at bar, it is necessary for the notice to restate that fact. Additionally it may be remarked that the designation of the "City Hall" is much more general than "in the tax collector's office." Appellant also relies upon Numitor Gold Mining Co. v. Katzer, 83 Cal. App. 161, 256 P. 464; and Sawyer v. Berkeley Securities Co., 99 Cal. App. 545, 279 P. 217. The first of these two cases involved a notice in which the time was not designated and where the notice of sale (required to be mailed to the person to whom the property was last assessed in case of a sale to the highest bidder) was not delivered. For three reasons, therefore, the case is not in point: First, it concerned a sale not to the state but to the highest bidder; second, the notice failed to specify the time; and, third, service was not had upon the person to whom the property was last assessed. The other case likewise misses the mark. There the notice of the sale to the state also failed to specify the time and the notice of sale to the highest bidder required to be mailed to the person to whom the property was last assessed was not mailed in time. General language therein, it is true, is quoted from 24 Cal. Jur., page 326. The quotation, however, is based upon the case of Hinds v. Clark, supra, which we have found to be beside the point. It should be remembered that there is every reason for a distinction between sales to the state and sales to the highest bidder at public auction.

[3-6] Appellant's other contention is that, as the law stood in 1924 the year of the sale to the state, which law follows through all proceedings dependent upon that sale (see Scott v. Beck, 204 Cal. 78, 266 P. 951, and cases there cited), there was no provision in section 3785b of the Political Code for the execution of a deed to the purchaser. In this the appellant is in error. This section, in its material portions, read, in 1924, as follows: "When property has been sold to a purchaser at delinquent-tax sale, other than the State of California, in pursuance of section 3771 of this code, the tax-collector must forthwith ex-

ecute a deed to such purchaser, or his assigns, conveying said property; provided, no deed shall be delivered in any event until redemption has been made of such property and all taxes, penalties, interest and charges have been paid which may have been accrued by reason of any previous tax-sale or delinquency." Section 3771a provides for the sale of property at public auction, which has been sold to the state and the full five years period for redemption has passed prior to the notice of sale, as well as property sold to the state which has not been redeemed for a period of five years prior to the actual sale. Jacoby v. Wolff, 198 Cal. 667, 247 P. 195. Section 3771 provides solely for the sale of the property to the state, but prior to 1921, it included sales of property to the state by operation of law and sales of property to the highest bidder at public auction. In other words, in 1921, section 3771 was split into two pieces, the first being retained as section 3771 (St. 1921, p. 109, § 2) and the second, with some changes, being incorporated into section 3771a (St. 1921, p. 109, § 3). Therefore, it is obvious that the reference to purchasers, other than the state of California, must have been intended to refer to those who purchased at public auction under section 3771a. It could not possibly refer to sales under section 3771. In other words, suppose that section 3785b had made no reference whatsoever to section 3771, then there would be no doubt that the sales therein referred to were those made pursuant to section 3771a subsequent to the amendment of 1921. When the legislative intent is clear we cannot ignore it or wrench the language from its plain meaning. The same result is to be reached by another method. If the words in section 3785b "in pursuance of section 3771 of this code" had reference to the deeds to be executed, then the entire section was meaningless and inoperative. If, however, agreeable to a rule of statutory construction that such interpretation shall be given as will be consistent with sound sense and render the statute operative, the words be construed as modifying the clause "other than the state of California," the plain legislative intent is preserved. There is nothing in the record to indicate that a deed to the state was executed. In fact, the contrary appears. The sale to the state occurred June 28, 1924. The sale to the respondent took place June 29, 1929, notice thereof having been started June 6, 1929, some time prior to the expiration of the five-year period. In other words, the same procedure was followed as was pursued in Jacoby v. Wolff, supra. The attacks upon the deed are without foundation.

Judgment affirmed.

We concur: WASTE, C. J.; SHENK, J.; PRESTON, J.; CURTIS, J.; LANGDON, J.

217 Cal. 572

BLYMYER et al. v. SUTTER BUTTE CANAL CO.

Sac. 4423.

Supreme Court of California.

March 28, 1933.

Rehearing Denied April 27, 1933.

Judgment 🔑715(1).

Railroad commission's decision on issue whether ditch should have been classed as compensatory and future use of water as certain against owner, in suit to recover part of construction cost of irrigation ditch, *held* res judicata in subsequent action involving same issue between same parties.

In Bank.

Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

Action by G. G. Blymyer and another against Sutter Butte Canal Company. From judgment for plaintiffs, defendant appeals.

Reversed and remanded, with directions.

Isaac Frohman, of San Francisco, and Seth Millington, of Gridley, for appellant.

Elmer W. Armfield and Arthur B. Eddy, both of Woodland, for respondents.

PRESTON, Justice.

The word "plaintiffs" is used herein to designate plaintiffs and their co-owners of land. The appeal is by defendant from judgment for plaintiffs, which judgment must be reversed as the essential findings of fact upon which it is based are in direct contradiction of findings previously made on the identical issues of fact by the railroad commission in a like proceeding before it between these same parties. Only such matters as are necessary to a discussion of this subject will be here set forth:

On May 5, 1918, defendant, a public utility water company, entered into a written agreement with plaintiffs for the construction of a ditch from its canal to their lands for irrigation purposes and plaintiffs agreed to deposit with defendant the funds necessary for the construction work and to take water from the canal at a specified yearly rate. Defendant was to refund to plaintiffs over a period of years, without interest, the sums so deposited. Plaintiffs protested at the terms of this contract but, needing water immediately, they finally executed it upon attachment thereto of a rider which provided that the contract was "to be subservient to any ruling of the Railroad Commission in the matter of rates or other matters therein" and that it was expressly agreed that any controversies arising over the exactions incorporated in the terms of said contract should be referred to the railroad commission and its ruling thereon should be retroactive and operative upon said contract and should inure to the benefit of said landowners.

On June 20, 1918, differences between the parties were referred to the railroad commission. Plaintiffs claimed that the contract was manifestly unfair as the company should have made the extension and given the water service without requiring any deposit whatsoever from the consumers. They asked that the commission promulgate a rule or regulation under which the whole of the money advanced plus interest thereon should be refunded. Thereafter and on April 30, 1919, there became effective section 3 of revised rules and regulations, approved by the commission, which provided: "3. The company will make all reasonable enlargements or extensions of its ditches at its own expense, provided that if the proposed enlargement or extension is noncompensatory or the future use of water uncertain, the Company may require that its estimated cost * * * be deposited with it by the prospective consumer * * *. The amount deposited * * * shall be returned without interest at the rate of one-seventh of the gross revenue received from the extension, payable in annual installments until the entire amount deposited has been returned * * *."

This rule gave rise to an issue between the parties as to whether the ditch was to be considered as compensatory and the future use of water certain. The construction cost was in the neighborhood of $20,000, $3,884 of which these plaintiffs advanced. Defendant, acting pursuant to the proviso of the rule, supplied their lands with water from 1918 and, having collected substantial revenues, has made proportionate yearly refunds to them on account of said deposit. Plaintiffs, however, at all times contended that defendant should have borne the cost of making the ditch and they claim that they are therefore entitled to a return of the unrefunded portion of their deposit in a lump sum. In 1919 they filed with the railroad commission a formal complaint setting forth substantially the allegations of the complaint in this cause and praying for substantially the same relief, that is, they asked that the commission adjudge that the past and future use of water from the ditch was certain, that it was a compensatory ditch and that they were entitled to an immediate return in full of the entire unrefunded portion of the said funds advanced by them, with interest thereon. Numerous public hearings were had before the railroad commission and voluminous evidence was taken. Finally in July, 1921, the commission rendered its decision (Case 1352, Dec. 9294, rendered July 30, 1921), wherein it set forth at length the facts as found by it and its application thereto of said rule 3. We quote the closing paragraph of this decision:

"We will now consider the question of whether or not Rule No. 3 should apply to complainants herein as applicants for irrigation service. The commission is not convinced * * * that rice will continue to be planted to such an extent in the future as it was during the years 1918, 1919 and 1920. Let us presume that the planting of rice on the lands under this extension should be totally discontinued. In such an event the utility may be called upon to furnish a negligible amount of water * * *. The revenues * * * collected * * * would probably be insufficient to pay operating expenses on the extension. Again, we have the case of complainant Ashley pumping water from a drainage canal * * * thereby discontinuing the supply of the defendant utility, and his statement * * * that it is his intention to discontinue the supply of the Sutter-Butte Canal Company altogether. There is nothing in the record indicating that other consumers intend to follow this course, but the possibility of their so doing is of course suggested. We believe that the interests of the consumers * * * will best be served by the utility being permitted to rebate the amount advanced by the complainants in the manner provided by the company's rules. The complainants would not appear to be unduly burdened by the utility being permitted to follow this course inasmuch as it is shown hereinbefore that if the revenues from the extension should continue as they did during 1918, 1919 and 1920, the total amount advanced * * * will have been returned in about three years, the only loss to complainants being interest on the money so advanced. If the revenues should decline then, of course, a greater length of time would elapse before the money will have been returned. In either event, no injustice is done to either party, and the application of such a principle makes for a stabilization of the financial affairs of the utility, which, in turn, is reflected in a dependable and proper service to the consumers * * *. Said complaint * * * is hereby dismissed."

Following the dismissal of their complaint by the railroad commission, plaintiffs applied to this court for writ of review. Our opinion, rendered February 20, 1922, upon denial of their application (Ashley v. Railroad Commission, 188 Cal. 234–236, 204 P. 825), holds: "The petition to this court does not, in itself, state any facts which show that the railroad commission has exceeded its jurisdiction. It contains nothing more than general statements that the decision * * * violates the rights of the petitioners, and that it is unreasonable and discriminatory. * * * With respect to the request for the making of rules and regulations, it seems sufficient to say that such matters are largely, if not entirely, discretionary with the commission, and no facts are set forth which show such abuse of discretion as to make its refusal an excess of jurisdiction. With respect to the part of the complaint asking for an order by the commission upon the canal company requiring it to repay to the petitioners the money advanced by them, we think the commission properly dismissed the application. It was in effect a complaint to recover money, and it necessarily assumed that the commission has jurisdiction to entertain actions to compel public utilities to pay debts owing by them for money borrowed to enable it to construct its canals or works. We are not advised that the commission has jurisdiction of that character. It is part of the jurisdiction of the superior courts of the state. * * * It is not pointed out wherein the order dismissing the complaint and refusing to give the relief asked thereby has produced or will produce any unlawful discrimination between the petitioners and other persons. For these reasons we deny the application for the issuance of a writ of review."

On May 20, 1922, plaintiffs instituted this action; their complaint containing, as above stated, substantially the same allegations as were made in the proceeding before the railroad commission. Defendant answered interposing, among other things, the defense that the decision of the railroad commission made the matter res judicata. However, in view of the holding of Ashley v. Railroad Commission, supra, above quoted, to the effect that the commission was without jurisdiction to consider that part of the complaint asking for a money judgment, the trial court disregarded said defense and received evidence on all the issues tendered by the pleadings, and thereafter made its findings to the effect that the essential allegations of the complaint were true; that the future use of the water was certain; that defendant had collected approximately $100,000 in revenues and had repaid to plaintiffs $928.50, of the $3,884 advanced, leaving due them the sum of $2,955.50; further that the complaint herein and the complaint before the commission were substantially the same; that, however, the latter complaint was dismissed and writ of review denied (Ashley v. Railroad Commission, supra); hence the court concluded that plaintiffs were entitled to receive the unrefunded balance of their said deposit with interest from May 28, 1918, on the amounts as they remained due. Judgment for plaintiffs followed in the sum of $4,923.44. Defendant appealed.

It is to be noted that rule 3 provides that the company will make all reasonable extensions at its own expense, but if the proposed extension "is noncompensatory or the future use of water uncertain, the company may require" a deposit, etc. In other words, the real issue between these parties was whether the ditch should have been classed as compensatory and the future use of water certain. This was an issue of fact, dependent in part upon the rules, regulations and rates approved by the commission for the utility, and it was an issue within the jurisdiction of the commission to hear and determine, upon which its findings were final and conclusive. As the rule was designed to apply prior to continued use of an extension, the showing made upon the trial of this cause that the ditch had in fact paid revenues and the use of water had been continuous from 1918 to 1925, was not determinative in considering whether the original classification of the ditch as noncompensatory or the use of water uncertain was a wise exercise of discretion. To state the matter another way, the very facts which plaintiffs sought to establish in this action as a basis for their prayer for a money judgment, had been finally and conclusively determined to the contrary by the said proceeding before the commission.

But, plaintiffs contend, under the doctrine of the Ashley Case, the trial court properly disregarded the findings of the commission, in view of the holding there made that the commission had exceeded its jurisdiction. However, this court, in the Ashley Case, expressly limited its restriction upon the jurisdiction of the commission to its consideration of "the part of the complaint asking for an order by the commission upon the canal company requiring it to repay to the petitioners the money advanced by them." Nowhere is it implied in the language of that decision that the commission was without authority to pass upon the questions of fact relating to classification of the ditch and the certainty of the future use of water. Although the opinion is very brief, it nevertheless recites that no facts are shown that the commission exceeded its jurisdiction and with respect to the making of rules and regulations, such matters are largely, if not entirely, discretionary with the commission and "no facts are set forth which show such abuse of discretion as to make its refusal an excess of jurisdiction."

A simple statement of this case is that if the commission had found that said ditch should have been considered compensatory and the future use of water certain, then plaintiffs would have had a cause of action in the superior court, based upon such findings of the commission, for the return, with interest, of all unrefunded portions of their deposit. In other words, the decision of the commission would in that event have paved the way for them to secure a money judgment in the superior court. But as the findings of the commission, well supported by ample evidence, were to the opposite effect, and were binding and conclusive, plaintiffs had no foundation upon which to ground a plea in the superior court for a money judgment.

The judgment is reversed, with directions to the court below to dismiss the action.

We concur: WASTE, C. J.; CURTIS, J.; THOMPSON, J.; SHENK, J.; LANGDON, J.; SEAWELL, J.

217 Cal. 557

In re REYNOLDS' ESTATE.

REYNOLDS v. JONES.

L. A. 13497.

Supreme Court of California.
March 24, 1933.

Rehearing Denied April 21, 1933.

1. **Wills** 🔑**240.**

Ancillary probate proceedings may be had on will of resident of state (Probate Code, §§ 301, 360).

This is so, since the words "a will" appearing in Probate Code, § 360, which provides that a will admitted to probate in any other state or country may be offered for probate in the superior court having jurisdiction as determined by section 301 are comprehensive and sufficiently broad to include the will of a resident, as well as a nonresident, of state.

2. **Wills** 🔑**434.**

That ancillary proceedings may be had on will of resident of state does not preclude introduction of evidence that decedent's place of residence was other than as determined in foreign jurisdiction on original application for probate (Probate Code, §§ 301, 360; Const. U. S. art. 4, § 1).

3. **Wills** 🔑**434.**

State decision in probate proceedings that testator was domiciled there, is not binding on sister state, but sister state in which testator's property is situated may determine such question for itself (Const. U. S. art. 4, § 1).

4. **Wills** 🔑**384.**

Excluding evidence that testator's residence at time of death was in county where ancillary probate proceeding was pending *held* not prejudicial (Probate Code, §§ 301, 360).

5. **Wills** 🔑**70.**

As respects disposition of real property or of creation of interest therein, validity and effect of will depend on lex rei sitae.

6. **Wills** 🔑**434.**

Adjudication that decedent resided in Illinois at time of death was ordered stricken from order entered in ancillary probate proceeding wherein evidence that decedent resided in California was excluded, since problems arising in future administration of estate may depend on law of testator's domicile at death.

In Bank.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Petition by Clement E. Reynolds for the probate of the will of John R. Reynolds, deceased, as a foreign will, opposed by Maude Gertrude Jones, administratrix. From an order admitting the will to probate as a foreign will, the administratrix appeals.

Order modified and, as modified, affirmed.

Prior opinion, 13 P.(2d) 845.

Ward & Ward, of San Diego, for respondent.

C. C. Pease, of San Diego, for appellant.

WASTE, Chief Justice.

This is an appeal from an order admitting decedent's will to probate as a foreign will. On October 20, 1930, the decedent died testate in the county of San Diego, Cal., leaving estate therein. In August, 1931, his will was admitted to probate in Illinois. Thereafter a petition for probate of said will as a foreign will was filed in the superior court of San Diego county. The administratrix of the estate of the decedent's widow objected to the admission of the will as a foreign will. At the hearing upon the petition, and after the reception in evidence of exemplified copies of the proceedings of the Illinois court, said administratrix offered to prove that at the time of his death the decedent was, in fact, a resident of San Diego county. An objection to the proffered evidence was sustained and the will was admitted to probate as a foreign will. This appeal followed.

In support of her contention that it was error to reject evidence of decedent's residence, the appellant refers us to In re Estate of Clark, 148 Cal. 108, 82 P. 760, 1 L. R. A. (N. S.) 996, 113 Am. St. Rep. 197, 7 Ann. Cas. 306, wherein it was held that ancillary proceedings could not be had upon the will of a resident of this state theretofore admitted to probate in a foreign jurisdiction. That case definitely held that the will of a resident of this state could only be admitted to probate upon an original application for letters. This conclusion turned upon a construction of section 1322 of the Code of Civil Procedure which then read: "All wills duly proved and allowed in any other of the United States, or in any foreign country or state, may be allowed and recorded in the superior court of any county in which the testator shall have left any estate." In the Clark Case it was held that this language applied to foreign wills only and that, inasmuch as the decedent therein had died a resident of this state, his will could not be admitted to probate thereunder, but could only be admitted upon an original application.

The decision in the Clark Case was by a divided court, three of the justices writing dissenting opinions favoring a construction of section 1322, supra, which would permit ancillary proceedings upon the will of a resident of this state theretofore admitted to probate in a foreign jurisdiction. Apparently in order to accomplish this result, and to overcome the effect of the majority opinion in the Clark Case, supra, the Legislature in 1911 amended section 1322, supra (St. 1911, p. 88), by adding thereto a concluding clause reading as follows: "or shall have been a resident, at the time of his death." By this amendment the Legislature expressly authorized ancillary proceedings upon the will of a resident of this state. This change in the law was recognized in In re Estate of Sankey, 199 Cal. 391, 400, 249 P. 517, 520, wherein the following appears: "Since the decision in the Clark Case the Legislature has enlarged the jurisdiction of our superior courts in ancillary probate proceedings. In 1911 * * * the section was amended to provide that such foreign wills may be allowed and recorded in the superior court of any county 'in which the testator shall have left any estate, or shall have been a resident at the time of his death.' Apparently this amendment was intended to overcome the effect of the Clark decision, and now clearly authorizes the granting of ancillary probate even though the testator be, in fact, a resident of the country where the proceedings are instituted, at the time of his death."

The matter of ancillary proceedings upon foreign wills is now governed by sections 360 and 301 of the Probate Code, which, when read together, form the counterpart of the former section 1322, supra. Those sections provide:

"§ 360. A will admitted to probate in any other state or country may be offered for probate in the superior court having jurisdiction as determined by section 301 of this code."

"§ 301. Wills must be proved, and letters testamentary or of administration granted and administration of estates of decedents had, in the superior court: (1) Of the county of which the decedent was a resident at the time of his death, wherever he may have died; (2) Of the county in which the decedent died, leaving estate therein, he not being a resident of the state; (3) Of any county in which he leaves estate, the decedent not being a resident of the state at the time of his death, and having died out of the state. * * *"

[1] While the quoted Probate Code sections differ in phraseology from both the original and the amended section 1322, it is our opinion that they more closely approximate the latter and should therefore be construed as authorizing ancillary proceedings on the will of a resident of this state. Section 360 declares that "a will admitted to probate in any other state or country may be offered for probate in the superior court having jurisdiction as determined by section 301 of this code." The words "a will," appearing in the section, are comprehensive and sufficiently broad to include the will of a resident, as well as a nonresident, of this state. Moreover, by the express language of section 360, the three subdivisions of section 301 are to be looked to in order to determine the county in which the ancillary proceedings are to be had on a will elsewhere admitted upon original application. Looking to these three subdivisions we find that such ancillary proceedings are to be had (1) in the county of decedent's residence, (2) in the county where he died leaving estate, and (3) in the county where he left estate. From this it necessarily follows that ancillary proceedings may be had on the will of a resident of this state. Any other construction would disregard and nullify the first subdivision of section 301, supra, in so far as wills originally admitted to probate elsewhere are concerned.

[2, 3] The fact that ancillary proceedings may be had on the will of a resident does not, in our opinion, preclude the introduction of evidence tending to show decedent's place of residence to be other than as determined in the foreign jurisdiction upon the original application for probate. Since the testator's domicile is the jurisdictional fact, and since the recognition which is given by other states to the law of the testator's domicile is merely a rule of conflict of laws, the decision of one state, to the effect that a testator is domiciled there, is not binding on any other state, even under the full faith and credit clause of the federal Constitution (article 4, § 1); but other states in which a testator's property is situated, may determine such question, each state for itself, without reference to the decree of the state which passed upon that question first in point of time. Tilt v. Kelsey, 207 U. S. 43, 28 S. Ct. 1, 52 L. Ed. 95; Burbank v. Ernst, 232 U. S. 162, 34 S. Ct. 299, 58 L. Ed. 551; In re Horton's Will, 217 N. Y. 363, 371, 111 N. E. 1066, Ann. Cas. 1918A, 611; Green v. Moore, 206 Ky. 724, 268 S. W. 337; Delanoy v. Delanoy (Cal. Sup.) 13 P.(2d) 719; 1 Page on Wills (2d Ed.) 870, § 528.

[4] In an ancillary proceeding of the character here involved, evidence tending to show that the testator was a resident of a particular county of this state, and not of the foreign state or country wherein the will had

been admitted to probate upon original application, would be admissible under sections 360 and 301, supra, to preliminarily fix the jurisdiction of the ancillary proceeding in such county. It so happens in the instant case, that the proffered evidence tends to establish the testator's residence to be in San Diego county, wherein the ancillary proceeding was in fact pending. Consequently, its rejection could not have worked any prejudice to the appellant in this particular.

[5] However, this is not determinative of the present appeal. While, in respect to the disposition of real property or of the creation of an interest therein, the validity and effect of a will depend on the lex rei sitae, other problems, arising in the course of the administration of an estate, in many instances, and in the absence of positive law to the contrary, depend for their solution upon the law of the place of testator's domicile at the time of death. Examination of the authorities discloses that questions touching the validity and construction of the will, the testator's power to exclude certain persons from sharing in his estate, the time which must elapse between the execution of the will bequeathing personal property to charity and the testator's death, the capacity of a beneficiary to take a bequest of personalty, the validity of bequests of personalty in trust, and the testator's power to limit a legatee's right to alienate personalty bequeathed to him, may turn upon the law of the place of testator's domicile at the time of death. Authorities dealing with these several problems are In re Estate of Barton, 196 Cal. 508, 238 P. 681; Watkins v. Eaton (C. C.) 173 F. 133, 138–140; Dammert v. Osborn, 141 N. Y. 564, 35 N. E. 1088; Whitney v. Dodge, 105 Cal. 192, 38 P. 636; Jacobs v. Whitney, 205 Mass. 477, 91 N. E. 1009, 18 Ann. Cas. 576; In re Estate of Dwyer, 159 Cal. 680, 115 P. 242; In re Estate of Lathrop, 165 Cal. 243, 131 P. 752; Jones v. Habersham, 107 U. S. 174, 2 S. Ct. 336, 27 L. Ed. 401; Lozier v. Lozier, 99 Ohio St. 254, 124 N. E. 167; Hussey v. Sargent, 116 Ky. 53, 75 S. W. 211; Cross v. U. S. Trust Co., 131 N. Y. 330, 30 N. E. 125, 15 L. R. A. 606, 27 Am. St. Rep. 597.

[6] The fact that the solution of these and related problems may depend upon the law of the testator's domicile at the time of death, suggests additional reasons why evidence of domicile is admissible in ancillary proceedings. Though none of the designated problems is now presented in this proceeding, it appears necessary in order to protect appellant's rights to modify the order appealed from by striking therefrom the adjudication that decedent at the time of his death was a resident of and domiciled in the state of Illinois. This adjudication of residence, as already indicated, was grounded solely on the exemplified copy of the proceedings had in the Illinois court upon the original application for probate. Appellant's proffered evidence tending to show the decedent to have been a resident of this state was rejected and refused consideration in the determination of this issue. Inasmuch as the appellant's proffered evidence tended to show the decedent to have been a resident of San Diego county, wherein the ancillary proceeding is pending, and inasmuch as we have determined that ancillary proceedings may be had on the will of a resident, appellant's rights will be fully protected by the suggested modification of the order appealed from. The striking out of the adjudication of residence in the instant case will preclude the same from becoming final without the appellant having been heard thereon (In re Estate of Barton, 196 Cal. 508, 511, 512, 238 P. 681) and will leave the issue of residence open to be determined, upon competent evidence, in the event any of the above or related problems arise in the future administration of the decedent's estate under this ancillary proceeding. Such a course obviates the necessity for a reversal in this case.

The order appealed from is therefore modified by striking therefrom all reference to the residence or domicile of the decedent at the time of death. As so modified, the order is affirmed.

We concur: SHENK, J.; CURTIS, J.; PRESTON, J.; LANGDON, J.; SEAWELL, J.

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217 Cal. 578

SANDROSKY v. PRUDENTIAL INS. CO. OF AMERICA.

PRUDENTIAL INS. CO. OF AMERICA v. SANDROSKY et al.

L. A. 13934.

Supreme Court of California.

March 28, 1933.

Insurance ⚿585(3).

Wife designated beneficiary in husband's life policy *held* entitled to insurance money as against husband's administrator, notwithstanding entry of interlocutory divorce decree and execution of property settlement before husband's death.

> Interlocutory decree did not mention property rights, but contract of settlement recited that parties desired to settle their respective rights in community or separate property, and that wife conveyed, assigned, and transferred to husband all right, title, or interest she then had or

might thereafter acquire in any property owned or possessed by husband or which he might thereafter acquire. Furthermore, after execution of property settlement, the parties by their joint act in writing changed conditions of policy in other respects, but left provision naming wife as beneficiary unchanged, and thereafter husband borrowed money on policy and delivered policy to wife.

In Bank.

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by Eleanor Sandrosky against the Prudential Insurance Company of America, in which defendant insurance company filed cross-complaint interpleading the original plaintiff, Sam Newman, as administrator of the estate of Simon Sandrosky, deceased, and others. Judgment for plaintiff, and the administrator appeals.

Affirmed.

Mark M. Cohen and Irwin M. Fulop, both of Los Angeles, for appellant.

Davis & Thorne, of Los Angeles, for respondent.

Loeb, Walker & Loeb, of Los Angeles, for Prudential Ins. Co.

PRESTON, Justice.

This record presents a contest between the surviving widow, Eleanor Sandrosky, and the personal representative of Simon Sandrosky, deceased, over the disposition of the proceeds of a policy of insurance on the life of the said deceased, wherein the wife is named as the sole beneficiary. She sued defendant Prudential Insurance Company for the proceeds of the policy. The insurance company in turn interpleaded all the claimants and paid the proceeds into court, being thereby released from further liability. The issues were made up, and a trial was had which resulted in findings and judgment for plaintiff, the widow of the decedent, Simon Sandrosky. Defendant Sam Newman, as administrator of the estate of said Simon Sandrosky, has appealed.

To grasp the law point involved, it is necessary to set forth the further facts as follows: The insurance policy was dated July 1, 1929. In 1931 marital differences arose between said wife and husband, as the result of which a divorce action was instituted by the wife on March 6, 1931. On March 9th a written property settlement was executed without special mention of the policy of insurance. An interlocutory decree of divorce followed on April 13, 1931. On April 16, 1932, the husband met his death through an accident. The final decree of divorce was never entered. The interlocutory decree does not mention property rights. The controversy here arises from the said contract of settlement which appellant claims bars or estops plaintiff from claiming the proceeds of said policy. The material part of said agreement is as follows: "Whereas, the parties hereto are desirous of settling once and for all their respective rights in and to any community or separate property that they now have or may hereafter acquire. * * * Party of the first part (wife) does also by this instrument grant, convey, assign and transfer to party of the second part all right, title or interest she now has or which she may hereafter acquire in any property now owned or possessed by party of the second part or which he may hereafter acquire."

Presumably, at least, the premiums paid on this insurance policy were from the community funds of the husband and wife but there is even ground for conjecture that said premiums were paid from the separate property of the wife, as under said property settlement all property mentioned was separate property of the wife, and she agreed to pay the husband from the returns thereof the sum of $200 instead of receiving any sum or sums from him. If it be conceded that the terms of the property settlement were broad enough to transmute the community rights of the parties in the policy of insurance into separate property of the deceased, still that concession would not conclude this controversy, for such a conveyance would not affect the wife's status as the beneficiary. Such a right, standing alone, is no more than an expectancy; it is not a property right, and therefore it is not the subject of settlement. The beneficiary could be changed at any time at the will of the insured. In the case before us, the parties by their joint act in writing on March 30, 1931, changed the terms and conditions of the policy in other respects, but left the provision naming the wife as beneficiary unchanged On September 15, 1931, the husband, presumably with the aid and signature of the wife, borrowed a sum of money on the policy. In addition to this, the husband delivered the policy to the wife. These three separate and distinct acts, published and republished during the period subsequent to the execution of the property settlement, in addition to oral testimony in the record to the same effect, show conclusively that the husband intended that the wife take under the policy at his death.

The judgment is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; IRA F. THOMPSON, J.; SHENK, J.; LANGDON, J.; SEAWELL, J.

217 Cal. 606

Pearl HUTT, Plaintiff and Respondent, v. J. W. CORSER, Defendant and Appellant.

L. A. 13098.

Supreme Court of California.
March 31, 1933.

In Bank.

Appeal from Superior Court, Los Angeles County; Henry B. Neville, Judge.

James W. Bell, of Los Angeles, for appellant.

Patterson, Bailey & Montgomery and F. I. Richman, all of Los Angeles, for respondent.

PRESTON, Justice.

Action to quiet title. Judgment for plaintiff. Defendant appeals. His brief presents no question of law, but is at most an attempt to recite the evidence in the case, which on its face discloses not only conflicting evidence, but a preponderance thereof in favor of respondent's claims.

The motion to dismiss the appeal heretofore made herein, and submitted, is denied.

The judgment is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; LANGDON, J.; SHENK, J.; SEAWELL, J.; IRA F. THOMPSON, J.

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217 Cal. 533

LINDSEY v. DOMINGUEZ, City Clerk, et al.

L. A. 14160.

Supreme Court of California.
March 23, 1933.

1. Municipal corporations 🔑138.

City can fix reasonable restrictions upon right to hold office under charter.

2. Municipal corporations 🔑138.

Where candidate does not change his residence and district boundaries are gerrymandered annexing residence to new district, he may nevertheless use such period of residence as part or all of requisite period to qualify for office in new territory.

3. Municipal corporations 🔑138.

Candidate who changed his residence but remained in same councilmanic district, whose boundaries were thereafter altered so as to exclude his former residence, could not use period of such residence as part of requisite period to qualify as candidate in district to which he removed.

4. Municipal corporations 🔑138.

One who changes his residence must assume risk of being thereby disqualified from being candidate in district to which he removed.

LANGDON, SHENK, and CURTIS, JJ., dissenting.

In Bank.

Application for writ of mandate by William H. Lindsey prayed to be directed to Robert Dominguez, city clerk of the city of Los Angeles, a municipal corporation, to compel him to omit from the official primary election ballot the name of Emory J. Arnold as a candidate for tne office of councilman.

Writ granted.

Carl S. Kegley, of Los Angeles, for petitioner.

Erwin P. Werner, City Atty., and Frederick Von Schrader and William H. Neal, Deputy City Attys., all of Los Angeles, for respondent City of Los Angeles.

Kenneth K. Scott, of Los Angeles, for defendant Arnold.

PRESTON, Justice.

Proceeding in mandate by petition of an elector to compel respondent city clerk to omit from the official ballot to be used at the primary election to be held in Los Angeles on May 2, 1933, the name of Emory J. Arnold for the office of councilman of the Tenth councilmanic district of the city of Los Angeles. The petition, demurrer, and answer thereto present but a single question, and that is the qualification of Arnold for said office under the Los Angeles City Charter. Section 307 of the charter provides: "No person shall be eligible to nomination or election to any office under this charter who at the time of his nomination and election is not a qualified elector of this city, and shall not have been a resident of the city for at least two years next preceding his nomination or election, and to be eligible to nomination or election to the office of member of the council, the person nominated or elected must have been a resident of the district from which he is nominated or elected for at least two years next preceding his nomination or election."

Arnold, for some seven years prior to December 19, 1932, resided at a place designated as 918 South Beacon street in said city, in what was then known as councilmanic district No. 10. On said day he removed to 234 West Adams street, which was then located in the same district. On January 24, 1933, the boundaries of said district were so altered as to exclude his former residence and make it part of a different councilmanic district. On March 6, 1933, Arnold filed a petition with respondent clerk in due form, and took such further steps as are required to place his name on the official ballot for the forthcoming primary election.

Petitioner complaining, asserts that Arnold, because of a deficiency in his period of residence within said district, cannot qualify to hold the office of councilman, and hence he instituted this proceeding. It is at once seen that, to be qualified to hold said office, Arnold must tie to his present residence about 1½ years of his first residence which is now and since January 24, 1933, has been without district 10.

[1] The city has the undoubted right and power to fix reasonable restrictions upon the right to hold office under its charter. The right to vote and the right to hold office are independent matters. This is evidenced in Constitutions and statutes, both national and state. The doctrine that one does not lose his residence until he gains another has no application here. The sole question is: What meaning shall be given to the word "district" found in said above-quoted charter provision? Does it refer merely to the designated political entity, regardless of territory, or does it refer to the area then and at the time in question constituting the district?

[2, 3] No authority in point has been cited us. We must reach a conclusion by analogy and deduction from similar principles. For example, it seems to be generally conceded that where a candidate does not change his residence, and the district boundaries are so gerrymandered as to annex his residence to a new district, he may nevertheless use such period of residence as part or all of the requisite period to qualify him for office in the new territory. Gibson v. Wood, 105 Ky. 740, 49 S. W. 768, 43 L. R. A. 699. Speaking in terms of the case before us, if Arnold had not removed himself, he could have qualified as a candidate in said above-mentioned other district, although he had not resided therein for all or any of the required time. If he could have used such period of residence for such purpose, had he remained until cut off, it seems logically to follow that he cannot use this same period of time to qualify him as a candidate in the district to which he voluntarily betook himself.

[4] Confusion arises from the fact that Arnold has never at any time resided out of the political entity known as councilmanic district No. 10. This confusion passes when it is remembered that we are speaking territorially and as of the time in question, and not in terms of a political subdivision. If, when Arnold moved, he had located his residence in district No. 9, his residence in old district No. 10 would not have benefited him, but if he had resided in district No. 9 for the period required and that area had later, under alteration of boundaries, become a part of district No. 10, he would in that case have been eligible for office in such new district. In other words, Arnold must have resided in the territory comprising the new district for the period required by law. It seems to us that any other conclusion would bring about confusion, if not material complications. A man who changes his residence must assume the risk of being thereby disqualified.

This holding is in harmony with the recent pronouncement of this court in the case of Withers v. Kerr, 14 P.(2d) 1017, 1018, where one Hinshaw was an independent candidate for Congress from the new Eighteenth congressional district, which was established in 1931. This district was carved out of a portion of the old Ninth congressional district without any change in precinct lines.

Section 1188 of the Political Code (as amended by St. 1931, p. 2281) provides that signatures to be attached to independent nomination papers thereunder must be at least 5 per cent. in number of the entire vote cast at the last preceding general election "in the state, district or political subdivision for which the nomination is to be made." It was contended that since the old Ninth congressional district was wiped out by the 1931 reapportionment measure, no independent nomination for said office could be made in the new district because the latter was not in existence at the last general election.

This court there said: "In order to uphold this contention, it would be necessary to conclude that it was the intention of the Legislature to abolish the right to independent nominations in new congressional districts, at the same time continuing the right in the district or districts whose boundaries had not been changed. This conclusion would not be justified unless compelled by some expression of legislative will to that effect, and we find none. For the purposes of this proceeding it is enough to say that the term 'district' may be considered as the equivalent of 'area' or 'territory.' Without such construction it is fair to say that the proceedings to nominate Mr. Hinshaw were in substantial compliance with the statute. And with that construction a literal compliance would seem to have been accomplished."

Let the peremptory writ issue forthwith as prayed.

We concur: WASTE, C. J.; IRA S. THOMPSON, J.; SEAWELL, J.

LANGDON, Justice.

I dissent. As the opinion points out, there is an entire absence of authority on the issue before us, and the controlling consideration should therefore be the purpose of the charter provision. If familiarity with the problems of the district and with the voters thereof is the test, then the candidate here can certainly qualify, for he was for the full period a resident of a territory of which the present district No. 10 was a part. In other words, every voter in district No. 10 as it was formerly constituted, resided in the same territorial unit he did.

If the purpose of the statute will not be thwarted by upholding the eligibility of this candidate, then we should, as a matter of policy, do so, and leave to the voters the fullest possible measure of freedom in their choice of officers. In my opinion it is reasonable and proper to say that Arnold was always, during the period in question, a resident of district No. 10; that in spite of the reorganization of the boundaries of said district, he still is, as a result of his change of residence, a resident of said district; and that therefore he has complied with the letter of the charter provision, and to permit him to be a candidate would do no violence to its spirit.

The question whether he would have been an eligible candidate in the district of his former residence if he had not moved is not involved, and should not be permitted to determine the issue presented herein.

We concur: SHENK, J.; CURTIS, J.

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217 Cal. 660

ROTHSCHILD v. DAVIS et al.

S. F. 14460.

Supreme Court of California.

April 3, 1933.

1. **Bankruptcy** ⚷303(3).

Evidence sustained finding that property standing in names of bankrupt husband and wife was wife's separate estate.

2. **Bankruptcy** ⚷303(2).

Rejection of evidence concerning other real estate transactions of bankrupt husband, on issue whether property standing in name of spouses was wife's separate property, *held* not error.

In Bank.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Action by August B. Rothschild, as trustee in bankruptcy of A. J. Davis, against A. J. Davis, Emma W. Davis, and others. Judgment for defendant last named, and plaintiff appeals.

Affirmed.

Torregano & Stark, of San Francisco, for appellant.

Ross & Ross, of Redwood City, for respondent San Mateo County Building & Loan Ass'n.

Fred A. Watkins, of San Francisco, for respondents A. J. and Emma W. Davis.

IRA F. THOMPSON, Justice.

The defendant A. J. Davis filed a voluntary petition in bankruptcy April 18, 1928. This action was brought by the trustee in bankruptcy for the purpose of having it declared that the title to certain real property standing of record in the name of A. J. Davis and Emma W. Davis passed to him as trustee. It was and is the contention of the plaintiff that the property was the community property of A. J. and Emma Davis, who are, of course, husband and wife. It was the contention of Mrs. Davis that the property was her separate property. The trial court found in her fafor, and the trustee presents this appeal from the judgment.

[1] The real question underlying the entire argument of appellant is whether there is sufficient evidence to support the findings. It is not necessary for us to do more than to say that both Mr. and Mrs. Davis testified that the money which was used for the original purchase of a large parcel of property, from which the piece in question was carved, was the result of a loan on another parcel of property purchased by Mrs. Davis with money earned by her boarding teachers and doing unnecessary work, which money it was agreed should be her own to do with as she pleased. The remainder of the money used in connection with the purchase of the property involved came, so they testified, from sales of or loans on parcels of the original larger piece of property. There was also testimony that the name of A. J. Davis was inserted in the original instrument of transfer by mistake of the lawyer. Appellant devotes a great deal of time and space in an effort to show that the testimony should not be credited and is not sufficient to overcome the presumption that the property standing of record in the names of the husband and wife is held by them as tenants in common. We confess that some of the dealings give the appearance that A. J. Davis had an interest in the property, but that question, the credibility of the witnesses, and the weight of the evidence, were all matters, as has so often been said by this court, for the trial tribunal. There is substantial testimony to support the finding that the property was the separate estate of Mrs. Davis, for which reason we cannot overturn the judgment.

[2] The appellant further urges that the court fell into error in preventing him from inquiring into certain collateral matters having to do with the operation of a service station located on the property and the conduct of A. J. Davis with respect to other real property. A reading of the record discloses that the court permitted counsel to show that

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⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

A. J. Davis did in fact conduct negotiations for the construction of the service station building, ordering lumber and materials, and entering into the contract for the pumps. It does not appear, therefore, that the examination was unduly restricted. The course of dealing with the property involved, including all the parcels of the original purchase, was thoroughly covered. The source of the money was definitely fixed by the respondents, and there was no curtailment of the examination with respect to any transaction in any way connected therewith. But, when counsel sought to go into other real estate transactions of A. J. Davis, in no way connected with the subject-matter, except possibly to show that they were managed in the same manner as the one in question, the court indicated its unwillingness to proceed so far. We cannot say the trial judge transcended his discretion in this regard.

Judgment affirmed.

We concur: WASTE, C. J.; PRESTON, J.; CURTIS, J.; LANGDON, J.; SHENK, J.; SEAWELL, J.

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217 Cal. 568

KALSON v. PERCIVAL.

S. F. 14854.

Supreme Court of California.

March 24, 1933.

Rehearing Denied April 21, 1933.

1. **Judgment** ⚿138(1).

Policy of law is to have legal controversies tried on merits.

2. **Appeal and error** ⚿957(1).

Unless trial court abused discretion in vacating default, appellate court will not reverse order vacating default.

3. **Judgment** ⚿162(4).

Where motion to vacate default was heard on counter affidavits conflicting on questions of excusable neglect and date of service of summons on defendant, trial court *held* not shown to have abused discretion in vacating default.

In Bank.

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by Otto Kalson against W. E. Percival. From an order setting aside a default and judgment against the defendant, plaintiff appeals.

Affirmed.

For prior opinion see 16 P.(2d) 331.

L. L. Steele, of Oakland, for appellant.

Bronson, Bronson & Slaven, of San Francisco, for respondent.

PER CURIAM.

Plaintiff appeals from an order setting aside a default and judgment against the defendant entered on motion under section 473 of the Code of Civil Procedure. Briefly, plaintiff's contention is that the affidavit upon which the motion was based stated no meritorious case of surprise, mistake, inadvertence, or excusable neglect, and therefore the court abused its discretion in setting aside the default.

[1, 2] It is the well-established policy of the law to have legal controversies tried upon their merits, and unless it can be determined as matter of law that a trial court has abused its discretion in setting aside a default of a party and permitting an answer to be filed, the court on appeal will not reverse such an order. The decisions on these points are so numerous and unvarying that it is not necessary to refer to them.

[3] Plaintiff was suing defendant for damages suffered as the result of an automobile accident. The motion to set the default aside was heard on counter affidavits. Aside from counter averments on the question of excusable neglect, the affidavits of the respective parties as to the date of service are in conflict. Affidavits on behalf of the plaintiff averred that defendant was served with summons on December 26, 1931. Defendant's affidavit alleged that he was not served until January 3, 1932. From the minute order of the court and plaintiff's notice of appeal, it appears that the default was entered on January 7. Assuming, as urged by the appellant, that the defendant seems to have regarded any liability resting upon him because of the accident in an indifferent manner, and that he was guilty of neglect in the matter, it was the duty of the trial court to pass on the entire question, including the conflict in the evidence before it as to the date of service.

With such conflict in the record before us, we are not able to say, as a matter of law, that the trial court was guilty of any abuse of discretion. Consequently, the order setting aside the default of the defendant and the judgment in the action is affirmed.

RANDALL et al. v. CALIFORNIA LAND BUYERS' SYNDICATE et al.

L. A. 13069.

Supreme Court of California.

March 29, 1933.

Rehearing Denied April 27, 1933.

1. Licenses 🔑39.

Plaintiffs seeking reconveyance of realty deeded to corporation in exchange for stock in violation of statute *held* not in pari delicto with corporation or its directors (St. 1917, p. 679, § 12).

Plaintiffs were not in pari delicto with corporation or its directors in exchanging their realty for corporation's stock in violation of Corporate Securities Act, St. 1917, p. 679, § 12, though pleadings admitted that plaintiffs had seen copy of permit issued to defendant corporation, requiring sales of stock to be for cash; there being nothing in record to charge plaintiffs with any conspiracy or intent to defraud.

2. Licenses 🔑39.

Buyers of stock issued in violation of Corporate Securities Act, will be denied relief only where record shows they are equally culpable with parties against whom relief is sought (St. 1917, p. 679, § 12).

3. Licenses 🔑39.

Plaintiffs who exchanged realty for stock of corporation in violation of statute *held* not restricted to remedy by rescission, but could sue for damages (St. 1917, p. 679, § 12).

4. Licenses 🔑39.

Complaint seeking damages and reconveyance of property exchanged for stock *held* not to sound solely in equity for rescission so as to preclude making directors participating in transaction defendants (St. 1917, p. 679, § 12).

The complaint set up two causes of action, one for return to plaintiff of the real property conveyed or for damages against all defendants in specified sum for defendants' action in issuing to plaintiffs certificates of stock known to defendants to be void and valueless, and another cause of action for same relief based on alleged fraudulent representations of defendants as to business activities, financial condition, profits, and surplus of corporation. Though complaint contained allegations of notice and demand and offer to restore worthless stock, such allegations were unnecessary to maintenance of causes of action alleged and did not restrict plaintiffs to remedy of rescission.

5. Licenses 🔑39.

Directors' participation in corporation's issuance of stock in exchange for plaintiffs' realty in violation of statute amounted to representation that stock was valid and genuine, on which plaintiffs relied to their damage, and plaintiffs could therefore hold directors liable (St. 1917, p. 679, § 12).

In Bank.

Appeal from Superior Court, San Diego County; Arthur L. Mundo, Judge.

Action by I. W. Randall and another against California Land Buyers' Syndicate and others. From an adverse judgment, defendants appeal.

Affirmed.

Harrison G. Sloane and Hendee & Rodabaugh, all of San Diego, for appellants.

Ed. P. Sample and William H. Wylie, both of San Diego, for respondents.

SHENK, Justice.

This is an appeal from a judgment in favor of the plaintiffs in an action against the California Land Buyers' Syndicate, its directors, and its fiscal agent, to recover real property alleged to have been unlawfully received by the defendant corporation in exchange for shares of its stock, or for other appropriate relief.

At the times involved the defendant California Land Buyers' Syndicate was a corporation organized under the laws of the state of Delaware with authority to transact business in this state, and with its principal place of business in San Diego. Its business was to buy San Diego real estate and sell it at a profit. Its fiscal agent was R. L. Stewart, who had an exclusive agency for the sale of the corporation's stock at a commission to him of 20 per cent. Under an amended permit of the corporation commissioner the corporation was authorized to sell units consisting of one investment share and one common share of its capital stock for the sum of $30 per unit, cash.

The plaintiffs were the owners as joint tenants of real property in San Diego consisting of a lot and eight flats. The pleadings admit that the value of this property was $37,500, subject to a mortgage of $7,000. In June, 1929, the plaintiffs deeded their real property to the defendant corporation, subject to the $7,000 mortgage, and received from the corporation certificates representing 1000 of its investment shares and 1000 of its common shares in a transaction the details of which were arranged by the fiscal agent, R. L. Stewart, and which in People v. Stewart, 115 Cal. App. 681, 2 P.(2d) 195 was declared to be a sale of stock for real property and not a sale for cash, and therefore in contravention of the permit authorizing sales of stock for cash only. The stock certificates issued to the plaintiffs were void pursuant to the provisions of section 12 of the Corporate Securities Act (St. 1917, pp. 673, 679). Subsequent to the receipt by it of the deed from the plaintiffs and on the same day the defendant corporation by its officers executed and delivered its deed of trust of the same property to secure a loan of $18,000 from Pacific Finance Corporation, and which was still an outstanding lien against the property at the time judgment in this action was rendered. The trial court found all of the facts favorably to the plaintiffs and rendered judgment against each and all of the defendants, with the exception of three as to whom orders of dismissal were entered, that they forthwith obtain satisfaction of all liens and incumbrances against the real property involved over the sum of $7,000, and that they execute or cause to be executed a reconveyance of the property to the plaintiffs subject to an indebtedness of $7,000, or in lieu thereof, the plaintiffs to have judgment against the defendants in the sum of $30,163.28. The corporation and directors Fletcher and Haskell have prosecuted appeals from the judgment.

It is obvious that the judgment must stand unless the plaintiffs are in pari delicto with the defendant corporation; and, if the plaintiffs are not in pari delicto with the corporation, that it must stand also against the defendants Fletcher and Haskell unless no cause of action was stated and proved against them.

[1, 2] The plaintiffs, at the time of the transaction, were people of about eighty years of age. However, it is not denied that they knew that their property was to be taken in exchange for stock. Furthermore, the pleadings admit that the plaintiffs had seen a copy of the permit issued to the defendant corporation. It is upon these two facts appearing in the record that the appellants base their contention that the case of Domenigoni v. Imperial Livestock, etc., Co., 189 Cal. 467, 209 P. 36, applies to prevent the granting of any affirmative relief to the plaintiffs. The appellants do not, and in fact, on the record presented, cannot, charge the plaintiffs with any conspiracy or intent to defraud, as in the Domenigoni Case, or any conduct making it inequitable to grant the relief sought, as in Michell v. Grass Valley Gold Mines Co., 206 Cal. 609, 275 P. 418, or conduct excluding the buyer from obtaining relief at the hands of the court, as in First National Bank v. Thompson, 212 Cal. 388, 407, 298 P. 808. No facts are presented sufficient to take this case out of the operation of the general rule and within the exceptions noted in those cases. It is no longer questioned that the general rule stated in Tatterson v. Kehrlein, 88 Cal. App. 34, 263 P. 285, wherein the plaintiffs recovered damages, applies to a case such as is here presented. That rule is stated (at page 49 of 88 Cal. App., 263 P. 285, 291) to be that: "The penalties prescribed by the Corporate Securities Act being all laid on the seller and none on the buyer, and the statute being for the benefit and protection of buyers, the parties are not in pari delicto, and the buyer may have judgment for the money paid out by him under the illegal contract, and may have the contract, the stock certificates and promissory note given in payment of such stock canceled [citing cases]." That statement has been followed or recognized as the general rule in other cases. Eberhard v. Pacific Southwest L. & M. Corp., 215 Cal. 226, 9 P. (2d) 302; Walker v. Harbor Realty, etc., Corp. 214 Cal. 46, 3 P.(2d) 557; Pollak v. Staunton, 210 Cal. 656, 662, 663, 293 P. 26; Olds v. Simmons, 123 Cal. App. 275, 11 P.(2d) 36; McClory v. Dodge, 117 Cal. App. 148, 152, 4 P. (2d) 223; Becker v. Stineman, 115 Cal. App. 740, 2 P.(2d) 444; Rossi v. Jedlick, 115 Cal. App. 230, 235, 1 P.(2d) 1065; Castle v. Acme Ice Cream Co., 101 Cal. App. 94, 99, 281 P. 396; Hemmeon v. Amalgamated C. Mines Co., 95 Cal. App. 400, 402, 273 P. 74. Although the parties seeking affirmative relief, i. e., the buyers of such stocks, may be in some degree guilty with the parties against whom the relief is sought, they will be denied relief only where the record shows that they are equally culpable (Campbell v. Julian Merger Mines, 111 Cal. App. 649, 295 P. 1040); and, considering the object and purpose of the Corporate Securities Act, mere knowledge of the terms of the permit, or of the fact that no permit has been issued, may not alone be sufficient to raise the guilt of the purchaser or subscriber to that degree. In re Builders' Finance Association, Inc. (D. C.) 26 F.(2d) 123; Walker v. Harbor Realty, etc., Corp., supra; Olds v. Simmons, supra. The plaintiffs here were therefore not in pari delicto with the corporation.

The defendants Fletcher and Haskell contend that the causes of action stated by the plaintiffs and the theory of the action sound in equity for rescission only and seek a return to them of the property conveyed or the value thereof; therefore, that the plaintiffs may recover only from the party who received the property, which in this case is the corporation. The same defendants also contend that the evidence does not support various findings to the effect that certain statements issued concerning the financial condition, profits, and surplus of the corporation, were false and that the defendants well knew their falsity and that said statements, received by the plaintiffs, were issued and published by said defendants, or were relied upon by the plaintiffs; nor the finding that the defendants Fletcher and Haskell participated in the stock transaction involved.

[3, 4] The plaintiffs set up two causes of action, one for the return to them of the real property conveyed or for damages against all of the defendants in the sum of $30,162.28 suffered by the plaintiffs by virtue of the ac-

tion of the defendants in issuing to the plaintiffs void and valueless certificates of stock, known to the defendants to be void and valueless under the facts alleged in the complaint. The second cause of action was for the same relief based on the alleged fraudulent representations of the defendants as to the business activities and financial condition and the existence of profits and surplus of the corporation. Although the complaint contained allegations of notice and demand and offer to restore the worthless stock, such allegations were unnecessary to the maintenance of the causes of action alleged. The plaintiffs are not restricted to the remedy by way of rescission, but may bring an action for the damages suffered. Castle v. Acme Ice Cream Co., 101 Cal. App. 94, 98, 281 P. 396. Neither is the present action one for money had and received, as in Pollak v. Staunton, 210 Cal. 656, 293 P. 26, relied on by the defendants, wherein judgment was permitted only for the amounts received by the respective defendants.

[5] It is not necessary to consider the sufficiency of the evidence on the questions whether the defendants Fletcher and Haskell were aware of the falsity of the representations with respect to the business activities and financial condition of the corporation, nor whether such representations were in fact false, nor the other matters pertinent to an inquiry on the cause of action based thereon. It is enough to note that the judgment is supported by the findings on the issues raised by the first cause of action and the answer thereto, and that the evidence supports the findings that the defendants Fletcher and Haskell had notice and knowledge that the certificates issued to the plaintiffs were so issued in exchange for real property and with their aid and assistance. The evidence on this phase of the case is that the proposition to exchange the real property for stock was placed before said defendants as directors and the direction for the consummation of the transaction was voted by them. Participation on their part in the issuance of the stock amounts in law to a representation that such stock is valid and genuine upon which the plaintiffs relied to their damage. Walker v. Harbor Realty, etc., Co., 214 Cal. 46, 49, 3 P.(2d) 557; Boss v. Silent Drama Syndicate, 82 Cal. App. 109, 115, 255 P. 225. In such a case no ground exists for reversal of a judgment awarding recovery for the damage suffered. See, also, O'Connell v. Union Drilling, etc., Co., 121 Cal. App. 302, at page 309, 8 P.(2d) 867; McClory v. Dodge, 117 Cal. App. 148, 4 P.(2d) 223.

The judgment is affirmed.

We concur: WASTE, C. J.; LANGDON, J.; PRESTON, J.; THOMPSON, J.; SEAWELL, J.; CURTIS, J.

217 Cal. 538

Ex parte KEPFORD.

Cr. 3606.

Supreme Court of California.

March 24, 1933.

Criminal law ⚷1202(6).

One convicted of felony of driving automobile without owner's consent after two prior felony convictions should have been sentenced to five years' imprisonment, and prison board erred in fixing sentence at seven years (St. 1923, p. 564, § 146; Pen. Code, §§ 18, 667, and § 1168, subd. 2(c), as amended by St. 1931, p. 1053).

In Bank.

Habeas corpus proceeding by Edward Kepford against the Warden of Folsom State Prison to secure petitioner's release from custody.

Writ granted, and petitioner discharged.

See, also, 14 P.(2d) 145.

Edward Kepford, in pro. per.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for respondent.

WASTE, Chief Justice.

Application for a writ of habeas corpus.

Under an information filed by the district attorney of San Joaquin county, petitioner was charged with and convicted of a felony, to wit, driving an automobile without the consent of the owner in violation of section 146 of the California Vehicle Act (St. 1923, p. 564). Petitioner was also charged with and pleaded guilty to two prior felony convictions. He was sentenced to imprisonment in Folsom state prison for the indeterminate period prescribed by law, being received at the prison on June 15, 1928. Thereafter the prison board fixed his definite term of incarceration at ten years. Subsequently, and on May 14, 1932, the prison board, recognizing that it had exceeded its jurisdiction in so fixing petitioner's sentence, rescinded its order and fixed his term of imprisonment at seven years.

Citing sections 18 and 667 of the Penal Code, as they read at the time of his conviction and sentence, petitioner contends that the maximum term for which he may legally be sentenced is five years, and that the prison board therefore exceeded its authority in fixing his term at seven years. Inasmuch as his time served plus his time credits, duly allowed, now total in excess of five years, petitioner seeks his release and discharge.

Section 146 of the California Vehicle Act, for the violation of which petitioner now stands convicted, reads, in part: "Any person who shall drive a vehicle not his own, without the consent of the owner thereof and in the absence of the owner, and with intent to either permanently or temporarily deprive the owner thereof of his title to or possession of such vehicle, whether with or without intent to steal the same, shall be deemed guilty of a felony."

The penalty for such felony is prescribed by section 18 of the Penal Code which, at the time of petitioner's conviction and sentence, read as follows: "Except in cases where a different punishment is prescribed by this code, every offense declared to be a felony is punishable by imprisonment in the state prison, not exceeding five years."

The maximum penalty for a violation of section 146 of the California Vehicle Act is therefore five years. In view of this, petitioner cites us to section 667 of the Penal Code which, at the time of his conviction and sentence, provided: "Every person who, having been convicted of any offense punishable by imprisonment in the state prison, and having served a term therefor in any penal institution, commits any crime after such conviction, is punishable therefor as follows: 1. If the offense of which such person is subsequently convicted is such that, upon a first conviction, an offender would be punishable by imprisonment in the state prison, such person is punishable by imprisonment in the state prison for the maximum period for which he might have been sentenced, if such offense had been his first offense."

It is petitioner's theory that the language of the Code section last above quoted is controlling, and that since five years of imprisonment is prescribed by section 18 of the Penal Code as the maximum penalty for a violation of section 146 of the California Vehicle Act, of which he now stands convicted, that period of time becomes the measure of the penalty to be imposed upon him, which period of time, it is urged, may not, under section 667, supra, be extended because of his prior conviction of another felony.

In opposition to this contention, the Attorney General points out that subdivision 1, of section 667, of the Penal Code, relied on by petitioner, was enacted in 1909 (St. 1909, p. 364), and is specifically modified and controlled, or impliedly repealed, by the provisions of subdivision 2c of section 1168 of the Penal Code, which section was enacted in 1917 (St. 1917, p. 665), and amended in 1927 (St. 1927, p. 1491) prior to petitioner's conviction and sentence, to provide that the minimum penalty for a felony committed by "a person previously convicted of a felony * * * but not armed with a deadly weapon * * * at the time of his arrest, [is] seven years," "notwithstanding any other provision of this code or any provision of law specifying a lesser sentence." It is therefore contended that, under the provisions of this latter section, petitioner's term was properly fixed at seven years, thus precluding his release at this time.

In view of the conclusion we have reached, we find it unnecessary to pass on the merits of these respective contentions, for, even if it be assumed that section 1168, supra, is the governing section, petitioner still would be entitled to his discharge. In their presentation of this matter, the parties have overlooked the fact that subdivision 2(c) of said section, relied on by the Attorney General as directing the imposition of a minimum sentence of seven years on persons previously convicted of a felony, but not armed with a deadly weapon, was amended in 1931 (St. 1931, p. 1053) so as to fix such minimum penalty at five years. By subdivision 6 of the same section, added at the time of such amendment, this reduced minimum term was expressly made to apply to "all prisoners now serving sentences in the state prison." It is therefore apparent that, so far as petitioner here is concerned, the minimum term of five years for a second offender not armed with a deadly weapon is identical with the maximum term for a violation of section 146 of the California Vehicle Act, of which offense petitioner now stands convicted. Since such minimum and maximum sentences are now identical, it necessarily follows that in May, 1932, the prison board, when purporting to rescind its original and erroneous order fixing petitioner's sentence at ten years, should have fixed his term at five years, and not at seven. Having served, with allowance of credits, the equivalent of a five-year term, the maximum for which he may be legally incarcerated, petitioner is now entitled to his discharged.

The writ is granted, and the petitioner is discharged.

We concur: CURTIS, J.; PRESTON, J.; LANGDON, J.; SHENK, J.; SEAWELL, J.; IRA F. THOMPSON, J.

130 Cal.App. 788

In the Matter of the Application of Harold J. HALL, for a Writ of Habeas Corpus.

Cr. 1256.

District Court of Appeal, Third District, California.

March 28, 1933.

Application for writ of habeas corpus prayed to be directed to the Warden of Folsom State Prison to secure release of petitioner from custody on ground that his term has expired.

Writ granted; petitioner discharged.

Harold J. Hall in pro per.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for respondent.

PER CURIAM.

This is a petition for writ of habeas corpus.

The issues involved in this case are similar to those raised and determined in the Matter of the Application of Edward Kepford, 20 P.(2d) 333, decided by the Supreme Court on March 24, 1933.

Upon authority of that case, the writ is issued and the petitioner discharged.

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130 Cal.App. 632

VAUGHAN et al. v. PEOPLE'S MORTGAGE CO. et al.

Civ. 8747.

District Court of Appeal, First District, Division 1, California.

March 29, 1933.

Hearing Denied by Supreme Court May 25, 1933.

1. Building and loan associations 🔑23(6).

Where one making loan was sole representative and vice president of building and loan association, association was presumed to have knowledge of facts surrounding negotiations, but presumption was disputable.

2. Usury 🔑86.

Mere presumptive knowledge by corporation of circumstances surrounding negotiations for loan made through vice president would not render loan usurious as to corporation, where he took usurious bonus for his own benefit, but ratification or profit therefrom must likewise appear.

3. Usury 🔑86.

In case of corporation, loan will not be deemed usurious if officers of lending corporation have taken usurious bonus or commission for their own personal benefit.

4. Building and loan associations 🔑23(6).

Where vice president was sole representative of corporation in loan transaction, corporation could not be held as matter of law to have knowledge of all facts regarding usurious loan.

5. Evidence 🔑65.

Each of parties to usurious contract is presumed to know contract violates law.

6. Evidence 🔑65.

Parties to usurious contract are presumed to know that agency can be created only for performance of lawful acts, and that officer of corporation cannot use corporate property for his own benefit (Civ. Code, §§ 2230, 2234, 2306, 2322).

7. Usury 🔑113.

Where lending corporation's officer makes usurious loan, burden rests on corporation to prove its freedom of usury.

8. Building and loan associations 🔑33(21).

Evidence *held* to show that building and loan association neither ratified nor profited from usurious loan transaction whereby officer charged usurious bonus.

9. Building and loan associations 🔑33(22).

Whether loan from building and loan association was usurious where vice president and sole representative exacted usurious bonus *held* question of fact under evidence.

10. Appeal and error 🔑1012(1).

It is within province of trial court to weigh testimony in light of conduct and manner of witness and evidence in case.

11. Appeal and error 🔑1011(1).

Where evidence was conflicting, district court of appeal was bound by trial court's findings if supported by substantial evidence.

12. Usury 🔑117.

Evidence warranted court's finding that where mortgage company purchased note secured by trust deed from loan broker, transaction was not usurious as to mortgage company so that new note was free from usury.

13. Bills and notes 🔑394.

Demand for payment of note secured by trust deed was not required of payee.

14. Appeal and error 🔑1071(3).

Where finding was on immaterial matter, judgment would not be disturbed because of lack of evidence to support finding.

15. Appeal and error 🔑1011(1).

Trial court's finding on conflicting testimony could not be disturbed on appeal.

16. Mortgages 🔑338.

In suit to restrain sale of land under trust deeds, evidence supported finding that husband and wife did not own property in fee simple, but that husband's sister purchased land from them with proceeds of loan secured on property, and that husband was agent of sister in transactions involved.

17. Deeds 🔑109.

Deed to grantor's sister raised presumption that she was owner of land in fee (Code Civ. Proc. § 321).

18. Evidence 🔑89.

Presumption, even if disputable, will raise conflict sufficient to support finding made in accordance therewith, even though there be evidence to contrary.

19. Evidence 🔑353(2).

In suit to restrain sale under trust deeds, checks drawn by plaintiff in favor of various payees, offered to show that other money went into property besides money loaned *held* properly excluded as immaterial and incompetent, where it was not claimed checks were drawn with knowledge of defendants.

20. Mortgages 🔑338.

In suit to restrain sale under trust deeds executed after plaintiff had conveyed land to sister, evidence on whether plaintiff's wife consented to property being put in sister's name *held* properly excluded.

Evidence was properly excluded, since it did not appear that beneficiary of trust deed had knowledge, prior to filing of action that husband was married, and husband's attorney stated in reply brief, that there was no occasion for husband to volunteer information of his marriage.

21. Appeal and error 🔑1050(1).

In suit to restrain sale under trust deeds executed by plaintiff's sister after conveyance from plaintiff to sister, admitting evidence regarding when defendants' president learned of plaintiff's claimed interest in property *held* not prejudicial.

22. Appeal and error 🔑1078(1).

Reviewing court could assume that exceptions not supported by authorities were abandoned by appellants and court was not required to consider them.

Appeal from Superior Court, Los Angeles County; Charles C. Montgomery, Judge.

Suit by Arthur C. Vaughan and wife and another against the People's Mortgage Company, in which the defendant filed a cross-complaint against plaintiffs and the Protective Building & Loan Association. From the judgment, plaintiffs appeal.

Affirmed.

Arthur William Green and Arthur C. Vaughan, in pro. per., both of Los Angeles, for appellants.

Janeway, Beach & Hankey, of Los Angeles, for respondent People's Mortgage Co.

Joseph K. Horton and Benjamin F. Bledsoe, both of Los Angeles, for respondent R. E. Allen, receiver, etc.

GEARY, Justice pro tem.

Appellants brought their action to restrain respondent People's Mortgage Company from selling certain real property situated in Los Angeles county under a second and a third deed of trust thereon. Appellant Arthur C. Vaughan and Libbie L. Vaughan are husband and wife; appellant Jessie Vaughan is the maiden sister of Arthur C. Vaughan. The appellants' action is based upon the ground that the loan from People's Mortgage Company, secured by the second deed of trust, was usurious, and upon the further ground that the real property threatened to be sold was the community property of appellants Arthur C. and Libbie L. Vaughan, which fact it is alleged respondent People's Mortgage Company knew, and that the same was subjected to the lien of the second and third trust deeds without the knowledge or consent of appellant Libbie L. Vaughan. Appellants thereupon prayed that the court determine the legality of the second and third deeds of trust and restrain the threatened sale of the premises described therein until after the trial of the action. Respondent People's Mortgage Company filed its answer to the complaint denying all of the material allegations thereof. By way of an amended cross-complaint it alleged upon information and belief that the loan made by respondent Protective Building & Loan Association and secured by a first deed of trust upon the real property described therein was usurious, and prayed for an accounting of the sums due under the first deed of trust, and that a sale of the premises thereunder be restrained until the rights of the respective parties under their deeds of trust could be legally determined.

Answering the amended cross-complaint of the above-named respondent, the respondent Protective Building & Loan Association denied all of the material allegations thereof, and particularly that the loan secured by the first deed of trust was usurious. Appellants filed their answer to the amended cross-complaint and therein allege the loans secured by both the first and second deeds of trust are usurious, and pray for an accounting and for damages equal to treble the interest paid upon the first and second deeds of trust, and that sale under said trust deeds be enjoined until trial. The trial court held against appellants on each and every issue and from the judgment thereon appellants prosecute this appeal upon a bill of exceptions, wherein they designate "eight points" in addition to the exceptions specified for a reversal of the judgment herein. We shall take up the grounds urged by appellants as requiring a reversal in the order in which they are urged in their opening brief.

The evidence reveals with reference to the loan secured by the first trust deed that on or about April 1, 1925, appellant Arthur C. Vaughan was introduced to one R. N. Burgess, vice president of Protective Building & Loan Association, and was advised by the latter that he would make a loan of $25,000 on the real property involved herein for six months at 8 per cent., a bonus of 10 per cent., and a commission to one Belcher and one Neville, loan agents, the interest to be paid in advance and the interest and commissions to be added to the loan. Appellant, according to his testimony, informed Burgess that he (appellant Arthur C. Vaughan) was securing the property as a personal investment, and that he intended placing the record title in his sister Jessie Vaughan "in trust for me"; that Burgess said he would have no objection to this arrangement and thereupon made out an order to the treasurer of Protective Building & Loan Association, directing the issuance of a check in the sum of $4,841.20 to Jessie Vaughan. A check for this amount payable to Jessie Vaughan was issued, signed by R. M. Green and D. A. Hayes, president and treasurer respectively of said loan association, and was by Jessie Vaughan indorsed, so as to render the same payable to the order of "R. N. Burgess, Trustee." This check was indorsed "R. N. Burgess by M. C. Grant," M. C. Grant being the secretary of R. N. Burgess, and cashed. Thereupon on or about April 5, 1925, a promissory note for the sum of $29,801.20, a deed of trust securing payment thereof and an application for the purchase of stock by Jessie Vaughan was taken to the latter for her signature and executed by her. The application for purchase of stock, directed to R. N. Burgess, provides in part:

"I, (or we), hereinafter referred to as the Purchaser, hereby authorize R. N. Burgess, hereinafter referred to as the Seller, to procure a loan of Twenty-nine thousand Eight hundred One Dollars twenty cents ($29,801.20), payable six (6) months after date, with interest paid in advance * * * and in the event he procures said loan, or any loan acceptable to me, the Purchaser agrees to procure title insurance, fire insurance, etc., and to execute all papers that the Seller may require, all to his satisfaction, including a first lien on the following described property: [There follows a description of the real property involved herein].

"Therefore, in consideration of the efforts of the Seller in obtaining said loan, the Purchaser hereby agrees to purchase of him twenty-six (26) shares of the capital story [stock] in one of the companies hereinafter referred to, at a price of Two Hundred Dollars ($200.00) per share, and directs the Seller to allocate the purchase of stocks in any one, or more of the following companies, as he elects, and from his or his associate holdings.

"The Agricultural Credit Corporation—Common

"Protective Building and Loan Association—Common

"The Home Foundation Company—Preferred."

Then follow provisions to the effect that, if the purchaser does not pay the balance of the purchase price of the shares, the subscription shall be canceled and the seller entitled to retain the $2,600 paid on account, as liquidated damages, and the seller agrees in the event the balance is not paid to cancel the entire obligation. It is further declared that the stock purchase is made to assist in procuring the loan, to help the seller maintain the capital of the companies, and for numerous other reasons, followed by—

"Statement of Facts

"For the purpose of procuring this loan, the Purchaser certifies that the proceeds are to be used only as shown below and directs R. N. Burgess to pay, or cause to be paid such items, charges and expenses, as he deems necessary to procure said loan, * * * and to apply the proceeds as stated below:

Pay to Address	For	Amount
Protective Building & Loan Assn.	Advance Interest	$1,201.20
R. N. Burgess	Acct. of Stock	2,600.00
P. W. Neville	————	520.00
F. S. Belcher	————	520.00
In escrow * * * to complete the purchase of said Lot..................		15,000.00
In escrow * * * when a certain 19-room apartment house * * * has been moved to and located on the above described mortgaged property, completed and ready for occupancy and free of liens........................		9,960.00"

The Agricultural Credit Corporation and the Home Foundation Company—which name was later changed to Farm Home & Loan Company—were operated by R. N. Burgess, and the offices of these corporations were in the same suite with Protective Building & Loan Association. No evidence was offered as to the value of these stocks, but Jessie Vaughan testified she did not want them, and the payment therefor was not completed. Although Burgess was only vice president of the last-named corporation, he was apparently the dominating influence therein. Both Green, the president, and D. A. Hayes, the secretary and treasurer of Protective Building & Loan Association, testified that they signed the check for $4,841.20 by reason of the order therefor in writing of Burgess. Hayes, the secretary and treasurer, further testified that he did not know Burgess was receiving any of the proceeds of this check, nor that he was purporting to sell any stock; that he, Hayes, had nothing to do with the negotiations which resulted in the making of this loan.

The minutes of the association offered in evidence disclose that the Vaughan loan was approved by the board of directors on July 23, 1925, almost four months after the same was made. R. N. Burgess was not called as a witness. It appears that the Protective Building & Loan Association received no part of the "bonus" or commission or of the stock subscription paid to Burgess. The foregoing is a resumé of the evidence contained in the bill of exceptions concerning the loan secured by the first deed of trust.

The trial court found in regard to the same: * * * Nor is it true that, in making said loan or in accepting said promissory note and trust deed, said Protective Building & Loan Association exacted from plaintiffs, or either of them, a bonus, which, together with the interest agreed to be paid upon said loan, amounted to more than 12% interest per annum upon said loan; nor is it true that the making of said loan or the execution or delivery of said note or trust deed was, or either of them were, contrary to the provisions of Act 3757 of the General Laws of the State of California, known as the 'usury law.'"

There being practically no dispute on the facts hereinbefore set forth, must it be held as a matter of law that there was usury in the transaction with respondent Protective Building & Loan Association, even if the application for the purchase of stock was a mere subterfuge adopted by Burgess to exact a personal bonus for the loan to Jessie Vaughan?

[1-3] R. N. Burgess was the sole representative and vice president of Protective Building & Loan Association in its negotiations with Jessie Vaughan, and hence that corporation is presumed to have had knowledge of all the facts and circumstances surrounding the negotiations for the loan. McKenney v. Ellsworth, 165 Cal. 326, 329, 132 P. 75; Williams v. Hasshagen, 166 Cal. 386, 392, 393, 137 P. 9; Palo Alto, etc., Ass'n, v. First Nat. Bank, 33 Cal. App. 214, 224, 164 P. 1124; State Bank v. Adams, 142 Minn. 63, 170 N. W. 925, 927. This presumption is a disputable one. Palo Alto, etc., Ass'n, v. First Nat. Bank, supra. Will mere presumptive knowledge of this fact upon the part of Protective Building & Loan Association render the loan usurious as to it? There are two lines of authority on this proposition. In the rather early New York case of Condit v. Baldwin (1860) 21 N. Y. 219, 78 Am. Dec. 137, the court said:

"It is the essence of an usurious transaction, that there shall be an unlawful and corrupt intent, on the part of the lender, to take illegal interest, and so we must find before we can pronounce the transaction to be usurious. * * * In this case there is nothing on the face of the contract, reserving more than legal interest. * * * The rule that when an agent commits a wrong in the transaction of the business of his principal, the principal is liable for the injury produced by such wrong, has no application to the present case. That rule cannot apply where the agent when committing the wrong is bargaining on his own account, for his own private advantage exclusively, and this is known to the person with whom he is bargaining. It could only apply where the person dealt with is deceived or wronged, which in no sense is the present case. * * * When an act is done for another, by a person not assuming to act for himself but for such other person, though without any precedent authority whatever, it becomes the act of the principal if subsequently ratified by him. In that case the principal is bound by the act, whether it be for his detriment or his advantage, and whether it be founded on contract or tort, to the same extent and with all the consequences as if done by previous authority. But when the agent did not assume to act for another, but acted for himself and for his own benefit, a subsequent ratification does not bind the principal."

It is true that the decision in that case was by a divided court. The principle therein enunciated, however, was applied to the relationship of principal and agent, and the same is properly applicable herein. Palo Alto, etc., Ass'n v. First Nat. Bank, supra. This rule of law is approved in the later cases of Bell v. Day (1865) 32 N. Y. 165, 167, and Algur v. Gardner (1873) 54 N. Y. 360, 365. In the subsequent case of Terminal Bank v. Dubroff, 66 Misc. 100, 120 N. Y. S. 609, 610, a borrower consulted W. P. Reid, an attorney who was likewise president of the Terminal Bank and vice president of Williamsburgh Trust Company, and solicited him to secure a loan of $6,000 in consideration of a $600 personal bonus. Reid secured the money from the bank of which he was president, the check therefor being issued to "W. P. Reid, Trustee for L. Harry Fisher," a dummy, and the bond and mortgage to secure the same was executed to "L. Harry Fisher" and by him assigned to the bank. Reid actually received a commission of $550. Upon the bank's suit to foreclose the mortgage the borrower raised the issue of usury as a defense. The court held: "There is no evidence that Reid acted in this transaction as an officer of the Terminal Bank, or that the latter had any knowledge of the agreement between him and Dubroff regarding the commission, or that the bank ever received any part thereof. In order to establish the defense of usury, *it must be shown that the plaintiff had knowledge of the usury and that it was taken with its consent.* Philips v. Mackellar, 92 N. Y. 36; Ditmars v. Sackett, 92 Hun, 381, 36 N. Y. S. 690." (Italics ours.)

This rule has been reaffirmed by later cases from that jurisdiction so that the rule in New York appears to be definitely settled that in order to render a loan usurious, knowledge or consent and ratification or profit on the part of the lender must be proved.

"The great weight of authority supports the doctrine that a loan is not rendered usurious by the lender's agent charging the borrower, for his own benefit, a commission or bonus for procuring the loan, in excess of the maximum legal rate of interest, where such charge is made without the lender's knowledge or consent, either express or implied, and is not ratified or shared in by him." 21 A. L. R. pp. 841, 855, 856; Braine v. Rosswog (1897) 13 App. Div. 249, 42 N. Y. S. 1098; Brown v. Jones, 89 Misc. 538, 152 N. Y. S. 571, 573; 46 Am. St. Rep. 197, 198 note.

Nor in the case of a corporation will a loan be deemed usurious, if the officers of the lending corporation have taken a usurious bonus or commission for their own personal benefit, although the burden of proof may be cast upon the corporation to prove that it has not received any part of the usurious bonus or commission.

"Where an individual wishes to invest money through an agent, the integrity of the loan is not affected by the act of the agent in charging usury, unless the lender has knowledge of the transaction or assents to it or receives some benefit from it. St. John v. Fowler, 229 N. Y. 270, 273, 128 N. E. 199. We think the rule is different in the case of a corporation, which cannot act or acquire knowledge except through its officers and agents. Here we have a continuous transaction undertaken and carried on by authorized officers in its behalf and interest. * * * At no time was anything said about a fee or profit to the officers individually. Payment to the executive officers in the regular course of the transaction *presumptively* is payment to the corporation, and the knowledge of the officers is constructively its knowledge. [Citing cases.] * * * The mortgagors were not to be held responsible if the officers should convert the money payable to the corporation. McCarthy v. Liberty Nat. Bank, supra [73 Okl. 275, 175 P. 940, 7 A. L. R. 137]. *No attempt was made on the trial to call these officers to prove that the taking of the bonus was a personal transaction. In fact, the only proof that the corporation did not actually receive the bonus was the production of a book kept by the plaintiff and containing a record of the mortgage, in which it did not appear that the money was received. This was practically no proof at all.*" (Italics ours.) New York Mortgage Co. v. Garfinkle, 231 App. Div. 327, 247 N. Y. S. 313, 315, 316.

The above rule is generally accepted in other jurisdictions. In the case of Chicago Fire Proofing Co. v. Park Nat. Bank, 145 Ill. 481, 32 N. E. 534, 535, Parker, the president of a bank, compelled a borrower from the bank to pay him a commission in addition to the interest paid to the bank, and also to buy from him some worthless stocks, as a condition to obtaining a loan. It did not appear from the evidence that the bank received the commission or was benefited by the sale of the stock. The court held: "If Parker in his individual capacity entered into an agreement under which he was to receive a commission for procuring a loan, and the bank had nothing whatever to do with the agreement and received no part of the money, it could not be charged with usury." See Ballinger v. Bourland, 87 Ill. 513, 516, 29 Am. Rep. 69; Phillips v. Roberts, 90 Ill. 492, 498; Boylston v. Bain, 90 Ill. 283, 285.

The rule in Wisconsin is set forth in the case of Franzen v. Hammond, 136 Wis. 239, 116 N. W. 169, 170, 19 L. R. A. (N. S.) 399, 128 Am. St. Rep. 1079, 1082, as follows: "It is not within the apparent scope of a legitimate business agency to violate the law. So where an agent loans money, exacting a bonus for himself, the presumption is rather that it is without the knowledge of the principal than with such knowledge."

In Michigan the rule is declared in the case of Freedman v. Katz, 246 Mich. 296, 224 N. W. 325, 326, cited in 63 A. L. R. 834, note, wherein the court says: "The great weight of authority is that *a loan is not rendered usurious by the lender's agent charging the borrower, for his own benefit, a commission or bonus for procuring the loan, in excess of the maximum legal rate of interest, where such charge is made without the lender's knowledge or consent, either expressed or implied, and is not ratified or shared by him.* 21 A. L. R. note, 841. However, such knowledge and consent may be implied from circumstances. * * * Once general loan agency has been established and excessive exaction shown, the burden shifts to the mortgagee to prove that his agent took the fee for his own benefit, not for the benefit of the principal, and without the lender's knowledge or consent." See, also, 27 R. C. L. 237, 238; 39 Cyc. 973; 46 Am. St. Rep. 197, 198 note. (Italics ours.)

A different rule prevails in some jurisdictions. Wade v. Citizens' State Bank, 165 Minn. 396, 206 N. W. 728, 730; Federal Mortgage Co. v. State Nat. Bank (Tex. Civ. App.) 254 S. W. 1002, 1005; Clarke v. Havard (1900) 111 Ga. 242, 36 S. E. 837, 51 L. R. A. 499, 502; McCarthy v. Liberty Nat. Bank, 73 Okl. 275, 175 P. 940, 7 A. L. R. 137. However, it would seem the weight of authority supports the rule that mere presumptive knowledge will not suffice to render a loan usurious, but ratification thereof or profit therefrom must likewise appear.

In California in the case of Niles v. Kavanagh, 179 Cal. 98, 100, 175 P. 462, 463, 1 A.

L. R. 831, the court stated the rule: "A payment to an agent of the lender is, in effect, a payment to the lender himself. *But where the lender is in no way interested in a charge, or connected with it, the transaction is not to be denounced as usurious.*" (Italics ours.)

[4] That this is the better rule appears beyond question. In this day, when the business of the nation is conducted on a scale that renders combinations of capital necessary to meet the every day demands of almost every mercantile purpose, the organization of corporations, large and small, has necessarily resulted in order to enable people to meet their business requirements. These corporations vary in size from very small affairs with but few stockholders to huge concerns whose stockholders are numbered in thousands. In each the actual conduct of the corporate affairs is necessarily entrusted to the management of officials, subject to the approval of the directorate and stockholders. It is to be expected that occasionally corporate officials will betray the trust reposed in them by their stockholders and directors for the sake of private gain. Appellants contend that because Burgess was the sole representative of Protective Building & Loan Association in the transaction, the corporation, as a matter of law, must be held to have knowledge of all the facts.

"The doctrine manifestly cannot be applied to the extent and end claimed by appellant. * * * Such doctrine, of course, could not be maintained, as it would place it within the power of an agent to bind the principal to any course of conduct however foreign or obnoxious to the authority actually conferred." Palo Alto, etc., Ass'n v. First Nat. Bank, supra, at page 224 of 33 Cal. App., 164 P. 1124, 1129.

[5, 6] In the case of a usurious contract the parties thereto are, or should be, fully aware of the terms of the contract; each of the parties knows or is presumed to know that the contract is in violation of the law. They know, or are presumed to know, that an agency can be created only for the performance of lawful acts; that "* * * an officer of a corporation can have no authority to use the corporate property for his own benefit, and such use is notice of lack of authority. Sections 2230, 2234, 2306, and 2322, Civ. Code." Palo Alto, etc., Ass'n v. First Nat. Bank, supra, at page 221 of 33 Cal. App., 164 P. 1124, 1128; 1 Cal. Jur. 695.

[7-9] The reason for the rule is apparent. In the absence of ratification of a usurious transaction or participating in the usurious profit therefrom, to hold a corporation liable for the illegal acts of its officers will result in either opening the door to a wholesale fraud upon stockholders or offering an undue reward by way of treble interest to those who participate in or who may promote illegal transactions. Such a construction of the Usury Law would soon penalize corporate management to the extent that its present day usefulness would be totally destroyed. Of course, if a corporation knowingly ratifies or participates in the usurious profits of a transaction, it will be held to suffer the consequences. Nor are we to be understood as holding that it is incumbent upon one dealing with corporate officials to establish that the corporation ratified or shared in the profits of a usurious transaction. On the contrary, the better rule undoubtedly is that in such a case the usury being established, the burden rests upon the corporation to prove its freedom of usury. In the instant case the undisputed evidence convinces that Protective Building & Loan Association neither ratified nor profited from the illegal transaction of Burgess. Therefore, assuming that the application for the purchase of stock from Burgess was a mere subterfuge, the loan from respondent Protective Building & Loan Association cannot be deemed usurious as a matter of law.

The second and third points urged as requiring the reversal of the judgment have to do with the execution of two second trust deeds and the promissory notes secured thereby. The evidence in regard thereto discloses that on or about April 10, 1925, appellant Arthur C. Vaughan applied to one P. William Neville, a loan broker, to arrange a second loan of $7,500 on the property described in the complaint. Thereafter, a note and deed of trust securing the same bearing date April 28, 1925, payable on or before five months with interest at 8 per cent. were executed by Jessie Vaughan, payable to P. William Neville. On May 12, 1925, the note and trust deed securing same were assigned by Neville to respondent People's Mortgage Company. The evidence discloses that there was actually paid to Jessie Vaughan upon said note the sum of $6,567. Thereafter, and on or about January 12, 1926, Jessie Vaughan applied in writing to respondent People's Mortgage Company for a new loan of $17,500 to be secured by a new trust deed in lieu of the then existing second lien of $7,500 upon the property. The evidence shows that at this time respondent Protective Building & Loan Association was threatening a sale of the property under their first deed of trust. The application for the new loan provided, in part, that in the event the loan was approved—

"You are to dispose of the proceeds thereof as follows:

Protective Building & Loan Association, for credit on said trust deed or mortgage note..	$10,000.00
To rapay you for advance on purchase of deed of trust given by myself to P. W. Neville......	6,567.00
Interest on said advance to date	525.36
Insurance Premium............	60.00
Interest thereon................	3.60
Attorney's fees not to exceed...	344.04."

The application for loan was approved, respondent People's Mortgage Company taking a new note for $17,500, secured by a second deed of trust due June 12, 1926, with interest thereon at 12 per cent. per annum. There is no dispute that the money credited to Jessie Vaughan by reason of the new note for $17,500 was expended as directed in the application for the loan, except that instead of paying Protective Building & Loan Association the sum of $10,000, it was paid the sum of $9,749.01, the balance of $250.99 being retained for the payment of taxes on the property.

Subsequently on March 13, 1926, appellant Jessie Vaughan executed and delivered to respondent People's Mortgage Company her promissory note for the sum of $300, secured by a third deed of trust upon the property involved herein, payable on or before ninety days after date with interest thereon at 8 per cent.

It is the contention of appellants that the loan upon the note for $7,500 was usurious, and that the usury continued as a matter of law into the subsequent loan of $17,500, thereby tainting that transaction. The evidence with reference to the negotiation of the loan of the $7,500 is in direct conflict. According to the testimony of Arthur C. Vaughan the execution and delivery of the note for $7,500 and trust deed to P. William Neville was a subterfuge to avoid the Usury Law; that Neville, the loan broker, was advised by C. Edwin Adams, president of People's Mortgage Company, that the loan would be made for a 10 per cent. bonus and 8 per cent. interest, but the transaction would have to be handled so as to appear that the People's Mortgage Company had purchased the note and deed of trust from Neville at a discount. Vaughan also testified that Adams made a statement of like import to him. Neville was not called as a witness. It was stipulated that, if present, he would testify to the same effect as Vaughan, but the accuracy of his testimony was not admitted.

Against the testimony of Vaughan was that of C. Edwin Adams, president of respondent People's Mortgage Company, who stated that his company purchased the Vaughan note from Neville for $6,567, following receipt of a letter from the latter offering to sell the same for $6,750. The letter, undated, was offered and received in evidence. Adams further testified that he never met Arthur C. Vaughan until after People's Mortgage Company had purchased the note from Neville; that Vaughan was an entire stranger to the transaction.

[10-12] If the facts in the transaction regarding the $7,500 note were as testified by Vaughan, the loan was usurious. The trial court, however, evidently believed the testimony of Adams and found there was no usury in the transaction. It is within the province of the trial court to weigh the testimony of each witness in the case in the light of the conduct and manner of the witness upon the stand and the evidence in the case and to determine what weight and credit shall be given to the testimony of any witness. Cox v. Schnerr, 172 Cal. 371, 379, 156 P. 509. In view of the direct conflict of the evidence this court is bound by the action of the trial court, if there is substantial evidence to sustain the findings. Steinberger v. Young, 175 Cal. 81, 84–85, 165 P. 432; Whitelaw v. McGilliard, 179 Cal. 349, 351, 176 P. 679; Estate of Pepper, 158 Cal. 619, 112 P. 62, 31 L. R. A. (N. S.) 1092; 2 Cal. Jur. 921. The court likewise found that the transaction with reference to the $17,500 note was free from usury. It is appellants' contention that the note for $17,500 was tainted with the alleged usury of the $7,500 note; that the usury was continuing. The trial court having found that no usury existed in the last-mentioned note and there being substantial evidence to support the finding, it follows that the court's finding that the $17,500 note is free from usury is proper and cannot be disturbed.

[13-15] Appellants complain of that portion of the court's finding with reference to the $300 note, which reads: "When said $300.00 became due, said People's Mortgage Company made numerous attempts to collect the same from said Arthur C. Vaughan and said Jessie Vaughan," on the ground that "there is not a scintilla of evidence to support such a finding." An examination of the record sustains appellants' contention. However, the finding is not essential to sustain the judgment. It was not required that People's Mortgage Company make any effort to collect the note. Demand for payment was not required of the payee. The finding being upon an immaterial matter, the judgment will not be disturbed because of lack of evidence to support the same. Benoist v. Benoist, 178 Cal. 234, 236, 172 P. 1109; Winbigler v. Sherman, 175 Cal. 270, 273, 165 P. 943. The trial court did find that at no time had Jessie Vaughan or Arthur C. Vaughan tendered or offered to pay the amount due upon the $300 note and the trust deed securing the same. This finding, while contrary to the testimony of appellant Arthur C. Vaughan, is amply supported by the testimony of C. E. Adams, president of People's Mortgage Company at the time when the note became due. In view of the law heretofore stated with reference to conflict in testimony, this finding of the trial court cannot be disturbed. The trial court having found there was never a tender or offer upon the part of Arthur C. or Jessie Vaughan of payment of the $300 note, it follows, in view of the fact that there is evidence to support the finding, that appellants' complaint that respondent People's Mortgage Company refused payment of money due on the $300 note ex-

cept as payment upon the $17,500 note is without merit.

[16-18] Appellants next contend that Protective Building & Loan Association before parting with any money on the $29,801.20 note, and People's Mortgage Company, at the time the $17,500 note and trust deed securing same were executed, knew that Jessie Vaughan, in whose name the record title to the property stood, was a mere dummy, and that Arthur C. Vaughan and Libbie L. Vaughan, his wife, were the real owners thereof; that Jessie Vaughan was a mere trustee and the interest of Arthur C. and Libbie L. Vaughan being a community interest, the encumbrances thereon being without the knowledge of Libbie L. Vaughan, were void as to her.

The trial court found that Arthur C. Vaughan and Libbie L. Vaughan, his wife, were not the owners in fee simple of the property in question, but that the same was acquired by Jessie Vaughan by purchase, with funds received by her as the proceeds of a loan secured upon the property. The court further found that at all times material to the transactions involved herein Arthur C. Vaughan represented himself to be, and was, the agent of Jessie Vaughan. Appellants complain that the evidence does not support such findings. It is true that this finding is contrary to the testimony of Arthur C. Vaughan and Jessie Vaughan. However, it is hardly to be expected that either Arthur C. or Jessie Vaughan would admit the relationship of principal and agent. There was offered in evidence on behalf of appellants a general power of attorney from Jessie Vaughan to Arthur C. Vaughan dated April 15, 1925. By reason of the fact that this power of attorney was not recorded until November, 1925, appellants contend that the same cannot be considered for any purpose. They overlook the fact that regardless of whether either of the respondents herein knew of such power of attorney, the existence of the same affords ample support to the finding of the trial court that Arthur C. Vaughan was in fact the agent of Jessie Vaughan. In the face of this solemn written declaration of agency by the parties themselves the trial court was thoroughly justified in finding that such an agency existed, notwithstanding the testimony of appellants to the contrary. Arthur C. Vaughan and Jessie Vaughan testified that the former was the owner of the real property; that the latter merely held title to the same as trustee. The deed to Jessie Vaughan raised a presumption that she was the owner of the same in fee. Code Civ. Proc. § 321. The execution of the power of attorney to Arthur Vaughan, when considered with all the evidence of the case, clearly supports that presumption.

"A presumption, even if disputable, will raise a conflict which is sufficient to support a finding made in accordance therewith, even though there be evidence to the contrary. Whether a presumption has been controverted is a question of fact." Grantham v. Ordway, 40 Cal. App. 758, 761, 182 P. 73, 74, and cases cited.

It was the duty of the trial court to determine the credit and weight to be accorded to the testimony of appellants when considered in conjunction with the facts and circumstances of all of the transactions as revealed by the evidence of the entire case. Donovan v. Kemper, 26 Cal. App. 352, 356, 146 P. 1044. In view of the evidence in the instant case this rule appears peculiarly applicable to the facts herein.

[19] Appellant Arthur C. Vaughan offered in evidence seven checks drawn by him on Farmers' & Merchants' National Bank of Los Angeles in favor of various payees, and which checks it appeared had been cashed by the payees named therein. These checks were drawn between May 10, 1925, and June 3, 1925, after the first deed of trust, and the former second deed of trust had been executed and delivered to the respective respondents herein. In response to a question of counsel as to the purpose of the offer, appellant Arthur C. Vaughan stated they were offered "to show that other moneys went into the property besides the money loaned." Objection to the receipt of these checks in evidence was made on the ground that the same was immaterial. The court sustained the objection, which ruling is designated by appellants as exception number one. The checks were drawn by appellant between May 10 and June 3, 1925, and after the first deed of trust for $29,801.20 and the second deed of trust for $7,500 had been executed and delivered to the respective respondents herein. It is not claimed that the checks were drawn in the presence of officers of either of the respondents nor with their knowledge. The checks were therefore certainly immaterial and incompetent and the objection thereto properly sustained.

[20] Libbie L. Vaughan was asked the question: "Did you know or consent to the property being put in the name of Jessie Vaughan?" Objection thereto was made by respondents upon the ground of immateriality "in view of the fact that the evidence of plaintiff shows all the transactions were handled by this witness' husband." The action of the trial court in sustaining the objection is designated as appellants' objection No. 3. The ruling was proper. It nowhere appears that either of the respondents herein had knowledge prior to the filing of the action that Arthur C. Vaughan was married: in fact in their reply brief appellants state that "there was no occasion for Vaughan to volunteer the information of his marriage to Mr. Burgess." The court's ruling on this objection was proper for the very same reason

set forth in reference to appellants' exception number one.

[21] C. Edwin Adams, of respondent People's Mortgage Company, was asked the question on direct examination: "State when it was you first learned that the plaintiff, Libbie L. Vaughan, claimed any interest in this property that is covered by these trust deeds." Objection was made by appellant Arthur C. Vaughan on the ground that it was incompetent and irrelevant; "it would be just the same to ask a witness when he knew a certain deed was recorded, or if it was recorded." The ruling of the trial court overruling the objection is designated as appellants' exception No. 6. The ruling of the court was proper and in any event was in no way prejudicial to appellants.

[22] Certain other "exceptions" appearing in the bill of exceptions as numbers two, four and five, are not mentioned in the appellants' briefs on appeal. Since they are not supported by authorities, this court may properly assume that they have been abandoned by appellants. Under such circumstances, this court is not required to consider them.

Appellants urge that the trial court erred in denying the motion for new trial. We have carefully considered such of the evidence as appears in the record herein, and the exceptions to the rulings of the court thereon and find no error requiring a reversal of the judgment herein.

The judgment is therefore hereby affirmed.

We concur: CASHIN, J.; KNIGHT, Acting P. J.

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130 Cal.App. 625

HOTCHKISS v. DARLING et al.

Civ. 847.

District Court of Appeal, Fourth District, California.

March 28, 1933.

1. Time 🔑6.

Publication in three successive editions of weekly paper fulfills requirement for notice once a week for 20 days (Code Civ. Proc. § 692).

The validity of a sale under a trust deed was questioned on the ground that notice of sale was insufficient; it being argued that, since only 14 days elapsed between the first and last publications, the notice was not published for 20 days.

2. Mortgages 🔑356.

There was presumption that notices of sale under trust deed, having been posted remained in place for required time.

3. Mortgages 🔑356.

Evidence *held* to show that notices of sale under trust deed were posted for required time.

The trustee's deed recited that such notices were posted for sufficient time, and the trust deed signed by plaintiff contained provision that in event of sale thereunder recital in any deed given by trustee of any fact affected regularity or validity of sale should be conclusive proof of truthfulness of such recital.

4. Mortgages 🔑357.

Sale under trust deed *held* not void because trustee, at time and place for which sale was noticed, appeared and declared sale adjourned to later date.

Appeal from Superior Court, Fresno County; C. E. Beaumont, Judge.

Action by O. E. Hotchkiss against Anita M. Darling and another, in which defendants filed a cross-complaint. From an adverse judgment, plaintiff appeals.

Affirmed.

Fred W. Lake, of Los Angeles, for appellant.

Shepard & Shepard, of Fresno, for respondents.

BARNARD, Presiding Justice.

The plaintiff filed this action to quiet title to certain lots in the city of Selma. The defendants filed a cross-complaint asking that their title be quieted as against the plaintiff. The defendants alleged and proved a sale of the lots to them by a trustee under the terms of a trust deed given by the plaintiff to the defendants to secure a note for $2,500. This appeal is taken from a judgment quieting title to the lots in the defendants; the only questions raised relating to the validity of the sale under the trust deed.

[1] It is first contended that the notice of sale, as published, did not comply with the provision of section 692 of the Code of Civil Procedure requiring such a notice to be published "once a week for the same period"; the period referred to being 20 days. The notice here in question was published three times in a weekly newspaper, on August 15, August 22, and August 29, 1929. It is argued that since but 14 days elapsed between the first and the last publication, the same was not published "for twenty days." In Estate of Sankey, 199 Cal. 391, 249 P. 517, 519, it is said: "It is apparent that but two weekly notices could be published during the period of ten days. This notice was actually published once each week for two successive times during the ten days prescribed,

prior to the day of hearing. The first publication occurred December 16th, and the ten days prescribed expired on December 26th. The following Monday the matter was set for hearing. During that period the notice was published as often as it could have been done, once each week, to comply with the statute. In 21 Cal. Jur. at 517, it is said: 'Where the publication is made once each week instead of daily, it is not necessary that the full time prescribed by the order shall intervene between the first and last publications, but only that the summons shall be published once each week during the time prescribed. Of course the full period prescribed must elapse after the first publication before the service is complete.' "

In Foster v. Vehmeyer, 133 Cal. 459, 65 P. 974, in commenting on another statute, the court said: "There appears to be but one rational construction to be given this statute, and that is, the defendant is entitled to the publication of the summons for a period extending over two full calendar months. It is not at all necessary that two full calendar months should intervene between the first and last publication, but it is necessary that the summons be published once each week for those two months; and it is also necessary that from the day of the first publication two calendar months should intervene before the service of the summons is complete."

A similar principle was applied in the case of Mintzer v. Schilling, 117 Cal. 361, 49 P. 209. The statute here in question, providing for a publication once a week, would be complied with by publishing the notice the requisite number of times in a weekly newspaper. Such publication is to be for 20 days only, and nothing in the statute requires that this period be extended. There can be but three publications in a weekly paper issued regularly on the same day of each week within a period of 20 days. To require an additional publication would be to add to the requirement of the statute.

[2, 3] It is next urged that it was not affirmatively shown at the trial that the notices which were posted remained posted "for twenty days." No objection was offered to testimony that the notices were posted, and the court found that the sale was made "after due publication and posting of notice of said sale according to law." In the absence of any evidence to the contrary, this finding is supported by the presumption that the notices, having been posted, remained in place for the required time. West Berkeley v. Berkeley, 164 Cal. 406, 129 P. 281; Estate of Sbarboro, 70 Cal. 147, 11 P. 563. There was also introduced in evidence the trustee's deed conveying the property to the respondents. This deed recites that notices of the sale were posted on each parcel of the property and in three of the most public places in the township where the land was sold, naming the places, and that such posting was continued for a period not less than 20 days prior to the date of sale contained in the notice. The trust deed under which the sale was made, and which was signed by the appellant, contains the provision that in the event of a sale thereunder the recital in any deed given by the trustee of any fact or matter affecting the regularity or validity of such sale shall be conclusive proof of the truthfulness of such recital. There is no merit in the objection referred to.

[4] The only other point raised is that the sale is void because the trustee, at the time and place for which the sale was noticed, appeared and declared the sale adjourned to a later date. Not only does it appear from the evidence that this sale was thus postponed upon the request of and for the accommodation of this appellant, but the trust deed itself provides that a sale thereunder may be postponed by the trustee by public announcement thereof at the time and place for which the sale was noticed. We are cited to no authorities, and we know of none, justifying the conclusion that this sale was rendered void by a postponement under the circumstances here shown.

The judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.

130 Cal.App. 749

PEOPLE v. SHAFFER.

Cr. 2355.

District Court of Appeal, Second District, Division 1, California.

April 1, 1933.

Criminal law ⚷1023(3).

Order denying defendant's motion to change plea from guilty to not guilty *held* not appealable; hence purported appeal therefrom was dismissible (Pen. Code, § 1237).

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Proceeding by the People against George W. Shaffer. From an order denying his motion to change his plea from guilty to not guilty, defendant appeals. On motion for dismissal of appeal.

Motion granted.

Harold D. Kraft, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen. (by Bayard Rhone, of Los Angeles), for the People.

PER CURIAM.

On motion for dismissal of appeal. It appearing that the order denying defendant's motion to change his plea from guilty to not guilty is a nonappealable order:

Now, therefore, on motion of the Attorney General, the purported appeal from said order is dismissed. Pen. Code, § 1237; People v. Dabner, 153 Cal. 398, 95 P. 880; People v. Patello (Cal. App.) 13 P.(2d) 1068.

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130 Cal.App. 737

GOBLE v. APPELLATE DEPARTMENT OF SUPERIOR COURT OF LOS ANGELES COUNTY et al.

Civ. 8787.

District Court of Appeal, Second District, Division 2, California.

March 31, 1933.

Courts ⚷190(9).

Any error in failing to give notice of order of Appellate Department of Superior Court staying issuance of remittitur to municipal court was cured where, on subsequent motion to vacate such order, a hearing on such motion was had.

Petition for writ of mandate by Myron H. Goble against the Appellate Department of the Superior Court of Los Angeles County and Victor R. McLucas and others, Judges thereof.

Alternative writ of mandate vacated, and peremptory writ denied.

Burke, Hickson & Burke and Daniel G. Marshall, all of Los Angeles, for petitioner.

Everett W. Mattoon, Co. Counsel, and J. F. Moroney, Deputy Co. Counsel, both of Los Angeles (Mathes & Sheppard, Robert A. Cushman, and Gene G. Curry, all of Los Angeles, of counsel), for respondents.

WORKS, Presiding Justice.

The petition for the writ of mandate is demurred to on the ground that no cause for relief is stated against respondent judges. The demurrer must be sustained. This point has been decided with tiresome frequency. See, for instance, Alexander v. Superior Court, 91 Cal. App. 312, 266 P. 993.

Demurrer is also interposed on the grounds, in effect, that the Appellate Department of the Superior Court is not a proper party respondent and that the proper party is the Superior Court. This point we shall not determine. We shall assume, for the purpose of the decision only, that the proceeding has been properly instituted against the Appellate Department.

The Appellate Department, on the day preceding the one on which its remittitur ordinarily would have gone down to the municipal court in a certain case, entered an order staying the issuance of the remittitur. This order was made without notice. The writ of mandate is asked for the purpose of requiring the remittitur to be sent down, but solely upon the ground that the order staying it was made without notice, it being admitted that respondent has power to stay the issuance of remittitur upon notice. Whether notice is required as a prerequisite to such a stay order we shall also not decide.

After the order was made, petitioner, upon due notice, moved respondent that it be vacated, a hearing of the motion was had and it was denied. This circumstance cured the lack of precedent notice, if there was legally such a lack. Bryan v. Stidger, 17 Cal. 270; Doehla v. Phillips, 151 Cal. 488, 91 P. 330. In a case before the Supreme Court an order was made "directing the immediate issuance and execution of an order of sale." This order was made upon an ex parte application. A motion was then made for a stay of the execution and it was denied. The court said: "Whether the court erred in granting the order without notice need not be considered, as plaintiffs were heard upon the motion to recall the order, or to stay its execution; and if their motion was properly denied, they were not prejudiced by the first order." Thomas v. San Diego College Co., 111 Cal. 358, 43 P. 965, 967. In other words, to translate this language into terms of the present proceeding, while petitioner had no notice preceding the order staying remittitur, he had his day in court under the motion to vacate it. It is for this reason that he was not prejudiced by the lack of notice. The only purpose of the notice, if one were in fact required, would have been to furnish him an opportunity to be heard. That opportunity he has had.

Many other points are made in the proceeding but it is unnecessary to consider them.

The demurrer of respondent judges is sustained. The alternative writ of mandate is vacated and a peremptory writ is denied.

We concur: CRAIG, J.; ARCHBALD, Justice pro tem.

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130 Cal.App. 651

AMERICAN TRUST CO. v. JONES et al.

Civ. 8707.

District Court of Appeal, First District, Division 2, California.

March 29, 1933.

1. Banks and banking ⚷31.

Where bank changed name, but guaranty note to bank was executed on old form containing bank's old name, bank, in new name, *held* not precluded from suing.

2. Guaranty ⚷48.

Where guaranty note to bank secured advances made, or thereafter made, to named borrower on notes made by borrower and authorized bank to substitute any security or substitute indorsers or guarantors, that bank accepted joint note of borrower and another *held* not to release guarantor (Civ. Code, § 2819).

Guarantor was not released since by no act was contract of guarantor changed, and when, as here, contract provides in advance for changes, substitutions, etc., they may be made in accordance with terms of guaranty, and such acts do not release guarantor.

Appeal from Superior Court, Santa Clara County; F. B. Brown, Judge.

Action by the American Trust Company against J. H. Jones, Frank Wishon, and another. From a judgment in favor of plaintiff, defendant Wishon appeals.

Affirmed.

R. M. Wright and Owen D. Richardson, both of San Jose, for appellant.

Fry & Jenkins, of San Jose, for respondent.

STURTEVANT, Justice.

The plaintiff sued on a promissory note. The trial court made findings in favor of the plaintiff and from the judgment entered thereon Frank Wishon, one of the defendants, has appealed.

On September 26, 1926, the American Bank and the Mercantile Trust Company merged and became the Mercantile Trust Company of California. On December 27, 1926, a decree of court was duly rendered changing its name to American Trust Company. On July 8, 1929, the defendant executed and delivered to that company a note which, among other things, provided as follows:

"$5,000.00

"In consideration of the sum of One Dollar to the undersigned in hand paid by Mercantile Trust Company of California, a corporation, created, organized and existing under and by virtue of the laws of the State of California, the receipt whereof is hereby acknowledged, and for divers other valuable considerations, the undersigned—jointly and severally, promise after demand, to pay to the order of said Mercantile Trust Company of California (hereinafter called Bank), at its San Jose Branch, in San Jose, California, in Gold Coin of the United States of America, the balance both of principal and interest due said Bank for or on account of any and all sums of money which the said Bank may have heretofore advanced or loaned, or may hereafter advance or loan to J. W. Rowntree (hereinafter called the Borrowers), or which may be drawn from said Bank by the said Borrowers, (or any of them), by check or checks drawn by said Borrowers, (or any of them), or upon promissory notes made by or endorsed by said Borrowers, (or any of them), and held by said Bank, or upon bills receivable, drafts, overdrafts, acceptances, or other evidences of indebtedness, said advances and loans being made at the special instance and request of the undersigned, and upon the faith of this undertaking; and the undersigned hereby authorize said Bank, at any time and from time to time and in such manner and upon such terms, and for such time as it may see fit, to extend or change the time or manner for the payment of said sum or sums of money, or any part thereof, or alter the rate of interest thereon, or to release, sell, substitute, or exchange any security therefor, or to release or substitute endorsers or guarantors therefor, all without any notice to the undersigned or to any of them, and the undersigned hereby agree beforehand that no such change or extension of time or credit or rate of interest, or release, sale, substitution or exchange of security thereof, or release or substitution of endorsers or guarantors shall in any manner affect the liability of the undersigned thereon. * * *

"San Jose, California July 8, 1929.
"Frank Wishon."

The contract was written by using one of the forms theretofore in use by the Mercantile Trust Company of California. In that document no specific note or notes are mentioned. On May 7, 1931, Jones and Rowntree executed and delivered to the plaintiff a note which, among other things, provided as follows:

"No. 3780 $9,000.00
"San Jose, California, May 7, 1931.

"On or before August 5, 1931, for value received, I or we, jointly and severally, promise to pay to the order of American Trust Company at its San Jose Branch, in San Jose California, the sum of Nine Thousand and no/100——Dollars * * *

"J. H. Jones
"J. W. Rowntree
"Address Montgomery Hotel."

[1] Invoking the rule of strict construction applicable to contracts of this class, the defendant asserts the contract sued on runs in favor of the Mercantile Trust Company of California, and that this plaintiff may not sue on it. He cites and relies on Mechanics' American Nat. Bank v. Rowell (Mo. Sup.) 182 S. W. 989, and Crane Co. v. Specht, 39 Neb. 123, 57 N. W. 1015, 42 Am. St. Rep. 562. The first case did not involve a mere change of name, it involved a new and different corporation. The second case is directly in point. However, it is opposed by nearly all of the other authorities. 14 C. J. 321, 322. The Supreme Court of Nebraska, the court that rendered it, therefore expressly overruled it in the later case. W. T. Rawleigh Medical Company v. Bunning, 104 Neb. 179, 176 N. W. 85. The defendant's contention is not well founded.

[2] The next point made by the defendant is that inasmuch as Rowntree only is the principal obligor or debtor whose obligations are covered by the guaranty, it cannot be extended to the debts of Jones nor to the joint obligation of Rowntree and Jones. In making that contention he fails to take into consideration the facts. For many years prior to the execution of the notes in suit the defendant Wishon was the proprietor of the Montgomery Hotel in San Jose and did his banking business with the plaintiff. After he had incurred a debt of $5,000, he made arrangements with Rowntree to take over the hotel and to assume his debt to the plaintiff. As a part of that transaction the guaranty note was executed. Later Rowntree incurred further debts until the entire debt amounted to $9,000. From time to time the debt was renewed by giving new notes and taking up the old ones, but the debt remained unpaid. On May 7, 1931, Rowntree and Jones entered into a contract regarding the hotel and both executed the note in suit. All sums were advanced to and were received by Rowntree. From the time that the latter assumed the debt of Wishon, $5,000, nothing was paid on the principal. Bearing these facts in mind, we turn next to the terms of the guaranty alleged in the complaint. Up to the sum of $5,000 it guaranteed the payment of "* * * the balance both of principal and interest due said bank for or on account of any and all sums of money which the said bank may have heretofore advanced or loaned or may hereafter advance or loan to J. W. Rowntree * * * upon promissory notes made by * * * said borrowers * * * said advances and loans being made at the special instance and request of the undersigned, * * * and the undersigned hereby authorize said bank * * * to substitute any security therefor or to release or substitute endorsers or guarantors thereof * * *" without affecting the liability of the guarantors. These provisions show that no specific note was secured by the guaranty, but that primarily it secured advances made. True, notes were incidentally mentioned, but by the clear terms of the contract the bank was authorized to substitute notes signed by joint makers for notes signed by Rowntree only. No advances were made to Jones and the acceptance by the bank of the joint note instead of a personal note was expressly permitted by the terms of the contract. By no act was the contract of this defendant changed. Therefore he was not released. Stearns on Suretyship, § 132; 1 Brandt on Suretyship, § 416; Civ. Code, § 2819. When, as here, the contract provides in advance for changes, substitutions, etc., they may be made in accordance with the terms of the guaranty and such acts do not release the guarantor. First National Bank v. Spalding, 177 Cal. 217, 170 P. 407; 13 Cal. Jur. 117.

The trial court rendered a judgment in the sum of $9,421.43 against Rowntree and Jones and for $5,000 of that amount it rendered judgment against Wishon.

We find no error in the record. The judgment is affirmed.

We concur: SPENCE, Acting P. J.; GOODELL, Justice pro tem.

130 Cal.App. 669

NEVILLE et al. v. HIGBIE et al.

Civ. 7535.

District Court of Appeal, Second District,
Division 2, California.
March 29, 1933.

Libel and slander 🔑**139.**

Complaint for damages for slander of title *held* not to state cause of action.

The complaint alleged that defendant, having exclusive agency for disposal of property, maliciously refused to sell during period when oil boom made property salable at high figure, but the so-called exclusive agency for the disposal of the property was limited to 30 days, and it could not be ascertained from the complaint whether the declination to buy or to lease happened before or after the granted agency had expired.

Appeal from Superior Court, Los Angeles County; F. C. Valentine, Judge.

Action by E. L. Neville and others against G. C. Higbie and another, for damages for slander of title. From an adverse judgment, plaintiffs appeal.

Affirmed.

James M. Carter and H. Dexter McKay, both of Los Angeles, for appellants.

Scarborough & Bowen, of Los Angeles, for respondents.

STEPHENS, Justice.

At the opening of this case in the superior court objection was made and sustained that no cause of action was stated in the complaint, and after plaintiffs had declined to amend, judgment was had against them.

The action is for the recovery of damages for slander of title and the claimed facts are roughly as follows: An exclusive agency in writing was given by plaintiffs to defendants, giving thirty days in which to sell the property in question. An oil boom made the property salable at a high figure and also leasable at an attractive price, but defendant agents would not close a deal. Plaintiffs, by a written notice, attempted to revoke the agency and proceeded to enter into an escrow to sell a part of the property and to lease a part of it. Before either of the deals were consummated defendants caused the agency-authorizing instrument to be officially recorded, thus bringing notice of the agency to the intended purchaser and intended lessee, and both of the deals failed for this reason. The acts of defendants are alleged to be malicious and false. The boom soon collapsed and the land's valuation with it.

Although there are other points made we think but one need be noticed for it disposes of the case. The so-called exclusive agency for the disposal of the property was limited on its face to thirty days after the date it bore. It cannot be ascertained from the complaint whether the declination to buy or to lease happened before or after the granted agency had expired, and it certainly cannot be successfully maintained that actionable damages could have been suffered subsequent to the expiration date of the recorded instrument.

The judgment is affirmed.

We concur: CRAIG, Acting P. J.; ARCHBALD, Justice pro tem.

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130 Cal.App. 607

HAYWARD et al. v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

Civ. 8522.

District Court of Appeal, Second District,
Division 2, California.
March 27, 1933.

1. Mandamus 🔑**4(1).**

Mandamus cannot be employed as corrective of error.

2. Mandamus 🔑**26.**

Mandamus will issue only for purpose of enforcing commencement of wholly unexercised or completion of partially exercised jurisdiction.

3. Courts 🔑**1.**

"Jurisdiction" is power to hear and determine, exercise of which involves ascertainment of facts and application of law thereto.

[Ed. Note.—For other definitions of "Jurisdiction (of Courts)," see Words and Phrases.]

4. Mandamus 🔑**57(2).**

Where superior court, pending appeal of defendants from judgment on note and decree of foreclosure of stock pledge, entertained plaintiffs' motion to direct defendants to give undertaking on appeal because stock had greatly declined in value, and where court heard evidence on motion but dismissed motion because of opinion movants did not come within statute, mandamus *held* not to lie, though court believed it had no "jurisdiction" (Code Civ. Proc. § 949).

Mandamus did not lie even if court terminated proceedings under motion, for reason that it considered it had no power, authority, or "jurisdiction" to order undertaking on appeal, and for that reason never determined whether to exercise discretion under Code Civ. Proc. § 949, since court had assumed jurisdiction of the motion, and, having pursued such jurisdiction to hearing of evidence and presentation of argument, it had jurisdiction to decide matter against petitioners upon any ground which appeared to it to bar plaintiffs' right to relief, even upon construction of section 949.

5. Appeal and error ⊙⇒**477.**

Trial court has jurisdiction, pending appeal from judgment for plaintiff on note and decree of foreclosure of pledge of corporate stock, to entertain plaintiff's motion to require defendant to give stay bond on appeal (Code Civ. Proc. § 949).

Proceeding on the petition of Max E. Hayward and another against the Superior Court of the State of California in and for the County of Los Angeles and the Honorable Francis J. Heney, judge thereof, for a writ of mandate requiring respondent court to exercise its discretion and determine whether the execution of an undertaking on appeal should be ordered in a certain action.

Alternative writ of mandate vacated, and peremptory writ denied.

Meserve, Mumper, Hughes & Robertson, of Los Angeles, for petitioners.

Newlin & Ashburn, of Los Angeles, for respondent superior court.

Everett W. Mattoon, Co. Counsel, and J. F. Moroney, Deputy Co. Counsel, both of Los Angeles, for respondent Heney.

WORKS, Presiding Justice.

Petitioners were parties plaintiff in an action in respondent court. The action was commenced for the purpose of procuring judgment on a promissory note, and for a decree of foreclosure of a pledge of corporate stock which had been placed with an escrow holder as security for the payment of the paper. Judgment went for plaintiffs under both branches of the prayer of their complaint. Defendants appealed from the judgment, and the appeal is yet pending. After it was perfected, upon notice given, a motion was made in respondent court for an order directing and requiring that an undertaking in an amount to be fixed by the court be executed on the part of appellants, conditioned for the performance of the judgment if it should be affirmed, or if the appeal should be dismissed. The motion was made on the ground that the collateral pledged as security for the payment of the note had become of little or no value, and the undertaking on appeal was demanded upon the theory that respondent court had authority to order it under the terms of section 949 of the Code of Civil Procedure. The hearing upon the motion was held by respondent court during four successive days. The court heard evidence from both sides as to the value of the collateral, necessarily considered the pleadings, findings, and judgment in the case, and listened to argument upon the question whether, under the facts thus disclosed, it had power or authority, and, indeed, whether it had jurisdiction to order the undertaking. The motion was submitted on the fourth day, and ten days thereafter the court made an order, according to its minutes, to the effect "that the motion for bond of plaintiffs * * * be and hereby is denied." The court also made a written order to the same effect. Four days after the entry of these orders, respondent court made a further order, entitled "Order Nunc pro Tunc Correcting Clerical Misprision in Minute and Written Orders," and by it changed the word "denied" in its first orders to the word "dismissed."

Section 949 of the Code of Civil Procedure confers upon the superior court the right to exercise a discretion in determining, in cases to which the section applies, whether a stay bond on appeal shall be required. Petitioners came to this court for the writ of mandate upon the theory that respondent court had decided that it had no jurisdiction to order a stay bond, and therefore that it had not exercised what counsel conceive to be the real jurisdiction conferred by section 949; that is, the court had not gotten so far as to exercise a discretion upon the point as to whether the undertaking requested should be ordered. There is evidence in the record—for the proceeding has been before a referee—to the effect that the judge of respondent court before whom the motion for an undertaking came on for hearing was of the opinion that the pledged stock was of a value far less than the amount of the judgment in the action. The evidence also shows that the judge thought that he had not the authority—he calls it the jurisdiction—under the section to order the undertaking; that is, that under the evidence which he had heard the movants for the bond were not within the statute. Petitioners ask, the judge having so expressed himself, that respondent court be required to exercise the discretion referred to in the section and determine whether or not the execution of the undertaking shall be ordered. Upon the usual ex parte application, we ordered an alternative writ.

Passing the question whether the nunc pro tunc order was a valid exercise of respondent court's power to make its orders speak the truth, passing the question whether the judge's views as to the effect of the proceedings of respondent court can have any bearing upon the fate of the proceeding—and a determination of the second of these questions might serve to solve the problem before us—we shall proceed to a discussion of the principal point presented in the briefs. In doing so we shall go so far as to assume, for the purposes of the decision, that respondent court terminated proceedings under the motion as it did, for the reason that it had no power, authority, jurisdiction—what you will for the moment—to order an undertaking on appeal, and that for that reason it never got to the point of determining whether the court should exercise the discretion mentioned in section 949.

[1, 2] We shall first determine, however, that no importance is to be attached to the question whether the order is to be treated as one of denial or as one of dismissal. If we concede that the nunc pro tunc order was in form valid, we must at once assert that it was in effect nugatory. The question here is not by what kind of order respondent court disposed of petitioners' motion—and it did dispose of the motion, correctly or incorrectly, whether the order was one of denial or one of dismissal—but whether the order was made without the functioning of a jurisdiction respondent court was required by law to exercise, or whether it was made through mere error. The rule is too well settled to require exposition here, that the writ of mandate cannot be employed as a corrective of error. It will only issue for the purpose of enforcing the commencement of a wholly unexercised, or the completion of a partially exercised, jurisdiction.

[3-5] The entire difficulty here present lies in a failure to distinguish between the exercise of jurisdiction and the exertion of power and authority through the exercise of jurisdiction and the consequent rendition of judgment or order. This distinction is not always maintained in the decisions of the courts, and we shall make an endeavor to dispel the mist which obscures the subject. Jurisdiction is the power to hear and determine. Two steps, generally speaking, are necessary to the exercise of jurisdiction: (1) The ascertainment of facts; (2) the application of law to the facts. All these requisites were met in the consideration and determination of the motion presented to respondent court. It is true that after ascertaining the facts pertinent to the motion, and before applying the law to them, respondent court was compelled to construe a statute. Order was then made pursuant to the construction arrived at, and petitioner contends that respondent failed in a complete exercise of jurisdiction because it did not go further, or because it did not do something different. The logic of such a contention makes no appeal to us. There is a statute in this state (St. 1923, p. 517, § 141¾, as added by St. 1929, p. 1580) to the effect that a guest passenger in an automobile can recover damages from the driver or owner of the car for injuries suffered only because of his intoxication, willful misconduct, or gross negligence. Suppose a passenger in a car brings suit against the driver for damages suffered in a collision, and the testimony shows beyond dispute that the driver was guilty only of ordinary negligence, and that the passenger, instead of having paid for his ride, was but a guest of the driver. A motion for nonsuit is made and is, of course, granted. This is for the reason that the court determined that plaintiff cannot recover because of the statute as to guest passengers. Nor will it make a difference if the court announces in granting the nonsuit that because of the statute he has no "jurisdiction" to render judgment in the plaintiff's favor. The court's decision, if wrong, does not indicate a refusal to exercise jurisdiction, but is mere error. What is the difference here?

In the present instance the construction of section 949 by respondent court, in an effort to apply the law to the ascertained facts, was not a jurisdictional matter. If, when the motion to require an undertaking came on for hearing, respondent court had declined to entertain it on the ground that jurisdiction over the matter rested exclusively in the Supreme Court, or in the District Courts of Appeal, or in the municipal court, respondent court could have been compelled to proceed with the hearing by means of the writ of mandate, for it undoubtedly had jurisdiction of the motion. This jurisdiction, however, the court assumed, and having pursued the jurisdiction through the hearing of evidence and the presentation of argument, whether for four days or for fifteen minutes, the court had jurisdiction to decide the matter against petitioners upon any ground which appeared to it to bar petitioner's right to relief, even upon a construction of section 949, and it had jurisdiction to decide either erroneously or correctly.

There is little necessity for the citation of authority upon what seems to us so plain a question, and we shall refer to but one case, as it seems completely to cover the point. There a father was defendant in an action brought to compel him to support the child of his divorced wife and himself, the child being without the state. After ascertaining this latter fact, under an order to show cause why support should not be furnished pendente lite, the trial court made the following order: "Order to show cause denied on account of this court not having jurisdiction to award temporary attorneys fees, costs or support on two grounds; that the child is not within the jurisdiction of this court; also that provisions in section 137, Civ. Code, in respect to attorneys fees, costs and support money do not apply in this case." The District Court of Appeal, in denying a writ of mandate which was sought for the purpose of compelling the court to proceed, used the following language: "It thus appears that the court did not deny its jurisdiction to pass upon the application. It did pass upon and determine said application, but refused the requested allowance, because the court was of the opinion that it did not have authority to make such allowance to a child not residing in this state and not present in this state, in an action to compel a father to support his child. If the court erred in this conclusion (which we do not decide), it was only an error made by the court in the exercise of its jurisdiction. It was not a refusal to act upon the merits of the matter presented." Brock v. Superior Court, 119 Cal. App. 5, 5 P.(2d) 659.

The alternative writ of mandate is vacated, and a peremptory writ is denied.

We concur: CRAIG, J.; STEPHENS, J.

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130 Cal.App. 597

GOLDBERGER v. MARKET ST. RY. CO.

Civ. 8606.

District Court of Appeal, First District, Division 1, California.

March 27, 1933.

Rehearing Denied April 26, 1933.

Hearing Denied by Supreme Court May 25, 1933.

1. Negligence 🔑52.

Building owner must give invitee reasonable notice or warning of danger, attendant on entry or work invitee is to do on or in premises, because of conditions not readily apparent.

2. Negligence 🔑48.

Owner of premises is charged with knowledge of their condition when he invites others thereon and duty to convey such knowledge to invitee.

3. Negligence 🔑32(1).

Owner is not insurer of persons he invites into premises, but is required to use only ordinary care for their safety.

4. Appeal and error 🔑882(3).

Plaintiff resting case entirely on alleged negligence of defendant's employee in not warning him of pit in floor of defendant's building cannot claim on appeal that he could disregard such employee's direction to wait until light was obtained and still recover for injuries caused by fall into pit.

5. Negligence 🔑32(3).

One entering premises under owner's invitation may become licensee as to certain portions thereof and trespasser as to others.

6. Negligence 🔑32(3).

Invitee entering portions of premises without right becomes licensee, to whom owner owes only duty to refrain from willful or wanton injury.

7. Negligence 🔑141(3).

Instruction to find for defendant in action for injuries to invitee, falling into pit in floor of defendant's power house, if plaintiff ignored order or request of defendant's employee to wait until he obtained light, *held* proper.

8. Trial 🔑194(16).

Instruction that if defendant's employee told plaintiff to "wait" until light was obtained before proceeding to part of defendant's premises where pit, into which plaintiff fell, was located, such "warning" fully discharged defendant's duty, *held* not erroneous as on facts.

An order to "wait" is a command to "stop."

[Ed. Note.—For other definitions of "Stop" and "Wait," see Words and Phrases.]

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy. Judge.

Action by Joseph Goldberger against the Market Street Railway Company. Judgment for defendant, and plaintiff appeals.

Affirmed.

Daniel A. Ryan, Thomas C. Ryan, and George M. Naus, all of San Francisco, for appellant.

Wm. M. Abbott, Wm. M. Cannon, and Walter H. Linforth, all of San Francisco, for respondent.

PARKER, Justice pro tem.

The action is to recover damages on account of personal injuries alleged to have resulted through the negligence of defendant. The case was tried before a jury and verdict rendered in favor of defendant. Judgment followed pursuant to said verdict. Plaintiff prosecutes this appeal. The facts may be narrated.

Plaintiff is, and was at all of the times within the period discussed, a buyer of used machinery and equipment. The defendant, Market Street Railway Company, was the owner of certain motors, belting, and machinery formerly used in a power house located within the city of San Francisco. This power house had been closed but not dismantled; much of the machinery remained practically in place and consisted of large and heavy equipment such as is generally used in and about similar plants. Plaintiff had become interested in the purchase of the machinery and had approached the proper persons authorized to act for defendant. It was arranged that plaintiff should have access to the power house and an opportunity to examine and appraise the equipment. Accordingly the railway company, defendant, delegated an employee named Shufelt to take plaintiff over to the power house, open up the place, and permit plaintiff and an associate to go in and look over the machinery. While engaged in the examination of some belting, plaintiff fell into a pit on the premises and sustained serious injury. The foregoing sketches the admitted facts.

[1] We may proceed with the respective claims of appellant and respondent. In this review we revert to the original designation of the parties, viz., plaintiff and defendant. Continuing, then, we find plaintiff and the servant of the defendant at the door of the power house preparatory to entry. Both sides agree that at that time plaintiff's relation to defendant was that of an invitee to whom defendant owed a certain duty. The defendant was obligated to use ordinary care for the safety of his said invitee, and, if there was any danger attendant upon the entry, or upon the work which the invitee was to do upon or in the premises, and such danger arose from causes or conditions not readily apparent to the eye, it was the duty of defendant to give the said invitee reasonable notice or warning of such danger. Shanley v. American Olive Co., 185 Cal. 552, 197 P. 793; Mautino v. Sutter Hospital Association, 211 Cal. 556, 296 P. 76. The power house was opened and plaintiff and his associate, together with the guide or caretaker of the defendant, entered. There is some conflict in the evidence as to the then condition of the premises with regard to the sufficiency of the lighting. It may be conceded, as indeed it is, that the building had many windows through which came natural light sufficient to permit a survey of such objects as arose above the floor level. However, the evidence might support a conclusion that the floor surface was somewhat dark and shaded. This condition would result from the fact that large pieces of machinery standing upon the floor would prevent the light from reaching certain parts of the building. The trial court was of the opinion that the question of lighting was an issue to be determined by the jury.

The plaintiff had been engaged in the business of buying machinery and equipment for a period of almost twenty-five years. He had purchased other material from a different power house, but he had never seen or been in the power house herein concerned. Almost immediately upon entry into the building, plaintiff began an examination. He began with a large motor and after going over that he started on the belting. Plaintiff testified that he then asked the attendant or guide whether there were any cellars or holes in the building, and the reply was that there was no hole or cellar, but a solid concrete floor all through. The attendant asked plaintiff the purpose of the question and plaintiff informed him that if there was a cellar it would be necessary to prop up the timbers in the cellar in case a derrick had to be used in lifting out the machinery. Some importance is hereafter attached to this conversation and it is timely that we give more detail thereon. In passing, we note the attendant denies any such conversation took place, and denies that he ever told plaintiff there was no cellar or that there were no holes in the floor. Disregarding the conflict and assuming that the conversation occurred, it must be borne in mind with the question and the purpose thereof. At the time the question was asked the plaintiff was standing directly beside a pit in which a flywheel operated. He admitted seeing this pit, and possibly one more. Obviously, his question concerning holes or cellars had no reference to the pits used in the installation of machinery. Further, considering the reason plaintiff desired the information as stated, the given reason was that it would make a difference if a derrick were used in moving out the machines, because if there was a cellar or hole the timbers sustaining the floor above would have to be strengthened. Such a course would not be necessary in the case of pits in the surface of the floor. Therefore, we may assume, and there seems to be no contradiction either in fact or argument, that the presence or absence of floor pits was not the information sought.

The plaintiff being an expert in the dismantling of machines and having an admitted knowledge of at least one other power house in San Francisco, knew of the methods of installation used in power houses, and that such methods contemplated the use of pits wherein the larger flywheels and other mechanisms operated. From this situation of the record we are not inclined to place upon this claimed conversation the importance appellant seems to attach thereto. After being in the power house 15 or 20 minutes, plaintiff was engaged in examining a certain belting. He was going slowly, scrutinizing every foot of the belting, testing its pliability, fiber, and general condition. After the examination had proceeded up to this point and the parties were about finished on this particular item, and preparatory to going further into the back of the building, the attendant Shufelt said: "Wait, and I will see if I can get some light." Thereupon he left the party to reach a light switch. While he was away plaintiff proceeded with his examination and backed off into a pit, falling therein and sustaining the injuries complained of.

Plaintiff denies that the attendant said anything to him about waiting or about getting a light. Plaintiff, in denying this statement having been made, affirms that there was no need of any light, and on this point there is complete accord from all sides to the effect that there was sufficient light to disclose everything above the surface. Defendant contends there was sufficient light to disclose everything, including the floor. Admitting the conflict and without attempting to determine it, the conceded fact is that if further light were required, it was to give a clear view of the floor, and the contour thereof, and to disclose any openings therein. Therefore, at the time when the attendant made the remark and gave the notice that more light was desirable, the party had reached a point at or near which the shadows of the surrounding structures obscured or shaded the floor plan. Summing up the situation to this point, we find the plaintiff upon the premises of defendant as an invitee, for whose safety defendant was bound to use ordinary care; that the exercise of such ordinary care required defendant to give plaintiff ample warning of concealed danger. The plaintiff proceeded under the guidance of defendant's agent through the premises wherein there was no danger concealed, and where an abundance of natural light threw into view the conditions existing. At the very moment a point was reached where the natural light seemed insufficient, the attendant called the fact to the attention of plaintiff and directed him to await the aid of artificial light. Thus prefaced, we reach the point of the appeal.

In submitting the case to the jury, the court gave the following instruction: "The only alleged negligence referred to in plaintiff's complaint, upon which he bases his cause of action, is the alleged failure of the defendant to warn him of the existence of that pit into which it is claimed that he fell. If you find from the evidence that prior to the time it is claimed that plaintiff fell into such pit and while he was standing in a part of said premises distant from said pit he was told by an employee of said defendant to wait where he was until a light was obtained, but instead of so doing he proceeded to that part of said premises where said pit is located, then I charge you that such warning fully discharged the duty of the defendant in the premises, and if you so find, your verdict should be against the plaintiff and in favor of the defendant, Market Street Railway Company." The entire appeal centers about this instruction.

Appellant specifies two grounds of attack: (1) That the court erred in ruling, as a matter of law, that it was a full discharge of defendant's duty for Shufelt, the attendant, to say, without more, merely: "Wait, and I will see if I can get some light." (2) The court erred in assuming as a fact that such an equivocal remark was a warning of concealed danger, rather than a courteous offer to illuminate the belting, to make examination easier. We have three interesting, learned, and instructive briefs on the attacked instruction, and every word is painstakingly analyzed and argued. We are not inclined to follow the respective arguments throughout all the niceties urged. We will consider the instruction as a whole. In its effect the instruction told the jury that, if the plaintiff was standing in a place of safety and was told by the attendant, under whose guidance he was permitted entrance to the premises, to wait where he was until a light was obtained, and plaintiff had disregarded this order and proceeded on without waiting, there had been no failure of duty on the part of defendant. It seems of not the greatest importance that we determine whether the words of the attendant constituted a warning or a direction.

[2, 3] An owner of premises is charged with a knowledge of the condition of these premises when he invites others thereon. He is charged with the duty of conveying that knowledge to an invitee. We can conceive of no better way of conveying that knowledge than for the owner to accompany the invitee and point out the way, and the danger if any. The owner is not an insurer of persons whom he has invited into his premises. The responsibility of such owner for the safety of such person in such a case is not absolute: he is only required to use ordinary care for the safety of persons he invites to come upon the premises. Weddle v. Heath, 211 Cal. 445, 452, 295 P. 832.

[4] The fact that there were pits in the building, under the evidence, was obvious and fully apparent and well known to plaintiff. True, the exact location of these pits was not known to plaintiff, or at least we may deem such knowledge to have been a disputed fact sufficiently in conflict to render erroneous any instruction based upon an assumption thereof. On such portions of the floor where light was thrown, the presence of any depression or pit was unmistakable. The pit itself was not a concealed or latent hazard. The danger lay entirely in the fact of darkness. The one definite way to destroy and remove the latent danger was to make it visible and obvious, and there was no surer method of accomplishing this result than by light. The words of defendant's employee, directed to plaintiff at a point where for the first time any latent danger might be, were sufficient to convey to plaintiff a notice of the lack of light, and with such notice came also a knowledge that danger might lurk in the shadows. The questioned instruction told the jury that if defendant's employee had told plaintiff to await more light before

proceeding, and plaintiff, heedless of the order or suggestion, went on alone into danger, the jury should find for defendant. Whether or not the statement of defendant's said employee was a warning is not conclusive of the question. If, as the instruction indicates, the words and conduct of the employee fully discharged the duty owed to plaintiff, it becomes immaterial that the duty assumed in the instruction might have been loosely stated.

The whole theory of plaintiff's case is that he was on the premises trusting his safety to this employee; that because the employee was derelict in his duty of conducting plaintiff safely through the building, the latter was injured. No negligence is claimed in the manner of keeping the premises, nor is it alleged that in any respect the premises were maintained in an unsafe and dangerous condition. The whole case rests on the conduct of defendant's employee in giving plaintiff safe conduct through. Having thus framed the issues, plaintiff cannot now claim that he could entirely disregard the orders or direction of the attendant and launch out by himself, unfamiliar with the premises, and still claim the protection which he had rejected.

[5, 6] It is well settled that a single individual may, on the same premises and during practically the same period, occupy various legal relationships toward the owner. One may have entered the premises under invitation, and during his stay he may become a licensee as to certain portions and a trespasser as to others. In each change of status the rights and duties of the respective parties vary. Lindholm v. Northwestern Pac. R. Co., 79 Cal. App. 34, 248 P. 1033. An invitee who enters on portions of the premises where he has no right to enter becomes a licensee, and the only duty owing him then is to refrain from willful or wanton injury. Chichas v. Foley Bros. Grocery Co., 73 Mont. 575, 236 P. 361. It is well settled that a person may be an invitee in a portion of a building and not enjoy that status as to other portions thereof. Medcraft v. Merchants' Exchange, 211 Cal. 404, 295 P. 822; State Compensation Ins. Fund v. Allen, 104 Cal. App. 400, 285 P. 1053. By way of illustration, if one invites a buyer of furniture to his home for the purpose of inspecting and appraising furniture offered for sale, and upon his arrival at the home the front room is crowded with chairs and tables, and in full light and after inspection of the goods in said room the owner states that there are other goods in the next room, which is unlighted, and tells the invitee to wait until a light is obtained, there can be no question but that the owner is absolved from the necessity of any further warning as to any latent dangers that may be in the latter room. And under such conditions, the former invitee going unattended and without light into the second room, shifts his status from an invitee to a mere licensee, if not a trespasser.

[7] In Coberth v. Great Atlantic & P. Tea Co., 36 App. D. C. 569, we find a situation similar in many respects to the case at bar. Many authorities are reviewed and the conclusion supports the views herein announced. Referring to a direction given by an employee to an invitee, the court says: "Such a request, if clearly expressed, was quite as effective as a command to withdraw the implied invitation theretofore existing." The facts of the instant case reflect the illustration. The instruction assumes plaintiff in a place of safety, distant from the pit. The claim of plaintiff is that the presence of the pit was not disclosed on account of the darkness. The duty on defendant was to make such disclosure either by word of mouth or otherwise. Defendant was in the actual discharge of such duty, and plaintiff refused the care and protection offered. Giving appellant's construction of the instruction its greatest effect, we concede that the court told the jury to find for defendant if the evidence showed that plaintiff had ignored the offer of light and disregarded the order or request to proceed no further until light was obtained. We think it was a proper instruction.

[8] The second ground of attack upon the instruction is that it is an instruction upon the facts. The argument is that it was a disputed question whether the words used were merely by way of a courteous offer to aid in examining the belting or whether the words were intended to convey the idea of a safer progress through the remaining equipment. In Coberth v. Great Atlantic & P. Tea Co., supra, we find this apt language: "The plaintiff insists that the jury should have been permitted to find not only whether she was notified not to go back where the trapdoor was located, but also whether the plaintiff, in view of the nature or character of such notice, exercised that degree of care and caution demanded of her; in other words, that, notwithstanding the jury should find that the defendant expressly withdrew its implied invitation to the plaintiff to enter the rear of its store, where this danger existed, and notwithstanding that she, without the knowledge of the defendant, disregarded such express notice of withdrawal, and placed herself in a position of peril, the jury should be permitted to speculate whether the defendant ought not to have gone further and assigned a definite reason for its action. We are unable to assent to this doctrine." And here we, too, find an inability to assent to the contention that the attendant was required to state more fully the reasons for his order to await the light. The plaintiff denies that such words were used at all. We will

not attempt to guess on the interpretation plaintiff would have given the words had he heard them. Suffice it to say that to any intelligent mind the thought conveyed is that more light would be furnished. And to the same mind would come the idea that the light would dispel the darkness; and with darkness dispelled no danger would exist. Coberth v. Great Atlantic & P. Tea Co., supra.

In Wixon v. Raisch Improvement Co., 91 Cal. App. 129, 134, 266 P. 964, it is said that the difference between the words "stop" and "wait" is infinitesimal. An order to wait is a command to stop. No other complaint is made as to instructions given or refused, nor is error predicated upon any of the trial court's rulings in the admission or rejection of testimony. Therefore we assume that the law as applicable to all phases of the case and all theories of the parties was fully explained to the jury. A full and complete hearing was given. The plaintiff himself set forth, in the following instruction given at his request, the duty he claimed owing to him: "You are instructed that one who invites another upon his premises owes such invited person the duty of having his premises in a reasonably safe condition and of maintaining his premises in a reasonably safe condition, and of exercising reasonable care in protecting the invitee from injury, and of giving warning of concealed perils." The instruction here reviewed is complementary thereto and correctly sets forth the manner in which such duty may be discharged.

The judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

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130 Cal.App. 573

BEATTY v. WARREN.

Civ. 7579.

District Court of Appeal, Second District, Division 1, California.

March 24, 1933.

1. Libel and slander ⚿7(13), 113.

Defendant's statements to others that plaintiff stole money were slanderous per se, and jury on finding statements were uttered must assess compensatory damages.

2. Appeal and error ⚿1004(1).

Amount of damages must at first blush suggest passion, prejudice, or corruption of jury to warrant appellate court's interference (Code Civ. Proc. § 657).

3. Appeal and error ⚿301.

Verdict should not be set aside on appeal as excessive where point was not raised below and trial judge permitted verdict to stand (Code Civ. Proc. § 657).

Appeal from Superior Court, Los Angeles County; Edwin F. Hahn, Judge.

Action by Elmo Beatty against Mrs. E. A. Warren. Judgment for plaintiff, and defendant appeals.

Affirmed.

John C. Miles and Samuel Marks, both of Los Angeles, for appellant.

P. J. Tscharner, of Azusa, for respondent.

DESMOND, Justice pro tem.

The defendant appeals from a judgment aggregating $500, awarded plaintiff in an action based upon slanderous statements alleged to have been made by the defendant.

The complaint alleged in the first count that the defendant, in the presence of Mr. and Mrs. Miller, used the following language: "Elmo Beatty stole thirty-five dollars from a woman down the street, while delivering groceries there. There was One Hundred dollars laying there, and he took Thirty-five Dollars."

Another count alleged that the following language was used by defendant in the presence of Mr. Thomas A. Smith: "Your son is going to lose trade, because he has a man employed that is a thief. He went down and delivered some groceries to a lady near my house. The lady was going away and he was delivering the goods there and when she went away she left a purse in the dresser containing thirty-five dollars. When she returned the purse was lying on the dresser empty. The thirty-five dollars was gone and there was nobody in the house but Elmo Beatty, and nobody could have taken the thirty-five dollars but Beatty."

Although it was alleged that the language above quoted was uttered by the defendant maliciously, there was no prayer in the complaint for exemplary damages. The defendant by her answer did not set up justification or privilege, but denied all the material allegations of the complaint bearing upon the alleged slander. The jury found for the plaintiff in the sum of $250 on each of said counts.

[1] There can be no doubt that the statements referred to were slanderous per se, and the jury finding on evidence which from the record seems amply sufficient that they were uttered by the appellant, was bound to assess damages in an amount which would fairly compensate the plaintiff for the injury suffered by him. Childers v. San Jose Mercury Printing & Publishing Co., 105 Cal. 284, 289,

38 P. 903, 45 Am. St. Rep. 40. Appellant claims that the damages so assessed are excessive and that certain instructions given by the trial court were so erroneous or ambiguous as to possibly have misled the jury.

[2, 3] As to the question of excessive damages, it may be noted that section 657 of the Code of Civil Procedure specifies as one of the grounds upon which a verdict may be vacated and any other decision modified and a new trial granted, "excessive damages, appearing to have been given under the influence of passion or prejudice." A motion for new trial was made in this case, submitted without argument, and by the trial court denied. The grounds of the motion upon which defendant relied were insufficiency of the evidence to justify the verdict, that the verdict was against the law and the evidence, and errors of law occurring at the trial and excepted to by the defendant. No suggestion apparently being made until after the filing of this appeal that the damages awarded were excessive, it now appears as an afterthought. The conclusion therefore must be that the amount of damages awarded by the jury did not in the first instance shock the defendant by reason of its size, nor does it "at first blush, suggest passion, prejudice or corruption on the part of the jury"—a requisite condition for the exercise of the power of an appellate court over excessive damages. Williams v. A. R. G. Bus Co., 47 Cal. App. 568, 190 P. 1036, and cases there cited. In the case of Harris v. Zanone, 93 Cal. 59, 28 P. 845, 846, the plaintiff recovered as combined actual and exemplary damages the sum of $5,000 for a statement, "She is a damned thief" made by the defendant, which statement the jury found was not privileged. The Supreme Court refused to disturb the verdict, saying (page 72 of 93 Cal., 28 P. 845, 848): "In Wilson v. Fitch, 41 Cal. 386, where there was no proof of express malice, and, as was held by the court, not a case of punitive damages, it was said, upon the claim that the damages awarded were excessive: 'The court will not interfere in such cases unless the amount awarded is so grossly excessive as to shock the moral sense, and raise a reasonable presumption that the jury was under the influence of passion or prejudice. In this case, while the sum awarded [$7,500 on account of newspaper article] appears to be much larger than the facts demanded, the amount cannot be said to be so grossly excessive as to be reasonably imputed only to passion or prejudice in the jury. In such cases there is no accurate standard by which to compute the injury, and the jury must necessarily be left to the exercise of a wide discretion, to be restricted by the court only when the sum awarded is so large that the verdict shocks the moral sense, and raises the presumption that it must have proceeded from passion or prejudice.'" If the award had impressed the trial court as being obviously the result of passion, prejudice, or disregard of its instructions, a new trial might have been ordered by the court of its own motion, as was suggested in Bond v. United Railroads, 159 Cal. 270, 287, 113 P. 366, 48 L. R. A. (N. S.) 687, Ann. Cas. 1912C, 50. Since no such action was taken, it is manifest that the judge who heard the evidence, saw the witnesses, and had his attention later directed to the case in all its aspects upon consideration of the motion for new trial, found no impropriety in allowing the verdicts to stand as rendered. "The trial court should be vigilant to set aside verdicts where there is reason to believe this [emotional verdict rendered] has been done, or that passion, prejudice, or sympathy has influenced the jury to give more than the facts reasonably warrant. * * * Practically, the trial court must bear the whole responsibility in every case." Bond v. United Railroads, supra, at page 286 of 159 Cal., 113 P. 366, 373.

In Chiarini v. Rochon, 1 Cal. Unrep. 540, the following language attracts attention: "If the damages were excessive, it was incumbent on the defendant, in his statement on motion for new trial, to specify in what respect the evidence was insufficient to support this portion of the finding, or wherein or for what reason the damages were excessive. If the matter had thus been brought to the attention of the court and counsel, it might then have been corrected, if erroneous; but it is too late to raise the point for the first time in this court." Under the circumstances of this case, we do not feel that the question of excessive damages is one for us to pass upon, that question not having been raised in the lower court (8 Cal. Jur. 837); however, we have no hesitation in saying that the amount awarded by the jury does not impress us as being excessive, having in mind the character of the statements which the jury found the defendant uttered concerning the plaintiff.

We pass now to the claim of appellant that the jury may have been misled by erroneous or ambiguous instructions given by the court. Having examined all the instructions carefully, we find that the jury was limited thereby to a verdict for actual damages, if they should find that defendant uttered substantially the words charged in the complaint, being expressly advised that no punitive or exemplary damages were sought by the plaintiff. Reading all the instructions together, we are convinced that the verdicts rendered by the jury were not grounded in any part upon actual malice or malice in fact, as it is sometimes called; that the jury did not attempt to assess exemplary damages, but merely the actual damages which they found the plaintiff sustained by reason of the tort committed by appellant. "The respondent is not required to prove, and in the nature of things cannot prove, the extent to which he has been damaged by this libel. * * * It is well settled that in such cases as this a jury may consider as a basis for its award of actual damages all of such matters as those set out above, including * * * his good name and reputation, his injured feelings and his mental sufferings." Scott v. Times-Mirror Co., 181 Cal. 345, 365, 184 P. 672, 681, 12 A. L. R. 1007.

The judgment is affirmed.

We concur: HOUSER, Acting P. J.; YORK, J.

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130 Cal.App. 735

HUTCHON v. ROSE et al.

Civ. 8311.

District Court of Appeal, Second District, Division 2, California.

March 31, 1933.

1. Brokers 🔑86(1).

Evidence showed implied agreement by broker to forbear suing another broker for commissions as result of owner's promise to pay commission if other broker did not.

2. Brokers 🔑74.

Broker's implied agreement to forbear suing another broker for commissions as result of owner's promise to pay if the other broker did not, with actual forbearance, was sufficient to make promise binding on owner.

Appeal from Superior Court, San Diego County; Lacy D. Jennings, Judge.

Action by David C. Hutchon against Ray Clarke Rose and others. From a judgment for plaintiff, defendant named appeals.

Affirmed.

Edward J. Kelly, of Los Angeles, for appellant.

Lyon, Fleming & Robbins, of Los Angeles, for respondent.

CRAIG, Justice.

In an action for a share of brokers' commission alleged to have been earned in negotiating a sale of certain real property, judgment was rendered in favor of the plaintiff, from which the defendant appealed.

[1, 2] The principal question presented by the appellant's briefs must be determined upon the sufficiency or insufficiency of the evidence to support judgment. It appeared that the respondent demanded payment for his services from one H. S. Sewell, who had been employed by the appellant to effect a sale of real estate. One J. E. Saint, who was then assisting Sewell in obtaining a sale of the same property, introduced the latter to the respondent, who worked with Sewell and the purchaser until the transaction was placed in escrow which resulted in its consummation. Sewell agreed in writing to a division of such commission as might be due to himself and Saint with the respondent, which agreement was delivered to Hutchon, approved by Saint, and so reported back to Sewell. Thereafter the respondent wrote the appellant, setting forth foregoing agreement, attached a copy thereof to his letter, and the same was approved in writing by the appellant. Following a failure of payment of his share of earned commissions, the respondent was about to commence action against Sewell therefor, whereupon the appellant agreed that if he would refrain from instituting such suit he (Rose) would promise in writing to pay the same, and it appeared that the respondent thereafter received such written assurance. The appellant executed and delivered a statement that, "in case Mr. Sewell, the broker through whom we made the transaction, fails to pay you three thousand dollars ($3,000) * * * I will personally pay you that amount within a reasonable length of time." The respondent testified: "He explained that there was no necessity for doing so; that he would be in my office next morning, and would settle it up. * * * I told him again that unless the matter was closed then and there, I would commence an action for collection of the commission. He then said to me that if I would refrain from doing that at that time that he himself would agree to pay me, if Mr. Sewell did not. I then asked him in front of the witness would he put it in writing and he said 'yes,' and I dictated the letter which I think you have before you, which he signed." Authorities cited to cases wherein no forbearance nor agreement to forbear from instituting legal action was made to appear, we think inapplicable to the instant case. That the appellant was liable for payment of a commission to Sewell, and that he wrote the respondent recognizing the latter's "dealings with Sewell * * * and my efforts to help you in the collection of the amount are purely voluntary," is apparent. Actual forbearance from commencing suit against Sewell having been so effected by the appellant, it cannot successfully be denied that at least an implied agreement to forbear existed as a result of his promise. This was sufficient. Whelan v. Swain, 132 Cal. 389, 64 P. 560; Humboldt Savings, etc., Society v. Dowd, 137 Cal. 408, 70 P. 274.

The judgment is affirmed.

We concur. WORKS, P. J.; ARCHBALD, Justice pro tem.

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130 Cal.App. 522

PEOPLE v. DYE.

Cr. 2258.

District Court of Appeal, Second District, Division 1, California.

March 23, 1933.

Hearing Denied by Supreme Court April 21, 1933.

1. **Criminal law ⇨1189.**

Reversal of conviction and of order denying new trial in criminal case constituted order for new trial so as to give trial court jurisdiction of second trial.

2. **Criminal law ⇨193½.**

That on first trial accused was found guilty of murder in second degree constituted no bar to conviction of murder in first degree on second trial.

3. **Homicide ⇨307(4).**

Where only issue was whether murder during attempted robbery or burglary was committed by accused, instruction that jury must convict of first degree murder or find accused not guilty was not error (Pen. Code, § 189).

4. **Homicide ⇨307(4).**

Where only issue was whether murder during attempted robbery or burglary was committed by accused, refusal to instruct that in case there was reasonable doubt as to which degree of offense had been committed accused could be convicted only of lowest degree *held* not error (Pen. Code, § 189).

Appeal from Superior Court, Los Angeles County; Thomas P. White, Judge.

Lloyd W. Dye was convicted of murder in the first degree, and he appeals.

Affirmed.

Catherine A. McKenna and J. Irving McKenna, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Lionel Browne, Deputy Atty. Gen., for the People.

CONREY, Presiding Justice.

Upon conviction of murder in the first degree the defendant was sentenced to imprisonment for the term of his natural life. He appeals from the judgment and from the order denying his motion for a new trial.

As the result of a former trial this defendant was convicted of murder in the second degree. On appeal to this court from the judgment and from an order denying motion for a new trial the judgment and order were reversed. People v. Dye, 119 Cal. App. 262, 6 P.(2d) 313.

[1] At the opening of the second trial defendant moved to dismiss the action, and that he be discharged from custody, on the ground that the District Court of Appeal had reversed the judgment without ordering a new trial. Appellant now contends that the court erred in denying the motion, and relies upon In re Hampton, 98 Cal. App. 480, 277 P. 170, and the provisions of the Penal Code mentioned in that decision. The point is without merit. The decision in the Hampton Case merely declared that where the appeal is from the judgment alone, and where the court reverses the judgment without making any order concerning the subject of new trial, such reversal operates as a final determination of the action. The former appeal in this case not only reversed the judgment, but also reversed an order denying motion for new trial, and thereby, in effect, ordered a new trial.

[2] Next, it is contended that because the jury at the former trial found the defendant guilty of murder in the second degree, he could not now lawfully be convicted of murder in the first degree. We think that this point is without merit. In People v. Superior Court, 202 Cal. 165, 173, 259 P. 943, 946, the Supreme Court said: "A person charged with murder is not acquitted of a higher degree until a valid conviction obtained in the law's form has become final. It is true that a conviction of manslaughter has been held to be an acquittal of murder. But in no case has it been held that a conviction of murder in the second degree, or in the first degree punishable with life imprisonment, upon a new trial granted, bars a conviction of murder carrying with it the death penalty." Neither do we think that such conviction of murder in the second degree would bar a conviction of murder in the first degree with recommendation to life imprisonment.

[3, 4] It is next contended that the court committed reversible error in directing the jury that they could only convict of first degree murder, or find the defendant not guilty; and in refusing to instruct that, "when it appears that the defendant has committed a public offense, and there is a reasonable ground of doubt in which of the two or more degrees he is guilty, he can be convicted of the lowest degree only." The court refused this instruction for the stated reason that there was no evidence as to any offense except first degree, and that lesser degrees were not here involved. In giving the instruction as stated, and in refusing said requested instruction, the court did not err. Upon the evidence produced before the court there remained no doubt that the crime committed was the crime of murder in the first degree, and there was no evidence to the contrary. The only real question was the question as to whether or not this defendant was guilty of the crime. "In a criminal case instructions are always to be given with reference to the facts proved before the jury. Accordingly, it is the established rule that on the trial of a person charged with murder it is proper to

refuse to give an instruction as to a lesser degree than that of murder in the first degree, or as to a lesser offense included within the crime charged, if the evidence is of such a nature as to warrant only a verdict of first degree murder, in the event that the accused is guilty at all." People v. Watts, 198 Cal. 776, 793, 247 P. 884, 890. In this case the murder was committed in the course of an attempt to perpetrate robbery, or burglary, and therefore was murder in the first degree. Pen. Code, § 189.

We are satisfied that the evidence is sufficient to sustain the verdict. It is at least as completely sufficient, and in large part is the same, as the evidence produced at the first trial, which was reviewed in the decision of the former appeal, where it was held that there was evidence sufficient to have sustained a conviction if such conviction had been secured without the use of a confession which this court held was erroneously admitted in evidence. That error was not repeated at the second trial.

The judgment is affirmed, and the order denying motion for new trial is affirmed.

We concur: HOUSER, J.; YORK, J.

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130 Cal.App. 722

LEWIS et al. v. SCAZIGHINI.

Civ. 387.

District Court of Appeal, Fourth District, California.

March 30, 1933.

Hearing Denied by Supreme Court May 29, 1933.

Brokers ⚷42.
Property ⚷5.

Well water, when delivered under sales contract to oil company for drilling operations, became "personalty" and persons securing contract were not required to be licensed real estate brokers to recover compensation.

[Ed. Note.—For other definitions of "Personal Property," see Words and Phrases.]

Appeal from Superior Court, Kings County; K. Van Zante, Judge.

Action by W. D. Lewis and another against Russell G. Scazighini, also known as Russell Scazighini. From an order sustaining a demurrer, plaintiffs appeal.

Reversed with directions.

Everts, Ewing, Wild & Everts, Dan F. Conway, A. W. Carlson, and L. N. Barber, all of Fresno, for appellants.

M. L. Short and J. F. Pryor, both of Hanford, for respondent.

MARKS, Justice.

Appellants brought this action for an accounting, and for 25 per cent. of the money received for water sold from wells on respondent's ranch. The action finds its source in the following contract between the parties: "Coalinga, Fresno County, California, January 21—1929. I hereby enter into a contract with Wm. D. Lewis and E. B. Shaw. Whereas I agree to pay Wm. D. Lewis and E. B. Shaw twenty-five per cent of all water sold from the well or wells on my ranch near Murray in Kings County on T 21–R 18–Sec. 34. The time of this contract to last as long as Wm. D. Lewis and E. B. Shaw succeed in the sale of water under contract to the various oil companies. The contract sale of water made by Lewis and Shaw to any one company not to be less than $300.00 per month. Lewis and Shaw agree to have a contract, for the sale of water made by not less than one company before the end of thirty days."

It is alleged in the amended complaint that, at the time of the execution of the agreement, respondent owned lands in Kings county upon which there were wells producing water particularly adapted for use in boilers; that within thirty days from the execution of the contract appellants entered into negotiations with various oil companies drilling oil wells in the neighborhood, and as a result of their efforts and within such thirty days, the Petroleum Securities Company and respondent entered into an agreement whereby the corporation "was to receive and use water upon the oil properties of said Petroleum Securities Company, a corporation, to be stored thereon and kept in reservoirs for the purpose of operating its oil developments on its said oil properties so located a few miles from the land of this said defendant"; that large quantities of water were delivered to and used by the oil company; and that respondent was receiving in excess of $300 each month, the exact amount being unknown to appellants.

Respondent interposed a general and special demurrer to the amended complaint, which was sustained without leave to amend. The special demurrer is on a ground without merit. The general demurrer was sustained on the theory that the contract called for the sale by appellants of an interest in real property and that appellants were not alleged to be licensed real estate brokers. The correctness of the order sustaining the demurrer depends upon the question of whether the water sold to the Petroleum Securities Company was real or personal property under the allegations of the amended complaint.

Respondent relies upon the line of cases of which Fudickar v. East Riverside Irrigation District, 109 Cal. 29, 41 P. 1024, 1026, is an illustration and wherein it is held that "so long as the water flows in its natural channel it is undoubtedly real property; and, while flowing by right through a canal or pipe which is real property and owned by the owner of the water, it is appurtenant to the canal or pipe, and therefore real property." It is also held that when this water is used for irrigation purposes it is real property, for irrigating water when spread on the land percolates through the soil. We have no such condition in the case before us. We are not considering irrigating water, but water sold for industrial use. For this reason these cases are of no assistance to us.

We have concluded that the water involved in this litigation no more partook of the characteristics of realty than does domestic water delivered by a municipality to its inhabitants for use within their homes or to an industrial plant for use within its factory. When the water was delivered to the oil company for use in its drilling operations, it became severed from the real property on which it was produced and became personalty. Dicta in the cases of Stanislaus Water Co. v. Bachman, 152 Cal. 716, at pages 725, 726, 93 P. 858, 15 L. R. A. (N. S.) 359, and Copeland v. Fairview Land, etc., Co., 165 Cal. 148, at page 154, 131 P. 119, point out this distinction. See, also, Hesperia Land & Water Co. v. Gardner, 4 Cal. App. 357, 88 P. 286. In 40 Cyc., p. 552, it is said: "In the character of personal property, water, separated from its source or from the body of which it constituted a part, may be bought and sold like other commodities, as when it is supplied through artificial conduits for domestic use."

The judgment is reversed with directions to the trial court to overrule the demurrer and permit respondent to answer the amended complaint if he elects so to do.

We concur: BARNARD, P. J.; JENNINGS, J.

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130 Cal.App. 661

WOLFERT v. GUADAGNO et al.

Civ. 8735.

District Court of Appeal, First District, Division 2, California.

March 29, 1933.

1. **Mortgages ⚿278.**

One purchasing real estate under writing which makes purchase subject to mortgage does not thereby assume mortgage.

2. **Mortgages ⚿283(1).**

Purchasers of property covered by trust deed, not having assumed debt, were not principal obligors, and were not bound to make payments.

3. **Mortgages ⚿283(2).**

Purchasers of property covered by trust deed not having assumed debt, dealings between them and trust deed beneficiary could not affect rights of grantors under trust deed.

Appeal from Superior Court, City and County of San Francisco; Michael J. Roche, Judge.

Action by Carl Wolfert against Pompy Guadagno and another. From the judgment, defendants appeal.

Affirmed.

Eric Lyders, of San Francisco, for appellants.

Harry Gottesfeld and George C. Carmody, both of San Francisco, for respondent.

DOOLING, Justice pro tem.

The question involved upon this appeal as stated on the first page of appellant's opening brief pursuant to subdivision 2 of rule VIII of the Rules of the Supreme Court, uses the letters A, B, and C to designate the names of certain individuals involved in the transaction. Substituting for these letters the names of those persons as they appear from the record, that statement will then read:

"Appellants purchased realty from respondent giving their note payable in instalments, secured by second deed of trust as part of consideration. Thereafter they conveyed to Smythe. Thereafter, and without the consent of appellants Smythe conveyed to Pollak and Pollak to Crothers. Transferees assumed payment of appellants' note and were accepted as payors by respondent. Respondent demanded of Crothers insurance different from that provided in deed of trust. Crothers defaulted in his payments and respondent gave notice of intention to sell under trust deed. Prior to sale respondent notified tenants to pay rent to him and to nobody else while trust deed provided for payment to trustee in such case.

"Thereafter the property was sold under trust deed. Respondent bought it for less than residue of debt and sued appellants, but not the subsequent transferees, for deficiency and had judgment from which appellants appeal.

"Appellants contend that when they sold to Smythe he became the principal obligor and they sureties and that by virtue of the subsequent transfers to Pollak and Crothers and the dealings between respondent and Crothers, contrary to the provisions of the trust deed, they were released."

For simplicity we have used in this statement "Pollak" and "Crothers," although the transfers were in fact to Pollak and wife and to Crothers and wife. Wherever in this opinion Pollak or Crothers is used the reference will be understood to include both husband and wife.

It will be observed from this quoted statement that the keystone of the structure of appellants' argument is found in the claim that "transferees assumed payment of appellants' note and were accepted as payors by respondent." Upon this assumption appellants claim: (1) That the substitution of Pollak and Crothers as principal obligors in place of Smythe discharged appellants as sureties for Smythe; and (2) that respondent's dealings with Crothers as principal obligor contrary to the provisions of the trust deed likewise discharged appellants. If the keystone of this argument falls, it must carry the whole structure with it into collapse.

As a matter of fact, the trial court found that neither Pollak nor Crothers assumed the payment of this obligation. Appellants attack these findings as contrary to the evidence. As to Pollak, neither the written agreement under which he purchased nor secondary evidence thereof was introduced, and there is no evidence in the record which would support a finding that he assumed this obligation. As to Crothers, the written agreement under which he purchased shows that he bought the property "subject to" the deed of trust.

[1-3] It is settled law that a purchaser of real property who buys under a writing which makes his purchase "subject to" a mortgage or deed of trust does not thereby assume or agree to pay the obligation so secured. Hibernia S. & L. Society v. Dickinson, 167 Cal. 616, 620, 140 P. 265; McArthur v. Goodwin, 173 Cal. 499, 505, 160 P. 679; Andrews v. Robertson, 177 Cal. 434, 439, 170 P. 1129; Gursky v. Rosenberg, 105 Cal. App. 410, 412, 287 P. 575. We find no other evidence in the record which would compel the trial court to find that Crothers assumed the payment of this debt. This being so, neither Pollak nor Crothers became principal obligors as claimed by appellants. While they held title, they were naturally interested in making the payments to protect their property, but they were not legally bound to make them. Conceding that Smythe assumed this obligation, although the trial court found otherwise, the legal obligation to make the payments never passed from him to his successors in title. Any dealings had between respondent and Pollak or Crothers could therefore not affect appellants' rights, unless they thereby legally assumed the obligation of paying this debt to respondent, or appellants' legal position in respect to the debt was in some manner changed. No such facts appear.

There is no showing that the demand for rent made on one tenant was acceded to by the tenant, or that appellants' rights were by such demand in any way affected. We may add that, while very little testimony is reprinted in appellants' brief, we have examined the typewritten transcript, and are satisfied that no injustice has been done to appellants.

Judgment affirmed.

We concur: SPENCE, Acting P. J.; STURTEVANT, J.

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130 Cal.App. 725

In re FRITZ' ESTATE.

MULLER v. STIEGELER.

Civ. 8862.

District Court of Appeal, First Dstrict, Division 2, California.

March 31, 1933.

Hearing Denied by Supreme Court May 29, 1933.

1. **Appeal and error 🔑1011(1).**

Decision on fact question on conflicting testimony is binding on appeal.

2. **Evidence 🔑220(2).**

Executor's silence when testatrix was told card to be signed creating joint tenancy would only enable executor to withdraw money from bank account *held* admissible as admission.

The card in fact was an agreement to create a joint tenancy in such account, and, when testatrix was told that card would only enable executor to withdraw money from account, he was under clear duty to explain.

3. **Evidence 🔑251(2).**

That executor denied having made admissions after testatrix' death did not render them inadmissible.

4. **Joint tenancy 🔑3.**

Where person deposits his money in joint account signing agreement constituting himself and another joint tenants, joint tenancy with right of survivorship is created, in absence of fraud, undue influence, or mistake (St. 1925, p. 512, § 2; St. 1929, p. 444, § 3).

5. **Evidence 🔑397(3).**

Evidence outside writing is inadmissible to vary effect of agreement creating joint tenancy through joint bank account.

6. **Joint tenancy 🔑3.**

Testatrix' deposit of her money in joint bank account with executor created joint tenancy under evidence.

There was no showing that the deposit was procured by fraud or undue influence.

7. **Evidence 🔑413.**

Statement in testatrix' will could not be considered to contradict writing by which joint tenancy was created with executor in bank account.

8. Executors and administrators ⚷490.

Testatrix' attempt to limit executor's compensation to sum which vested in him by right of survivorship could not be given effect (Probate Code, §§ 900, 901).

Appeal from Superior Court, Alameda County; Lincoln S. Church, Judge.

In the matter of the estate of Lisetta E. Fritz, deceased. From an order sustaining objections to the account of C. Alvin Muller, executor of the estate of Lisetta E. Fritz, deceased, he appeals, opposed by Anna Dorothee Stiegeler.

Reversed in part, and affirmed in part.

Lynn W. Culp, Sr., & Crozier C. Culp, of Oakland, for appellant.

McKee, Tasheira & Wahrhaftig, of Oakland, for respondent.

DOOLING, Justice pro tem.

This is an appeal by C. Alvin Muller, as executor of the will of Lisetta E. Fritz, deceased, from an order of the superior court sustaining two certain objections to the account of appellant as such executor and directing him to restate his account. At the date of the testatrix' death, two joint bank accounts stood in the names of appellant and the testatrix. One in the Central Savings Bank of Oakland in the sum of $3,757.56 and the other in the Bank of California in San Francisco in the sum of $1,428. In his account the appellant failed to include either amount, claiming that upon the testatrix' death both vested in him as surviving joint tenant. Since the objections to the failure to include these amounts were as to each based upon a different ground, we pass to a consideration of each separately.

[1] As to the Central Savings Bank account, the court found that appellant had procured the testatrix to sign a purported joint tenancy agreement by fraud shortly before her death, and ordered appellant to account for the amount of such account. In this behalf the court found that for a long time prior to the execution of the purported joint tenancy agreement the testatrix had owned a bank account in the Central Savings Bank; that on May 12, 1931, decedent requested Anna Dorothee Stiegeler to telephone appellant and ask him to make arrangements with said bank so that money could be withdrawn from said account to pay the hospital bills and expenses of the testatrix; that pursuant to such request Mrs. Stiegeler so telephoned to appellant, and on the following day appellant and Mrs. Stiegeler met in the hospital room where the testatrix then was; that at said time Mrs. Stiegeler in appellant's presence told the testatrix that appellant had with him a card to be signed which would permit appellant to withdraw moneys from her account to pay hospital bills and expenses; that neither Mrs. Stiegeler nor the testatrix read such card or knew its contents; that appellant did not deny Mrs. Stiegeler's statement to the testatrix nor explain to her that the card was not a mere authorization to withdraw moneys from her account, although in fact it was an agreement to create a joint tenancy in such account with appellant; and that said act of appellant in not disclosing to the testatrix the effect of said card and in permitting her to sign it, believing that it was a mere authorization to draw money, constituted actual fraud.

Without detailing the testimony, it will suffice to say that everything so found is supported by competent evidence, and, while a conflict exists in the testimony, we are bound on appeal by the resolution of that conflict in favor of the respondent.

[2] Appellant complains of the introduction of the evidence of Mrs. Stiegeler's statement to the testatrix that appellant had brought a card for her to sign to enable him to withdraw money from the account and his silence in the face of such statement. In this behalf he cites cases from other jurisdictions holding that the failure to deny a statement made by a third person cannot constitute an admission, in the absence of a duty to speak. Conceding these authorities their full weight, such a duty was cast upon appellant. The court found that the testatrix requested Mrs. Stiegeler to telephone to appellant and ask him to arrange to withdraw money from her account, and that Mrs. Stiegeler did so. Under such circumstances, when Mrs. Stiegeler told the testatrix in appellant's presence that he had brought a card for her to sign to enable him to withdraw money, he was under a clear duty to explain to her that the card was not a mere authorization, but was in fact an agreement for a joint tenancy. Indeed, had nothing been said about the purpose or nature of the card, the mere presentation of a card purporting to create a joint tenancy in response to a request from the testatrix to arrange to withdraw money from her account would have constituted a fraud upon her without more.

[3] Appellant complains of the reception of certain evidence in the nature of admissions made by him after the testatrix' death. While appellant denied having made the admissions, this did not render evidence of them inadmissible. We find no error in connection with the trial court's order sustaining the objection to the failure to account for the money in the account in the Central Savings Bank of Oakland.

[4-7] The joint tenancy account in the Bank of California was created from funds theretofore belonging solely to the testatrix on January 9, 1928. At that time the testatrix and appellant both signed the following form of agreement upon a card furnished by the bank and retained by it: "This Time Account and all money now or hereafter credited thereon are the joint property (with right of survivorship) of Lisetta E. Fritz and C. Alvin Muller and payable on check of either and in case of death to the survivor."

In the will admitted to probate the testatrix inserted the following provision: "My money standing in my name and the name of C. Alvin Muller is all my own but as Mr. C. Alvin Muller is my executor, I added his name to my Bank Book in the Bank of California on California St. near Sansome St. for his convenience so that he can pay all honest debts of my funeral, etc. Then he may keep the balance for his services."

The trial court found in this connection:

"It was the purpose and intent of said decedent, as set forth in said quoted provision of said will, to compensate said executor for his services as such executor by permitting him to retain the balance of said savings account, and said compensation was to be in lieu of the statutory compensation to which an executor is entitled under the law. * * *

"The said bank account above referred to in the amount of $1428, notwithstanding the fact that it stood in the joint names of C. Alvin Muller and said decedent, was and is the property of said decedent, and C. Alvin Muller has no interest therein."

The court accordingly ordered that the statutory commission of the executor be disallowed, unless he should file a written stipulation waiving all claim to the sum of $593, the balance in such account, and account for said $593 as a part of the assets of the estate, in which event he may claim his statutory fee.

Appellant attacks the finding that the amount in this bank account was and is the property of the decedent as unsupported by any evidence. There is abundance of authority that, where a person deposits money belonging to himself in a joint account in the name of himself and another, and signs a written agreement with that other constituting himself and the other joint tenants therein, in the absence of fraud, undue influence, or mistake, a joint tenancy with right of survivorship is created, and that no evidence outside the writing itself is admissible to explain or vary its effect. Kennedy v. McMurray, 169 Cal. 287, 146 P. 647, Ann. Cas. 1916D, 515; Conneally v. San Francisco S. & L. Socy., 70 Cal. App. 180, 232 P. 755; Estate of Gurnsey, 177 Cal. 211, 170 P. 402; Estate of Nelson, 104 Cal. App. 613, 619, 286 P. 439. This rule is strengthened by the provisions of the Bank Act, which both at the time of the creation of this joint account (Stats. 1925, p. 512, § 2) and at the present time (Stats. 1929, pp. 444, 445, § 3) contained in section 15a the following provision with regard to deposits "made in any bank by any person in the names of such depositor and another person and in form to be paid to either or the survivor of them": "The making of the deposit in such form shall, in the absence of fraud or undue influence, be conclusive evidence, in any action or proceeding to which either such bank or the surviving depositor is a party, of the intention of both depositors to vest title to such deposit and the additions thereto in such survivor."

In Hill v. Badeljy, 107 Cal. App. 598, 290 P. 637, this court sustained the constitutionality of this provision of the Bank Act, and held that the making of a deposit in this form was conclusive evidence of the intention to vest title in the survivor, in the absence of a showing of fraud or undue influence. Since no claim is made by respondent in the briefs, and no finding was made by the court, that this deposit was procured by fraud or undue influence, and we find no evidence in the record to that effect, we conclude that the trial court erred in finding that this bank account "was and is the property of said decedent, and C. Alvin Muller has no interest therein."

We may add that the statement of testatrix in her will that this money "is all my own," etc., cannot be considered to contradict the writing by which the joint tenancy was created. Crowley v. Savings Union Bank, 30 Cal. App. 144, 155, 157 P. 516; Rowe v. Hibernia S. & L. Socy., 134 Cal. 403, 407, 66 P. 569; Estate of Learned, 156 Cal. 309, 311, 104 P. 315; Potter v. Smith, 48 Cal. App. 162, 169, 191 P. 1023; Estate of McCarthy (Cal. App.) 15 P.(2d) 223. It must be held under the authorities that the testatrix and appellant held this account in joint tenancy, and that upon the death of the testatrix it vested in appellant by right of survivorship.

[8] Section 900 of the Probate Code (formerly Code Civ. Proc. § 1616) provides: "The executor or administrator shall be allowed all necessary expenses in the care, management and settlement of the estate, and, for his services, the compensation hereinafter provided; but when the decedent, by his will, makes other provision for the compensation of the executor, that shall be a full compensation for his services, unless by a written instrument, filed in the court, he renounces all claim for compensation provided for in the will."

Section 901 of the Probate Code (formerly Code Civ. Proc. § 1618) provides: "The executor, when no compensation is provided by the will or he renounces all claim thereto, or the administrator, shall receive commissions upon the amount of estate accounted for by him, as follows. * * *"

Conceding that this account vested in appellant upon the death of the testatrix, respondent urges two arguments in support of the order of the court denying executor's fees to appellant, unless he renounces the balance in the account and surrenders it to the estate: First, respondent says that the creation of the joint tenancy may be treated as a payment of appellant's commission by the testatrix in advance of her death. If there was any competent evidence to establish that this was the agreement between the testatrix and appellant, this argument might carry weight; but outside of the declaration in the will itself, which under the authorities above quoted is not competent as evidence against appellant, there is not a syllable of evidence which would prove, or tend to prove, that appellant and the testatrix had any such understanding. Second, respondent argues that the case may be treated as one in which the testatrix provided that appellant should serve without compensation. Treating it as such, we are satisfied that such a provision would be in conflict with the intention and purpose of the sections of the Probate Code cited above. It is the plain and mandatory purpose of those sections that executors should receive the statutory compensation therein provided unless the will makes other provision for compensation, and even then the executor is given the right, in spite of the desire of the testator as expressed in the will, to renounce the compensation provided for by will, and claim the statutory fees. Estate of Shaw, 85 Cal. App. 518, 260 P. 351. It cannot be that the Legislature intended that, if the testator provided by will that the executor should receive $1 as compensation for his services, he could renounce the $1 and demand the statutory fees, but that, if the will provided that he receive nothing for his services, he would not be entitled to the statutory fees. To permit such a result would be to defeat the clear legislative intent that under any circumstances an executor should be entitled to receive the statutory compensation if he elected to do so.

It is true that under a similar statute an individual surrogate in New York reached a contrary conclusion (Secor v. Sentis, 5 Redf. Sur. [N. Y.] 570), but his reasoning and conclusion were afterwards criticized in In re Arkenburgh, 38 App. Div. 473, 56 N. Y. S. 523; and in New Jersey under a like statute the court arrived at a conclusion in accord with the one which we have announced (Tichenor v. Mechanics & Metals Nat. Bank, 96 N. J. Eq. 560, 125 A. 323, 325). The general statements from Woerner and Schouler quoted in the respondent's brief can be of little assistance in the construction of the particular provisions of our Probate Code.

We are satisfied that the attempt of the testatrix to limit appellant's compensation to a sum of money which vested in him absolutely upon her death by right of survivorship and upon which her will could not operate in any way cannot be given effect.

The order appealed from is accordingly reversed as to that portion only which deals with the account in the Bank of California and the allowance of the executor's statutory fee, and the trial court is directed to overrule and disallow the objections in those particulars and to order and approve the payment to appellant of the statutory fee for his services as executor upon his accounting for the balance in the account in the Central Savings Bank of Oakland. In all other respects the order is affirmed.

We concur: SPENCE, Acting P. J.; STURTEVANT, J.

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130 Cal.App. 568

SARNOW et al. v. WOOD et al.

Civ. 844.

District Court of Appeal, Fourth District, California.

March 23, 1933.

Rehearing Denied April 18, 1933.

Hearing Denied by Supreme Court May 22, 1933.

1. **Mines and minerals** ⚷20(1).

To sufficiently mark boundaries of mining claim, it is not enough to claim so many feet along vein or to post notices at each end of center line (Civ. Code, § 1426a).

2. **Mines and minerals** ⚷38(22).

When corners of mining claim have been marked but no side lines are laid down, whether boundaries can be traced is fact question for court (Civ. Code, § 1426a).

3. **Mines and minerals** ⚷38(22).

When monuments have been set at corners of mining claim and at center of each end, it is question of fact whether conformation of land was such that monuments so marked boundaries that they might be readily traced (Civ. Code, § 1426a).

4. **Mines and minerals** ⚷20(1).

Distinctly marking location on ground so that it can be readily traced is principal act of valid mining location (Civ. Code, § 1426a).

5. **Mines and minerals** ⚷38(19).

Evidence supported finding that plaintiffs did not define boundaries of claim so that they could be readily traced, and therefore did not make valid mining location (Civ. Code, § 1426a).

Appeal from Superior Court, Tulare County; Frank Lamberson, Judge.

Action by Ross L. Sarnow and another against Brooke P. Wood and another. From a judgment for defendants, plaintiffs appeal. Affirmed.

Robert T. Linney and Harold F. Clary, both of Los Angeles, for appellants.

Alfred Siemon, of Bakersfield, for respondents.

CAMPBELL, Justice pro tem.

This case involves conflicting mining claims growing out of mining locations of the respective parties upon the same ground.

The complaint is in the usual form of complaint in an action to quiet title. The answer traverses the allegations of the complaint and pleads the acquisition of the property described in the complaint by the respondents under the mining location as a separate defense. The separate defense is pleaded specifically and sets forth all the necessary requirements to make a valid mining location upon the public domain. The court found in favor of the respondents and their special defense and gave judgment accordingly. Appellants contend that the judgment of the trial court was erroneous and should be reversed. The questions presented are: (1) Were the boundaries of the mining claim sufficiently marked; (2) did the appellants do the annual assessment work; (3) does the evidence offered at the trial support the findings of fact; (4) do the findings of fact support the conclusions of law and judgment? The issues raised by the pleadings are broad enough to include all questions going to the legality or sufficiency of the mining locations of the respective parties. The allegations of the complaint, except that which states the respondents' claim and interest adverse to the appellants, are all found to be untrue in the first paragraph of the findings. The finding is in the same general language as the pleading and is therefore legally sufficient, and it may be justified on any specific ground, although not particularly stated, that would render the mining claim invalid.

The second paragraph of the findings adopts and finds all of the allegations of the separate defense to be true. This defense specifically pleads all of the conditions precedent to a valid mining location upon the public domain, including monumenting the corners and marking the boundaries, as well as continued exclusive possession of the ground since the time of the original discovery, together with the performance of the annual assessment work required by law. The finding last mentioned excludes the idea of possession by appellants as well as the idea that they may have done or performed any annual assessment work subsequent to the date of discovery by respondents on February 23, 1928.

Thus the first two questions on this appeal, viz., (1) were the boundaries of the mining claim sufficiently marked, and (2) did the appellants do the annual assessment work, have been by the trial court decided adversely to appellants.

It becomes necessary to quote some of the testimony relating to the marking of the boundaries of the mining claim in question, in order to determine whether the findings of the trial court are sustained by the evidence.

The witness A. E. Stegeman, a civil engineer and surveyor who had recently made a survey of the land in question, testified among other things, as follows:

"Q. I will ask you this: Could you go on the ground there and determine from the marking on the ground what the boundaries of the Arminta Mae claim were? * * * A. If I was to go there in the capacity of a mineral surveyor, I could not survey the claim, because the boundaries are not on the ground."

A witness, Mrs. Sorrels, testified as follows:

"Q. Now what was the east corner, southeast corner of the claim; how was that marked? A. I don't remember just how it was. I think it was—that was near the fence too, but I don't remember how it was marked, whether it was a tree, an oak or a mahogany tree.

"Q. Any brush in there? A. Yes, sir.

"Q. What kind of brush? A. It was mahogany brush, and there is chaparral brush, and there is buckeye brush and chin oak.

"Q. And pretty thick there? A. In places it is very thick so you have to crawl on your hands and knees.

"Q. What was the marking on the southwest corner of the claim? A. I don't remember that one, either.

"Q. Was any brush in there? A. Yes, sir.

"Q. Had any of it been cut out? A. I didn't notice that there had been when I was there."

And Mr. Wood, one of the respondents, testified as to the markings on the claim on the ground, as follows:

"Q. And did you see the outlines of the corners, that is, the markings of the claim that is usually made? A. No, sir.

"Q. You didn't examine those? A. I examined them, but I couldn't find them. The lines wasn't brushed out."

Carl Sarnow, one of the appellants, testified as follows:

"Q. Well, did you erect any monument, or make any marks on the ground, except the one at the point of discovery? A. A very few days after that, two or three days after that, I might say.

"Q. All right. A. We established our corners, and just the center of the claim, and laid out the claim.

"Q. And how did you do that? A. By erecting a monument of stone at what we call the west end center, a monument of stone at the east and center, and also the four corners of the claim."

On cross-examination the same witness testified as follows:

"Q. What did you do towards marking the side lines? A. Didn't do a thing on the side lines.

"Q. What did you do toward marking the end lines? A. Just made in the center, erected a monument of stone and blazed on trees on both centers, marked with a pencil, and so forth.

"Q. Blazed on trees on end centers? A. Yes, sir, and marked on the blaze.

"Q. Was that monument of stone there? A. Yes, sir."

Section 1426a of the Civil Code provides that: "The locator must define the boundaries of his claim so that they may be readily traced, and in no case shall the claim extend more than fifteen hundred feet along the course of the vein or lode, nor more than three hundred feet on either side thereof, measured from the center line of the vein at the surface."

[1-4] It is not enough to claim so many feet along the vein (Newbill v. Thurston, 65 Cal. 419, 4 P. 409), or to post notices at each end of the center line (Holland v. Mt. A., etc., Co., 53 Cal. 149). When the corners have been marked but no side lines are laid down, it becomes a question of fact for the court to determine whether the boundaries can be traced (DuPrat v. James, 65 Cal. 555, 4 P. 562); and when it has been shown that monuments or stakes have been set at the corners and at the center of each end, it becomes a question of fact whether or not the conformation of the land was such that such monuments so marked the boundaries that they might be readily traced (Taylor v. Middleton, 67 Cal. 656, 8 P. 594). Distinctly marking the location on the ground so that it can be readily traced is the principal act of the location. Donahue v. Meister, 88 Cal. 121, 131, 25 P. 1096, 22 Am. St. Rep. 283. In United States v. Castillero, 2 Black, 1, 191, 17 L. Ed. 360, the United States Supreme Court, said that marking boundaries was necessary or the claim would "be void for uncertainty," and "compliance with the requirement is essential to show what extent of the public domain has been segregated from the mass of such lands and has passed into private ownership."

[5] The implied finding of the trial court that the appellants did not define the boundaries of their claim so that they may be readily traced is amply supported by the evidence. There is a sharp conflict in the testimony as to whether or not the respondents did the annual assessment work, but the evidence is sufficient to support the implied finding that no work had been done by appellants sufficient to hold the claim. We think that under the evidence the trial court was justified in holding against appellants upon both grounds which have been discussed, and that either the failure of the appellants to initiate a valid claim or their failure to do the annual assessment work, will alone warrant the judgment.

The judgment is therefore affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

PEOPLE v. SKOFF.*

Cr. 1249.

District Court of Appeal, Third District, California.

March 30, 1933.

Rehearing Granted April 14, 1933.

1. Criminal law 🔑1136.

On state's appeal from order granting defendant new trial after verdict of guilty of driving while intoxicated, state could not complain that court struck out evidence regarding finding of bottle of liquor near defendant's automobile.

2. Criminal law 🔑1156(2).

Order granting new trial for insufficiency of evidence to support judgment will not be disturbed, except for clear abuse of discretion.

3. Criminal law 🔑1158(1).

Where there is substantial evidence supporting trial court's ruling granting new trial for insufficiency of evidence to support judgment, ruling should not be disturbed.

4. Criminal law 🔑1159(3).

Where record discloses conflict of testimony, reviewing court will not weigh evidence.

5. Criminal law 🔑935(1).

Where there was substantial evidence that defendant's appearance of apparent intoxication was caused by shock following injuries, court properly granted new trial on ground of insufficiency of evidence to support conviction for driving automobile while intoxicated (Pen. Code, § 367e).

🔑For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 21 P.2d 118.

Appeal from Superior Court, Sonoma County; Donald Geary, Judge.

Martin Skoff was convicted of driving an automobile while intoxicated, but a new trial was granted, and the State appeals.

Affirmed.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

H. B. Churchill, of Santa Rosa, for respondent.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

The defendant was convicted by a jury of driving his automobile while he was under the influence of intoxicating liquor, contrary to the provisions of section 367e of the Penal Code. Upon motion therefor, a new trial was granted. The state has appealed.

The defendant is a farmer residing near Cotati. At 9 o'clock on the evening of August 28, 1932, a collision occurred on the highway near his home between the defendant's automobile and a machine which was being driven by the prosecuting witness, Marie Gutermute. The defendant claimed the wheels of his car had dropped into the rut which existed adjacent to the right-hand side of the concrete pavement; that in his effort to pull the machine back onto the pavement he lost control of it, and the car crossed onto the wrong side of the highway, causing the collision. Miss Gutermute's machine was overturned, but she was only slightly injured. The defendant was thrown violently against the steering wheel of his car. His chest was injured. A rib was broken. He received a cut on the elbow, which, he claims, caused a numbness and partial paralysis of that side of the body. Two teeth were knocked out, and his mouth and nose were bleeding. He asserts that he was dazed and partly unconscious from the effect of the shock. Miss Gutermute extricated herself from the overturned machine, and walked over to the car of the defendant, which remained upright on the pavement. She observed his bleeding nose. She charged him with negligence. She even accused him of being drunk. He did not reply to her accusations. He sat silent beside another man who occupied the front seat with him. She said he did not seem to know anything. It is related he sat in his seat in this attitude for approximately fifteen minutes until two highway patrolmen arrived in their car. In the meantime Miss Gutermute had returned to her machine. The officers first talked with her. They then went over where the defendant sat in his machine. One of the officers asked him how the accident occurred. He said the girl ran into him. He was then requested to get out of his car, but he said that he was unable to do so. The officer helped him out, and assisted him to walk to their machine. The officer testified that the defendant seemed excited; his eyes were inflamed, and an odor of liquor was upon his breath. In the meantime the other officer searched the defendant's car for liquor, but found none. In the grass, about fifteen feet from the defendant's machine, the officers found a bottle half filled with jackass brandy. Both men denied they had any knowledge of this bottle. The defendant admitted they had drunk half a bottle of wine with their lunch in the middle of the afternoon. The defendant denied that he had imbibed any other liquor that day. He testified he never saw or heard of the bottle of brandy until it was produced by the officer.

The defendant was taken by the officers to Santa Rosa. Within about one hour of the time of the accident, a doctor was called, and, after examining the defendant as to his sobriety, testified that he was "unable to walk a chalk line"; that the pupils of his eyes were dilated; that he did not articulate clearly; and that he discerned "a marked odor of liquor" on his breath. The doctor said the defendant walked with his hand on his chest, that he complained of pain in the chest and arm, and that his mouth was bleeding. The doctor nevertheless pronounced him intoxicated. A subsequent examination by another doctor disclosed the fact that the defendant was seriously injured as above related. At the trial six reputable neighbors of the defendant testified they had known him many years, and that he bore a good reputation as to sobriety. Two or three of them said they had never known of his drinking intoxicating liquor. The jury found him guilty of the offense with which he was charged, but recommended the imposition of a fine as penalty therefor.

[1] During the trial the bottle of jackass brandy was admitted in evidence without tracing its possession to the defendant or his associate, except that it was found in the grass near the roadside a short distance from their machine. Upon motion, the evidence of this bottle of liquor was stricken from the record, and the jury was admonished to disregard it. As reasons for granting the new trial, the court assigned "error in admitting in evidence the bottle of liquor and testimony regarding the same, and because the evidence * * * was not sufficient to warrant a conviction."

The Attorney General argues that the court erred in striking the evidence of the bottle of liquor from the record and admonishing the jury to disregard it, and that the court abused its discretion in granting the motion for a new trial.

Regardless of whether the court properly struck from the evidence the testimony regarding the bottle of liquor which was found near the defendant's machine, the state may not complain of that fact, because the jury nevertheless found the accused guilty of the offense with which he was charged. If that ruling was erroneous, and the new trial had been granted upon the admission of that evidence alone, the order might properly be reversed upon the theory that the court was otherwise satisfied the verdict was amply supported by competent testimony. But the court specifically granted the new trial upon the added ground that, regardless of the effect of the testimony of the presence of jackass brandy, "the evidence was not sufficient to warrant a conviction."

It may be doubtful whether the evidence of the presence of the bottle of jackass brandy was properly excluded from the jury under the circumstances of this case. A collision had just occurred. The defendant's intoxication was charged as the cause of the accident. There was substantial evidence that the odor of alcohol was upon his breath. The car was standing on the highway in a sparsely settled country district. The bottle was found in the grass within a few feet of the automobile where it was likely to have been thrown by the occupants of the machine. There appears no other reasonable way to account for the presence of the bottle at that particular time and place. In the case of State v. Gondeiro, 82 Mont. 530, 268 P. 507, 508, under similar circumstances, the finding of a bottle of liquor in close proximity to the machine of an accused person was held to be competent evidence upon a charge of manslaughter. The court said: "It is urged strenuously that the court erred in admitting testimony respecting the bottle found in proximity to the car. We are wholly unable to agree with this argument. Clearly the testimony was relevant."

In spite of the exclusion of this evidence in the present case, the jury found the defendant guilty, and the prosecution was not harmed thereby.

The real issue upon this appeal is whether the court abused its discretion in granting a new trial upon the ground that "the evidence was not sufficient to warrant a conviction." It is not a question as to whether the evidence shows that the defendant had been drinking intoxicating liquor or whether he was actually possessed of a bottle of jackass brandy. The real question is whether the defendant was intoxicated while he was engaged in driving his automobile. The evidence is conflicting on this subject. The prosecution's witness, Dr. Shipley, admitted that, if the defendant had been seriously injured, as he claimed that he was, the shock and the result thereof might cause the pupils of his eyes to be dilated and account for his unsteady and apparently helpless condition. There appears to be no doubt he was more seriously injured than he at first claimed to be. Moreover, half a dozen reputable neighbors testified to his former good reputation for sobriety. The record certainly contains substantial evidence that his appearance and condition of apparent intoxication were caused by the shock which followed his serious injuries. The trial judge observed the witnesses on the stand, and had a much better opportunity to judge of the credibility and weight of the evidence.

[2-5] Upon an appeal from an order granting or denying a new trial for the insufficiency of evidence to support the judgment, the order of the court will not be disturbed except for a clear abuse of discretion. If there is substantial evidence to support the ruling of the trial court, it should not be disturbed. Where the record discloses a conflict of testimony upon that issue, the reviewing court will not weigh the evidence. The trial judge has a much better opportunity of passing upon the weight and sufficiency of the evidence. 20 Cal. Jur. 27, § 13; 2 Cal. Jur. 905, § 533; Quinn v. Kenyon, 22 Cal. 82; Petroff v. Nunes, 123 Cal. App. 614, 11 P.(2d) 648; Gaster v. Hinkley, 85 Cal. App. 55, 258 P. 988; Peri v. Culley, 119 Cal. App. 117, 6 P.(2d) 86. In 20 California Jurisprudence, 27, it is said: "It is settled that a motion for new trial is, to a large extent, addressed to the sound legal discretion of the court to which the application is made, and that its action, either in granting or refusing a new trial, is conclusive, and will not be disturbed—especially where the ground of the motion is insufficiency of the evidence to justify the verdict or decision and there is a substantial conflict in the evidence—in the absence of a clear and affirmative showing of a gross, manifest or unmistakable abuse of discretion."

In the present case we are unable to say there was an abuse of discretion on the part of the trial judge in granting the new trial.

The order is affirmed.

We concur: **PULLEN, P. J.**; **PLUMMER, J.**

130 Cal.App. 664

PEOPLE v. ROBINSON.

Cr. 2300.

District Court of Appeal, Second District, Division 2, California.

March 29, 1933.

Rehearing Denied April 13, 1933.

Hearing Denied by Supreme Court April 27, 1933.

1. Officers 🔑77.

Public office, quasi official or otherwise, is not "property."

[Ed. Note.—For other definitions of "Property," see Words and Phrases.]

2. Threats 🔑1(1).

Threat to expose judge to disgrace and impute disgrace to him unless he appointed defendant as receiver in pending action *held* not to support conviction of attempt to commit extortion, there being no attempt to extort "property" from another (Pen. Code, §§ 518, 519, 524).

Such alleged threat could not constitute extortion since extortion is defined by Pen. Code, § 518 as obtaining of "property" from another with his consent, induced by wrongful use of force or fear, or under color of official right, which fear, under section 519, may be induced by threat to expose, or impute to a person, deformity or disgrace, or to expose any secret affecting him, and since section 524 denounces attempt, by means of any threat specified in section 519, to extort "money or other property" from another.

3. Threats 🔑1(1).

Whether person making threat is guilty of attempt to commit extortion depends on his conduct and intent, regardless of effect on person threatened (Pen. Code, §§ 518, 519, 524).

4. Threats 🔑7.

Evidence that defendant, alleged newspaper editor and publisher, threatened, unless receiver in pending cases paid him $1,000, to "blow [certain receiverships] out of the water," *held* to support conviction of attempt to commit extortion, though no fear was actually produced in receiver's mind (Pen. Code, §§ 518, 519, 524).

Appeal from Superior Court, Los Angeles County; William Tell Aggeler, Judge.

Harold Robinson was convicted of attempts to commit extortion under the second and third counts of an indictment, and he appeals from the judgment of conviction and orders denying his motion for a new trial.

Judgment reversed as to the second count, and affirmed as to the third. Order denying motion for new trial on the second count reversed, and order denying motion for new trial on the third count affirmed.

Aileen M. MacLymont, Louis P. Russill, and J. H. Creighton, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Bayard Rhone, Buron Fitts, Dist. Atty., and Tracy Chatfield Becker, Deputy Dist. Atty., all of Los Angeles, for the People.

CRAIG, Acting Presiding Justice.

Upon an indictment charging attempts to commit extortion, the appellant was found guilty by a jury. He moved for a new trial, which was denied, and thereupon appealed from the judgment and from the orders entered upon said motions.

In one count of the indictment it was alleged that in violation of sections 518, 519, and 524 of the Penal Code, the defendant attempted to extort property from a judge of the superior court by a threat that he would publish and cause to be printed in a newspaper a statement falsely exposing said judge to disgrace and imputing disgrace to him, unless the latter should appoint him a receiver in an action then pending. In the remaining count it was charged that the defendant did "by means of a threat which he, the said defendant * * * did then and there * * * make and communicate orally to the said A. J. Showalter that he, the said defendant Harold Robinson would print and publish and cause to be printed and published in a newspaper edited and published by him, * * * and having a general circulation * * * a statement or article which would expose him the said A. J. Showalter to disgrace and would impute disgrace to him * * * and would express secrets affecting him * * * unless he * * * would pay and deliver or cause to be paid and delivered to the said defendant * * * the sum of * * * $1,000."

Said sections of the Penal Code provide, in part, as follows:

"§ 518. Extortion is the obtaining of property from another, with his consent, induced by a wrongful use of force or fear, or under color of official right."

"§ 519. Fear, such as will constitute extortion, may be induced by a threat, either: * * *

"3. To expose, or impute to him or them any deformity or disgrace; or,

"4. To expose any secret affecting him. * * *"

"§ 524. Every person who attempts, by means of any threat, such as is specified in section 519 of this code, to extort money or other property from another, is punishable by imprisonment * * * or by fine, * * * or by both such fine and imprisonment."

[1, 2] Based upon the testimony of Judge Walter S. Gates the evidence of threats under the first count referring to Robinson was that "he said, 'It is about time I was getting a receivership worth while. I have been sticking around here for a long while. * * * If you don't do something for me I'm going to print an article.' And he handed me the article. * * * The substance of the proposed article was that we were protecting A. J. Showalter, who was a receiver for us, and that we were getting friends and relatives positions." It has been settled law for many years that a public office, quasi official or otherwise, is not "property" within contemplation of the statutes nor of the Constitution. As stated by the Supreme Court of Illinois in an early case: "It is impossible to conceive how, under our form of government, a person can own or have a title to a governmental office. Offices are created for the administration of public affairs. When a person is inducted into an office, he thereby becomes empowered to exercise its powers and perform its duties, not for his, but for the public benefit. It would be a misnomer and a perversion of terms to say that an incumbent owned an office, or had any title to it. The doctrine on this subject is thus stated in the case of Conner v. The Mayor of New York, 1 Seld. [5 N. Y.] 285. It was there said: 'Public offices in this State are not incorporeal hereditaments, nor have they the character or quality of grants. * * * The prospective salary or other emoluments of a public office are not property of the officer, nor the property of the State. They are not property at all.'" Donahue v. County of Will, 100 Ill. 94. Opposed to the doctrine of common-law rulings cited by the respondent, we think the prevailing trend of American authorities is expressed in the quoted case. Attorney-General v. Jochim, 99 Mich. 358, 58 N. W. 611, 23 L. R. A. 699, 41 Am. St. Rep. 606; Moore v. Strickling, 46 W. Va. 515, 33 S. E. 274, 50 L. R. A. 279; Wilson v. City of New York, 31 Misc. 693, 65 N. Y. S. 328; Hawkins v. Roberts, 122 Ala. 130, 27 So. 327; State v. Henderson, 145 Iowa, 657, 124 N. W. 767, Ann. Cas. 1912A, 1286; Sumpter v. State, 81 Ark. 60, 98 S. W. 719; Gray v. McLendon, 134 Ga. 224, 67 S. E. 859; Mial v. Ellington, 134 N. C. 131, 46 S. E. 961, 65 L. R. A. 697. And the same rule has since been announced in this state in the language of Donahue v. County of Will, supra; Sponogle v. Curnow, 136 Cal. 580, 69 P. 255; In the Matter of Carter, 141 Cal. 316, 74 P. 997. The respondent would require by its contentions extension of the scope of our statutes to embrace an attempted coercion of the exercise of official duty to endow one with authority to possess and manage the property of a third, and with incidental emoluments, neither of which possession, dominion, or emoluments was possessed nor exercised by the official appointing the recipient thereof. We are cited to no authority nor has one been found, which can be said to sanction an enlargement of the purview of the legislative expression to unlawfully obtaining a mere preference by a disinterested official in bestowing upon another a naked position which in no sense is property and which cannot be owned nor held by the appointing officer. The statutes require that guilt be established beyond a reasonable doubt that the defendant attempted to obtain property from the victim by the means therein defined. Were a receivership deemed a public office, which is not justified by the authorities, the subject-matter of the attempted extortion would not fall within the statutory definition alleged in the indictment. Cohnen v. Sweenie, 105 Mich. 643, 63 N. W. 641; Citizens' Commercial & Savings Bank v. Bay Circuit Judge, 110 Mich. 633, 68 N. W. 649; Coburn v. Ames, 57 Cal. 201; Brandon v. Anglo-California Trust Co., 177 Cal. 699, 171 P. 956; Tapscott v. Lyon, 103 Cal. 297, 37 P. 225; Kreling v. Kreling, 118 Cal. 421, 50 P. 549; Takeba v. Superior Court, 43 Cal. App. 469, 185 P. 406.

[3, 4] Upon the remaining count it was testified that Showalter was receiver in possession and control of properties involved in pending cases, and that the defendant had repeatedly requested appointment by him as manager of properties so held; that Robinson "came in and demanded $1000, or said he would blow the American Mortgage receiverships out of the water." And upon another occasion had criticized them, the witness, however, admitting: "I don't recall that he made the statement that he would publish anything if I didn't do certain things. * * * I would not want to say that he threatened. The paper had already published articles regarding the American Mortgage receivership, and his attitude was that they would publish other things, but he did not say that he would not publish them if I did anything. There was no threat that I could do something to prevent him from doing it." It is not denied by the appellant's argument that the subject-matter of the alleged offense was in this instance "money," but it is urged by appellant that as to the use of "fear" the prosecuting witness swore that he ordered the defendant from the premises at the time of such threat, and therefore that evidence of this latter element of the offense is wholly negatived by his testimony. It is well settled that the crime here charged depends upon the conduct and intent of the person who makes the threat, and that the effect produced upon the person against whom it is made is immaterial, so that if the effect in evidence warranted the jury in believing that the defendant intended that his threat would produce "fear" in the mind of Showalter, and, if the threat was of such character as might reasonably have that result, it

would be wholly immaterial that Showalter was unaffected thereby. People v. Lavine, 115 Cal. App. 289, 1 P.(2d) 496. We have no doubt that the language used by Robinson as testified by Showalter was subject to such a construction.

As to the second count, the judgment of conviction is reversed; as to the third, it is affirmed.

The order denying the motion for new trial on the second count is reversed. As to the third count it is affirmed.

We concur: STEPHENS, J.; ARCHBALD, Justice pro tem.

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130 Cal.App. 671

WEST COAST BOND & MORTG. CO. v. WHITMAN et ux.

Civ. 7722.

District Court of Appeal, Second District, Division 2, California.

March 29, 1933.

1. Mortgages 🔑375.

That tenants refused to permit exhibition of premises to prospective foreclosure sale purchasers, as result of conduct of plaintiff, *held* no defense to action for deficiency.

> Defendants claimed that the price for which the property was sold at foreclosure was inadequate, and asserted in the answer that plaintiff intentionally prevented and obstructed defendants from obtaining a new loan by ousting defendants from the property and by persuading tenants to pay rent to plaintiff, and that this action caused tenants to recognize plaintiff and prevented exhibition of premises to prospective purchasers. There was nothing in the pleadings indicating that tenants, however, were not within their legal rights in refusing entry to prospective purchasers.

2. Mortgages 🔑375.

That plaintiff refused to state exact sum due *held* no defense in action for deficiency judgment.

3. Mortgages 🔑375.

Allegations in answer, in action for deficiency judgment, that plaintiff spread false statements reflecting on defendants' character, causing bidders to avoid sale, *held* insufficient.

Appeal from Superior Court, Los Angeles County: Marshall F. McComb, Judge.

Action by the West Coast Bond & Mortgage Company against Clinton A. Whitman and wife. Judgment for plaintiff, and defendants appeal.

Affirmed.

Porter C. Blackburn, of Los Angeles, for appellants.

Walter J. Richards, of Pasadena, for respondent.

STEPHENS, Justice.

In this appeal the plaintiff below is the respondent here and the defendants below are the appellants here. For convenience we shall herein generally refer to the parties as plaintiff and defendants.

Certain real property belonging to defendants was sold at public sale under the terms of a deed of trust. The deed of trust had been given to secure a loan from plaintiff in the sum of $3,500. It is claimed by defendants that the price the property sold for, to wit, $2,000, is inadequate compared with its value. The superior court in the instant case rendered a judgment upon the deficiency resulting from the sale for $2,720.71 after defendants had declined to amend their second amended answer. A demurrer to this pleading had been sustained on the ground that it did not state a cause of defense, and that it was uncertain in its allegations. Demurrers were also sustained against defendants' cross-complaint and two amended cross-complaints, but this phase of the matter is not before us.

We shall proceed to consider the defense set up in the second amended answer, freely interjecting our comment thereon. The answer asserts that plaintiff intentionally prevented and obstructed defendants from obtaining a new loan with which to meet the old one by ousting defendants from the property and by persuading tenants to pay rent to plaintiff; that this action caused tenants to recognize plaintiff instead of defendants, thus preventing the exhibition of the premises to prospective purchasers.

[1] It would seem to us that the enforcement of the terms of the trust deed could not be prevented by the tenants of a building refusing to allow prospective purchasers from entering their premises. There is nothing in the pleading which would indicate that the tenants were not within their legal rights in refusing such entry. It would follow then that it would be immaterial what or who caused them to decline the privilege.

[2] The answer asserts that plaintiff would not inform defendants of the exact sum due. It was as much defendants' duty to know the sum due as it was plaintiff's.

[3] The answer asserts that false statements reflecting upon the personal character

of defendants were spread by plaintiff, and that some or all of these things caused bidders to stay away from the sale, and caused the successful bid to be unreasonably low and inadequate. It will be seen that these allegations are extremely inadequate as to definiteness. They are but sketchy references to bickerings and bad feelings between debtor and creditor. Just how any or all of the acts alleged could have prevented or persuaded any one from bidding at the sale is left unexplained. No detail of the sale itself is attacked, and the due debt is admitted. Upon the question of inadequacy it is sufficient to say that the market value of the property is nowhere alleged, and we are therefore not furnished with any basis for comparison.

The second amended answer which defendants declined to amend was fatally uncertain in its allegations, and it stated no cause of defense.

The judgment is affirmed.

We concur: CRAIG, Acting P. J.; ARCHBALD, Justice pro tem.

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130 Cal.App. 488

ÆTNA LIFE INS. CO. et al. v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 4844.

District Court of Appeal, Third District, California.

March 21, 1933.

Hearing Denied by Supreme Court May 18, 1933.

1. Master and servant ⇨385(1).

Wages employee earned during year before injury should be considered, with all circumstances affecting his earning ability, in ascertaining his weekly earning capacity (Gen. Laws 1931, Act 4749, § 9(b), subd. 2 (1), § 12 (a) (3, 4).

2. Master and servant ⇨417(5).

Court cannot interfere with Industrial Accident Commission's award of compensation for temporary total disability, unless it abused discretion in ascertaining employee's average weekly earning capacity (Gen. Laws 1931, Act 4749, § 9(b), subd. 2 (1), § 12(a) (3, 4).

3. Master and servant ⇨385(15).

Laborer, paid $408 for 86 days' work in 16 weeks at wage never less than $4 daily during year before injury, *held* properly awarded compensation, based on $20 average weekly earning capacity, for temporary total disability (Gen. Laws 1931, Act 4749, § 9(b), subd. 2 (1), § 12(a) (4).

Proceeding for compensation under the Workmen's Compensation Act by R. W. Billings, employee, opposed by R. M. Stokesberry, doing business as the Stokesberry Lumber & Wrecking Company, employer, and the Ætna Life Insurance Company, insurance carrier. To review an award of compensation by the Industrial Accident Commission, the employer and insurance carrier bring certiorari.

Award affirmed.

Prior opinion, 19 P.(2d) 273.

Redman, Alexander & Bacon, of San Francisco, for petitioners.

A. I. Townsend, of San Francisco, for respondents.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

In this petition for a writ of certiorari, the insurance carrier of an accident policy contends the award of the Industrial Accident Commission in favor of an injured employee of the insured person is unreasonable and illegal. It is asserted the average weekly wages of the laborer, which were accepted by the commission as the basis for its award, are not estimated according to the rule prescribed by section 12 of the Workmen's Compensation Act (Gen. Laws 1931, Act 4749).

R. W. Billings, the claimant, was employed by the insured, Stokesberry Lumber and Wrecking Company, as a laborer at a wage of $4 a day. He was engaged in helping to wreck structures. His employment was not regular. He was paid a daily wage while the work lasted. He was not hired by the week or month or job. On the first day of his employment, March 18, 1932, a scaffold upon which he was working broke, causing him to fall to the ground, fracturing a rib and several vertebræ. A claim for compensation was duly presented. At the hearing it appeared he had been hired by the Stokesberry Company in the same character of work as a wrecker for three years. During the year previous to the time of his injury the claimant worked at wrecking buildings for the same employer from March 3, 1931, to February 15, 1932. The evidence shows that he was engaged during that year in this particular work for the period of 16 weeks with an aggregate employment of eighty-six days, for a total compensation of $408. This was an average employment during that period of over five days a week. The record shows that in only one week of that period was he employed less than five days a week. During eight weeks of that period he was actually engaged six days a week. The evidence also shows that from October 23, 1931, to March 18, 1932, he worked for the Globe Flour Mills, trucking and sewing sacks. For this last-mentioned service he was paid the additional total sum of $273. During the year previous to the time of his injury he was engaged for twenty-five days in digging a cellar and building a house for himself, except for which work he might have been otherwise employed. The claimant testified that he had previously worked for a firm by the name of Stroud, Marshall & Tarke sewing sacks, and that during the year prior to the time of his injury he could have worked for that firm from September to January at a compensation of from $5 to $7.50 per day, except that he had received a sum of $400 from other sources and voluntarily took a vacation to spend this money. There is no evidence of the average weekly earnings of other workmen who were engaged in wrecking structures during the year previous to the time of his injury.

The commission found that the claimant was injured in the course of his employment, and that it "caused temporary total disability continuing from March 18, 1932, to and including August 19, 1932, and indefinitely, entitling the employee to $12.35 a week during said time, exclusive of the waiting period of seven days. * * * The foregoing weekly benefit is based upon wages of $4.00 a day for employment five days a week." An award of $89.46, and the further sum of $12.35 a week, beginning August 20, 1932, until the termination of disability, was accordingly rendered against the insurance carrier. This award is challenged as erroneous and excessive.

[1] The petitioner contends that the "average weekly earning capacity" of the injured employee should be determined by ascertaining the average weekly wages which he actually received during the entire year previous to the time of his injury.

We do not so construe the law. We think this award conforms to the requirements for estimating average earning ability declared by sections 9 and 12 of the Workmen's Compensation Act of California. (St. 1917, p. 831, and amendments; 2 Deering's Gen. Laws, 1931, p. 2272, Act 4749.) The commission found that the claimant suffered "temporary total disability." This finding is not questioned. Section 9(b) 2 provides: "The disability payment shall be as follows: (1) If the injury causes temporary total disability, sixty-five per cent of the average weekly earnings during the period of such disability, consideration being given to the ability of the injured employee to compete in an open labor market."

Section 12(a) (3) provides that: "If the earnings be irregular, or specified to be by the week, month, or other period, then the average weekly earnings mentioned in subdivisions (1) and (2) above shall be ninety-five per cent of the average earnings during such period of time, not exceeding one year, as may conveniently be taken to determine an average weekly rate of pay."

Section 12(a) (4), as amended in Statutes of 1929, p. 553, provides: "Where the employment is for less than five days per week or is seasonal or where for any reason the foregoing methods for arriving at the average weekly earnings of the injured employee cannot reasonably and fairly be applied, such average weekly earnings shall be taken at ninety-five per cent of such sum as shall reasonably represent the average weekly earning capacity of the injured employee at the time of his injury, due consideration being given to his actual earnings from all sources and employments during the year preceding his injury; provided, that the earnings from other occupations shall not be allowed in excess of the rate of wages paid at the time of the injury."

The rule contended for by the petitioner would be unreasonable under some circumstances. It might result in grave injustice to a claimant. A workman may possess excellent earning ability and yet on account of temporary illness or other cause he may be prevented from working throughout a great portion of the year previous to his injury. Under such circumstances, an amount based only upon the average sum which he actually received during that year, regardless of the unusual conditions affecting his employment, would not fairly represent his earning capacity. We are of the opinion the language employed in paragraph (4) of subdivision (a) of section 12 of the Workmen's Compensation Act, which authorizes the acceptance of "such sum as shall reasonably represent the average weekly earning capacity of the injured employee at the time of his injury" should be construed to mean that the wages of the employee which were actually earned during the year, together with all the surrounding circumstances affecting his earning ability, should be considered in ascertaining a figure which will reasonably represent his weekly earning capacity. Capacity to earn money necessarily contemplates all the surrounding circumstances and conditions disclosed by the evidence which may indicate one's usual and ordinary ability to earn wages, including his physical ability, his natural talents, his training, his opportunity to secure employment and the condition of his health.

In the case of Texas Electric Ry. v. Worthy (Tex. Civ. App.) 250 S. W. 710, 712, it is said: "Earning capacity does not necessarily mean the actual earnings that one who suffers an injury was making at the time the injuries were sustained. It refers to that which, by virtue of the training, the experience, and the business acumen possessed, an individual is capable of earning."

[2] The amount of money which one has previously earned is an excellent criterion by which to estimate his future earning ability provided conditions remain the same. But to confine that estimate to an average of the

sum one actually received in a specified period of time, regardless of circumstances, may be very unjust and misleading. The provisions of the Workmen's Compensation Act above referred to clearly recognize this distinction. By inference, the language of that section refutes the theory of petitioner that the average weekly earnings which were actually received by the claimant during the year preceding the time of his injury controls the amount of the award. That section directs the "average weekly earning capacity" to be ascertained, "due consideration being given to his actual earnings from all sources and employments during the year preceding his injury." This language clearly means that the actual earnings for the previous year shall receive reasonable consideration, together with all other facts and circumstances surrounding the case, in ascertaining his average weekly earning capacity at the time of the accident. Since the statute specifically requires only due and not exclusive consideration to be given to previous wages actually received, it is evident that the Legislature intended to authorize a consideration of other circumstances. In ascertaining this average earning capacity the commission is vested with some discretion. Except for an abuse of this discretion the award of the commission may not be interfered with. It appears that the amount of wages actually paid to the claimant during the year previous to the time of his injury did receive due consideration. The record shows that he received $408 compensation for sixteen consecutive weeks of the same sort of work he was performing at the time of his injury. That was an average of $25.50 a week. He was allowed an average of only $20 per week. The record shows that from all the other work which he performed during that year, he never received less than $4 a day. This is the per diem rate which was allowed by the commission. This is fair and reasonable and in accordance with the rules prescribed by the statute. The commission is specifically charged with ascertaining and allowing a reasonable and fair award. The section above referred to declares that "where for any reason the foregoing methods of arriving at the average weekly earnings of the injured employee cannot reasonably and fairly be applied, such average weekly earnings shall be taken at ninety-five per cent of such sum as shall reasonably represent the average weekly earning capacity of the injured employee at the time of his injury." It is also provided this sum shall not exceed "the rate of wages paid at the time of the injury." In the present case, there is no dispute regarding the fact that the rate of wages which was received by the claimant at the time of his injury was $4 a day.

In the recent case of Department of Water and Power of the City of Los Angeles v. Industrial Accident Com. (Cal. App.) 19 P.(2d) 832, an award was affirmed which is based upon the average weekly earning capacity of an injured employee. The evidence shows that he had been engaged as a messenger in carrying packages for a period of thirty days at a wage of $4 a day. During the year prior to his injury the claimant had been irregularly employed at another occupation earning thereby an additional $150 within a period of about a month. The evidence shows no other specific employment during that year. Nor does it appear that any other employee was engaged in the same line of work for a period of 260 days during that year. The commission found that the claimant's average weekly earning capacity was $4 a day for a seven-day week. An award of $28 per week was accordingly rendered in favor of the claimant. Upon a writ of certiorari it was contended this award was not supported by the evidence. The Appellate Court said: "We are unable to say as a matter of law that the respondent commission erred in adopting $4 per day as reasonably representing the average weekly earning capacity of the injured at the time, taking into consideration for such purpose prior actual earnings."

The cases upon which the petitioner relies are not in conflict with the foregoing construction of the statute. Wingard v. Industrial Accident Commission, 57 Cal. App. 674, 207 P. 1030, 1032, involved the question as to whether an injured workman was entitled to compensation at the rate of $4.16 a day as a passer of rivets used in the construction of a steel frame, which job he was temporarily filling at the time of his injury, or whether he was entitled to an award based upon the wages of a riveter, which was his regular occupation. He had been previously injured and was temporarily filling the place of a rivet passer at the time he was injured. Subdivision (a) par. 4 of section 12 of the Workmen's Compensation Act provides that in computing the average weekly earning capacity of an injured employee "the earnings from other occupations shall not be allowed in excess of the rate of wages paid at the time of the injury." In the Wingard Case the court said: "As the finding of respondent Accident Commission was based upon the exact wage paid to petitioner at the time of his injury, the requirement of the proviso seems to have been met precisely."

No other issue material to this cause appears to have been involved in that case.

The award which was rendered in the case of Mahaffey v. Industrial Acc. Com., 176 Cal. 711, 171 P. 298, 299, was reversed because it affirmatively appeared the claimant was irregularly engaged in the work of cleaning roofs, at which he was employed at the time of his injury, not more than fifteen or twenty days during any year. The record fails to show that he was ever engaged in any other remunerative work. He was sixty-eight years of age. Yet the commission fixed his compensation at 300 times the amount of his daily wage. Of course, this finding was in conflict with the undisputed record. There was no evidence he was capable of earning more than $60 a year, yet his average annual earning ability was found to be $900. In the present case the evidence shows that Billings was capable of earning approximately $1,400 a year. He did actually earn $681 during the year prior to his injury. He worked 25 days digging a cellar and building a house for himself, except for which he testified he would have been able to earn $4 a day during that period. He testified that he had previously worked for Stroud, Marshall & Tarke, and could have worked for them from September to January seven days a week at from $5 to $7.50 a day. This is sufficient evidence to support the finding of the commission in the present case that the average weekly earning capacity of the claimant at the time of his injury was $12.35 a week. This was estimated on the assumption that he was able to obtain similar employment which would have enabled him to work 260 days during the previous year at an average wage of $4 a day. In the case last cited the court did not hold that the average earning capacity depended upon the exact mathematical calculation of what the claimant actually earned during the year previous to the accident. The court said: "The commission's authority to make an award depends upon evidence tending to show the existence of the conditions justifying the award."

Likewise, in the case of Littler v. George A. Fuller Co., 223 N. Y. 369, 119 N. E. 554, 555, cited by respondent, the average weekly wage of the claimant was estimated on the basis of his ability to secure three hundred days of work during the year previous to his injury. The court said: "The evidence is to the effect that they average about 30 weeks of employment at their trade in each year."

There was no evidence that the claimant had an opportunity to secure any other employment. The court did not say his earning capacity was confined to an average of the amount which he actually earned the previous year. It did say: "The order of the Appellate Division should be reversed and the proceeding remitted to the State Industrial Commission to compute the average weekly wage of claimant on the basis of his actual annual earning capacity."

This means, not the amount which he actually did earn, but the sum he was reasonably capable of earning under the circumstances disclosed by the evidence.

[3] In the present case the claimant was employed "irregularly." He was not hired by the year, month or week. He was not employed for a definite five or six days' service per week. During the year prior to the time of his injury he was employed by the same master and engaged in the same character of work sixteen weeks, with eighty-six days' actual service, for which he was paid $408. The employer testified that the claimant was regularly paid $4 a day. In all the work which he performed during the year he was never paid less than $4 a day. He earned the additional sum of $273 that year employed in a similar character of labor. The record indicates that he might have been employed that year for several additional months, if he had so desired, at an average wage in excess of the sum which was awarded by the commission. There is no evidence to the contrary. The finding to the effect that the claimant's "average weekly earning capacity" at the time of his injury was $20 a week is amply supported. Ninety-five per cent. of this sum is $19. Sixty-five per cent. of that sum is $12.35 per week. This is the exact amount which was allowed by the commission. It is estimated in accordance with the provisions of section 9(b) 2 and subdivision (a) par. 4 of section 12 of the Workmen's Compensation Act. It appears to be a just and reasonable allowance representing the average weekly earning capacity of the claimant.

The award is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

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130 Cal.App. 673

O'HAIR v. CALIFORNIA PRUNE & APRICOT GROWERS' ASS'N et al.

Civ. 4699.

District Court of Appeal, Third District, California.

March 29, 1933.

1. **Limitation of actions 🔑55(6).**
To obtain legal relief for nuisance, plaintiff was required to show damage within three-year limitation period.

2. **Appeal and error 🔑989.**
In action to enjoin nuisance, judge having found that defendant had prescriptive right, appellate court determines only whether substantial evidence warranted finding.

3. **Nuisance 🔑16.**
That city council, at public meeting, permitted defendant to discharge waste waters into sewer system discharging on plaintiff's lands, *held* not constructive notice of defendant's adverse use.

4. Nuisance 🔑53.

Where one discharges waste waters on another's lands, whether use is adverse is fact question.

5. Nuisance 🔑29, 46.

Where defendant operating prune processing plant discharged waste waters for eight years into sewer system discharging into slough flowing through plaintiff's lands, plaintiff's laches barred damage and injunction action.

Appeal from Superior Court, Colusa County; Ernest Weyand, Judge.

Action by Hattie O'Hair against the California Prune & Apricot Growers' Association, a corporation, and another. Judgment for defendants, and plaintiff appeals.

Affirmed.

C. D. McComish, of Colusa, for appellant.

Rutledge & Rutledge and Milton D. Sapiro, all of Colusa, for respondents.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

Plaintiff brought this action for damages and to enjoin the continuance of a nuisance by defendants upon her lands.

In 1912 the city of Colusa acquired a permanent right to discharge sewage into a slough flowing through the lands of plaintiff. In 1922 a prune processing plant was erected by Growers' Packing & Warehousing Association, Inc., outside of but contiguous to the limits of the city of Colusa, and by permission of the city the sewer pipes of said plant were connected with the sewer system of the city, and the waste waters from the plant which was operated by defendant California Prune & Apricot Growers' Association, a corporation, together with the sewage of the city, were conveyed through the septic system of the municipality and discharged into a slough on the lands of plaintiff. Neither the packing plant nor the city obtained the consent of plaintiff nor her predecessor in interest to thus dispose of the waters from the packing plant, and plaintiff now seeks damages for injuries to her lands, claiming the waters from the plant are impregnated with lye and other chemicals which create offensive odors, make the waters of the slough unfit for live stock to drink, and injure the lands for farming purposes.

The trial court found that the sewage and waste waters from the packing plant contained no alkali or other chemicals, but consisted only of water, that such discharge of sewage upon the lands of plaintiff was continuous, open, notorious, and uninterrupted under claim of right and adverse to plaintiff and her predecessors and had so been since the erection of said plant in 1922, and that no damage was suffered by plaintiff whatsoever.

As to each of these findings, plaintiff objects and appeals from the judgment based thereon.

As to the claim for damages, it was established that the city of Colusa had acquired a permanent right to discharge its sewage into a slough onto the lands of the plaintiff, and there was no showing that the city was limited as to quantity or type of sewage that could be thus discharged into the slough.

It furthermore appeared from the testimony of competent witnesses that the only sewage from the packing plant consisted of hot water, and contained no lye, soda, or chemicals of any kind whatsoever, and was entirely free from any obnoxious gas or odors.

The elements of damage being based upon disagreeable odors and the impregnation of the waters with chemicals, making the use thereof unfit for stock-watering purposes, and injurious to the lands for farming purposes, not having been established, the finding that plaintiff suffered no damage must be sustained.

[1] It is, as counsel point out, axiomatic that to obtain relief at law for a nuisance, plaintiff must show damage.

Thus in Jacob v. Day, 111 Cal. 571, 44 P. 243, plaintiff sought relief for an alleged nuisance which consisted of a tailrace, sluiceway, cut, or ditch, by which the water, bearing detritus from defendant's hydraulic mine, was carried across the land of plaintiff. Since plaintiff did not show the transportation of water across his land caused him injury, the court gave him no relief. Similarly in Grandona v. Lovdal, 78 Cal. 611, 21 P. 366, 368, 12 Am. St. Rep. 121, plaintiff claimed that a row of trees planted near the boundary line of his property constituted a nuisance. The court rejected his plea, stating: "His property was therefore not injuriously affected, nor his personal enjoyment lessened, by the crowding."

Even if it be assumed plaintiff made some showing of damage, she did not even attempt to prove when it occurred. It was incumbent upon plaintiff, in order to establish collectible damages, that these should have accrued within the three-year period of limitations. Donahue v. Stockton Gas, etc., Co., 6 Cal. App. 276, 282, 92 P. 196; Rankin v. DeBare, 205 Cal. 639, 641, 271 P. 1050.

[2] The trial court found all of the elements of a prescriptive right were acquired by defendant association over a period of eight years of use. The function of an appellate court is to determine whether there is any substantial evidence in the record from which a rational inference may be drawn that such prescriptive right exists.

"In considering the sufficiency of the evidence to support said finding we are not unmindful of the rule as thus stated in Clarke v. Clarke, 133 Cal. 667, 66 P. 10: 'The burden is upon the party who claims title by prescription to clearly prove by competent evidence all of the elements essential to such title. The user must have been adverse to the true owner and hostile to his title. It must have been actual, continued, open, and under a claim of right. It must have all the elements necessary to acquire title by adverse possession. * * * It must in some way be asserted in such manner that the owners may know of the claim.' But that rule is especially for the guidance of the trial court. The principle which controls us is that, if there is any substantial evidence in the record from which a rational inference may be drawn that said elements of descriptive right exist, then this court as an appellate tribunal is bound by the finding of the trial court." Turner v. Bush, 43 Cal. App. 309, 185 P. 190, 191.

The trial court, therefore, having determined the existence of the elements of a prescriptive right, this court is concerned only with whether or not there was substantial evidence in the record from which the trial court could find the necessary elements to establish such right.

Appellant who had resided in the city of Colusa for many years contends that she had no knowledge, either actual or constructive, of the use of her lands by defendant prune association, that it was adverse, and was a continuing nuisance.

[3, 4] It is our function to examine the record to ascertain if the findings, adverse to plaintiff, finds substantial support in the record. It is undisputed that defendant plant has since 1922 openly and visibly used the connecting sewer line to convey its waste waters to the city system. Such permission was granted at a public meeting of the city council, and at that time made a matter of record. We cite this, not that it is constructive notice to plaintiff as contended by respondent, but merely that the use was not created clandestinely nor by stealth or subterfuge. The testimony of the son of plaintiff shows that since approximately 1921 he has been in charge of the O'Hair ranch, and that the water from the slough became more black and polluted some seven or eight years prior to the filing of the present action. Also, whether or not the use is adverse is a question of fact, and the court on substantial evidence having found the same to be adverse will not be questioned here.

[5] In like position is the question that the nuisance alleged is a continuing nuisance, but there is nothing in the evidence so showing and no issue or finding was made thereon. Regardless, however, of the prescriptive rights of defendant, a use of the lands of plaintiff by defendant for a period of eight years does not show the necessary diligence in the assertion of her rights, and she must be held to be barred by her own laches.

Plaintiff moved for a new trial on the ground of newly discovered evidence. It appears that during the progress of the trial in an action brought by De Jarnatt against California Prune & Apricot Growers' Association, the association had given plaintiff therein permission to dispose of sewage through their sump. The record is conflicting as to whether the use was "newly discovered" by plaintiff. The trial court held adversely to plaintiff on that point, and we see no abuse of discretion in so holding.

It therefore appears plaintiff has been unable to establish damage or that she is entitled to any equitable relief or to a new trial, and for that reason the judgment and order of the trial court must be affirmed, and it is so ordered.

We concur: PLUMMER, J.; R. L. THOMPSON, J.

217 Cal. 570

GOLDEN STATE MILK PRODUCTS CO. v. BROWN.

L. A. 13085.

Supreme Court of California.
March 28, 1933.

Injunction 🔑55.

Dairy company *held* entitled to enjoin former employee, who had operated milk route for it, from soliciting former patrons on behalf of competitor.

In Bank.

Appeal from Superior Court, Los Angeles County; William D. Dehy, Judge.

Action by the Golden State Milk Products Company against William P. Brown. Judgment for plaintiff, and defendant appeals.

Affirmed.

Leo V. Silverstein, of Los Angeles, for appellant.

Benj. S. Parks and Wm. B. Himrod, both of Los Angeles, for respondent.

LANGDON, Justice.

This is an appeal from a judgment granting a permanent injunction. Plaintiff corporation is engaged in the business of selling and distributing dairy products in Los Angeles county. For some eleven years defendant was employed as route man within certain territory in the city of Alhambra. On November 20, 1930, defendant voluntarily left the employ of plaintiff and became route foreman for Valley Dairy Company, a competing concern. This action was commenced several months later to enjoin defendant from soliciting patronage of plaintiff's customers in said territory. The trial court ordered that defendant be enjoined from directly or indirectly soliciting any person along and within said territory formerly served by him while in the employ of plaintiff; and from supplying milk products to any such persons whom he had solicited. In his appeal, defendant contends first that the injunction is improper, in that it attempts to prohibit him from soliciting any business at all within the designated territory; but it is obvious from a reading of the order, and it is conceded by plaintiff, that it only prohibits solicitation of the former customers of plaintiff which were served by defendant. Defendant next contends that it is an unwarranted interference with the rights of third persons to prevent him from supplying milk products to those who may desire them; but the injunction, to be effective at all, must prevent him from supplying former customers of plaintiff solicited by him, and that is its provision. No attempt is made in the judgment to restrain defendant from receiving the unsolicited patronage of former customers of plaintiff whom he served, or from soliciting any persons who were not formerly on his route. The evidence sufficiently shows that a considerable number of customers left the plaintiff after years of steady patronage, and took milk from Valley Dairy Company, shortly after defendant changed his employment; and, while some of the witnesses testified that they came unsolicited, and that they learned of defendant's change of employment only incidentally during social calls which he made upon them, others admitted that he had informed them of his new association, and had asked that they try his company.

In this state of the record, the authorities definitely establish plaintiff's right to an injunction as granted. See Pasadena Ice Co. v. Reeder, 206 Cal. 697, 275 P. 944, 276 P. 995; New Method Laundry Co. v. MacCann, 174 Cal. 26, 161 P. 990, Ann. Cas. 1918C, 1022; Dairy Dale Co. v. Azevedo, 211 Cal. 344, 295 P. 10.

The judgment is affirmed.

We concur: WASTE, C. J.; CURTIS, J.; PRESTON, J.; SHENK, J.; IRA F. THOMPSON, J.

PACIFIC FINANCE CORPORATION v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.*

L. A. 13944.

Supreme Court of California.
March 27, 1933.

Rehearing Granted April 25, 1933.

1. **Dismissal and nonsuit** 🔑60(1).

Word "action" in statute requiring dismissal of action, unless brought to trial within 5 years after defendant filed answer, does not mean entire proceeding, including cross-complaint (Code Civ. Proc. § 583).

[Ed. Note.—For other definitions of "Action; Action at Law," see Words and Phrases.]

2. **Pleading** 🔑138.

Cross-actions are distinct and independent causes of action, and issues presented on cross-complaint and answer thereto are entirely separate and distinct from those raised on original complaint and answer (Code Civ. Proc. § 581).

3. **Constitutional law** 🔑70(1).

Court cannot read into statute anything enlarging its terms, unless its language renders such construction imperative.

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*For subsequent opinion see 25 P.2d 983.

4. Dismissal and nonsuit ⚷60(1).

Plaintiff is not entitled to dismissal of cross-complaint before lapse of 5 years between filing of answer thereto and trial of case (Code Civ. Proc. § 583).

In Bank.

Mandamus proceeding by the Pacific Finance Corporation against the Superior Court in and for Los Angeles County and Caryl M. Sheldon, Judge thereof.

Writ denied.

Prior opinion, 13 P.(2d) 1045.

Overton, Lyman & Plumb and Chalmers L. McGaughey, all of Los Angeles, for petitioner.

Everett W. Mattoon, Co. Counsel, S. V. O. Prichard, Deputy Co. Counsel, and Andrew J. Copp, Jr., all of Los Angeles, for respondents.

TYLER, Justice pro tem.

Mandamus to compel the dismissal of a cross-complaint.

The record presents the following facts: Petitioner commenced an action in the superior court on January 21, 1927, against one Beck, defendant. An answer was filed March 3, 1927, and at the same time defendant filed a cross-complaint. On April 4, 1927, an answer to the cross-complaint was filed. The case was set for trial on March 31, 1932, which was more than five years after issue was joined upon the original complaint, but less than five years after issue joined upon the cross-complaint. On the day set for the trial, upon motion regularly made, the original plaintiff, petitioner herein, moved the respondent court to dismiss "the action" under the provisions of section 583 of the Code of Civil Procedure. The court thereupon on its own motion dismissed the original complaint and answer which had not been brought to trial within five years, but it refused to dismiss the cross-complaint and answer upon which issue the five-year period had not yet run. The court thereupon proceeded to trial upon the cross-complaint, and petitioner then procured the alternative writ herein.

[1] It is conceded that no question as to the exercise of judicial discretion by respondent court is here involved. The motion to dismiss was addressed solely to the mandatory provisions of section 583 of the Code of Civil Procedure, which reads as follows: "Any action heretofore or hereafter commenced shall be dismissed by the court in which the same shall have been commenced or to which it may be transferred on motion of the defendant, after due notice to plaintiff or by the court upon its own motion, unless such action is brought to trial within five years after the defendant has filed his answer, except where the parties have stipulated in writing that the time may be extended." The controversy here presented relates to the proper interpretation to be placed on the word "action" as contained in the provision above quoted. Respondents, in support of the action of the trial court, contend that the issue joined upon a cross-complaint is a separate and distinct action from that joined on the complaint itself; that the two are severable, and the failure of the one has no effect upon the other. Petitioner argues that the word "action" means the entire proceeding or suit, and that when the parties have failed to bring "such action" to trial within five years, then the entire proceeding, cross-complaint and all, must be dismissed. We are of the opinion that petitioner's contention cannot be sustained. Preliminarily it may be stated that a diligent search of the authorities fails to reveal a single case where the precise situation was presented or passed upon by any court in the various jurisdictions. Authority on principle, however, is not wanting.

[2, 3] One of the objects of the reformed or code procedure is to simplify the pleadings and conduct of actions, and to permit of the settlement of all matters of controversy between the parties in one action, so far as may be practicable. And to this end most of the codes have provided that the defendant in an action may, by appropriate pleadings, set up various kinds of new matter, or cross-claims, which must otherwise have been tried in separate actions. Generally speaking, in most of the states this new matter is broad enough to embrace all controversies which under previous statutes might have been the subject of set-off, and all claims which under the adjudication of courts might have been interposed as defenses by way of recoupment, and secures to a defendant all the relief which an action at law, or a bill in equity, or a cross-bill would have secured on the same state of facts prior to the adoption of the code. The object of these remedial statutes is to enable, as far as possible, the settlement of cross-claims between the same parties in the same action, so as to prevent a multiplicity of actions. These cross-actions, however, are still distinct and independent causes of action, so that when properly interposed and stated the defendant becomes in respect to the matters pleaded by him, an actor, and there are two simultaneous actions pending between the same parties wherein each is at the same time both a plaintiff and a defendant. Francis & Bro. v. Edwards, 77 N. C. 271; Davidson v. Remington, 12 How. Prac. (N. Y.) 310; Cragin v. Lovell, 88 N. Y. 258. The same view has been taken by our appellate courts, for the cases recognize and establish the principle that the issues presented upon a cross-complaint and answer are entirely separate and distinct from the issues raised upon the original complaint and answer. In the case of

Millar v. Millar, 51 Cal. App. 718, 197 P. 811, it is held that the purpose of allowing a cross-complaint is to avoid a multiplicity of suits and thereby save vexation and expense, and that such a situation involves merely a consolidation of two independent actions arising out of or related to the same transaction. See, also, Mott v. Mott, 82 Cal. 413, 22 P. 1140, and Warner v. Darrow, 91 Cal. 309, 27 P. 737. The code provisions also recognize this distinction. Section 581 of the Code of Civil Procedure authorizing a dismissal of a suit by the plaintiff before trial provides that such dismissal may not be had where affirmative relief is sought by way of cross-complaint, and our courts in construing said section so hold. Islais & Salinas Water Co. v. Allen, 132 Cal. 432, 64 P. 713; Clark v. Hundley, 65 Cal. 96, 3 P. 131; Robinson v. Placerville & Sacramento Valley R. Co., 65 Cal. 263, 3 P. 878. For like reasons a cross-complainant cannot dismiss his cross-complaint after the filing of an answer thereto, asking affirmative relief. Rodgers v. Parker, 136 Cal. 313, 68 P. 975. It therefore seems plain to us that the issues raised upon the cross-complaint and answer are completely severable from the issues upon the original complaint and answer, and a plaintiff has no such control over a cross-complaint as would entitle him under the circumstances to ask for its dismissal under the code provision invoked. Moreover, we are of the further opinion that section 583 of the Code of Civil Procedure has no application whatsoever to the dismissal of a cross-complaint, and an action involving such pleading can never be dismissed under its provisions. The Legislature in adopting the section evidently had in mind the thought that the disposition of the issues raised under a cross-complaint would necessarily follow those raised under the original complaint and answer. Nowhere in the statute is "cross-complaint" mentioned. A court is not justified in reading into a statute anything that enlarges its terms, unless such construction is imperative by reason of the language employed therein.

[4] The case of Seaman v. Superior Court of Marin County, 183 Cal. 47, 190 P. 441, is directly in point in principle upon this subject. In that case it was held that section 581a of the Code of Civil Procedure, providing for the dismissal of an action when summons was not returned within three years, did not apply to the dismissal of a cross-complaint when the summons on the cross-complaint was not returned within that time. In the course of the opinion it was stated that the reason for a dismissal of a cross-complaint might be as cogent as the dismissal of the complaint, but the court refused to extend the statute to include a cross-complaint for the reason that it was not included in the statute. So here, for like reasons, the trial court was justified in refusing to extend the meaning of section 583, Code of Civil Procedure, by construction. Even if the statute were construed to include actions declared under a cross-complaint, petitioner is not entitled to the relief here prayed for as the five-year period had not elapsed between the filing of the answer to the cross-complaint and the bringing of the case on for trial. Petitioner has cited us to the cases of Perrin v. Miller, 35 Cal. App. 129, 169 P. 426; Sacramento Transportation Co. v. California Reclamation Co., 205 Cal. 42, 269 P. 640; Wutchumna Water Co. v. Stevenson, 204 Cal. 191, 267 P. 537. We do not deem a discussion of these cases to be necessary as they are not authority for any principle contrary to those herein expressed.

The writ is denied.

We concur: WASTE, C. J.; PRESTON, J.; SHENK, J.; SEAWELL, J.; CURTIS, J.; LANGDON, J.

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217 Cal. 747

MOORE v. CLAREMONT HEIGHTS CO.

S. F. 14770.

Supreme Court of California.
April 7, 1933.

Rehearing Denied May 4, 1933.

Vendor and purchaser 🔑215.

Deed conveying grantor's interest in lot, with all her claims and demands in connection therewith, *held* to include assignment of her contractual right to refund of money paid by her for such interest.

In Bank.

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Action by Helen A. Moore against the Claremont Heights Company, a corporation. Judgment for plaintiff, and defendant appeals.

Affirmed.

Joseph C. Meyerstein, of San Francisco (Frank P. Webster, of San Francisco, of counsel), for appellant.

Alfin N. Nelson, of Oakland, for respondent.

PER CURIAM.

In August, 1927, the plaintiff and Alma Nemir purchased from the defendant lot 22 in a tract known as Claremont Estates in Alameda county for the sum of $2,775. As part of the transaction, the defendant agreed to install "city standard street improvements" and have the same completed not later than September 15, 1928, and further agreed that, "if said improvements have not been put in by said date the money paid by you on account of the purchase of said lots will be refunded to you on said date plus interest at the rate of seven per cent per annum, on said lot being reconveyed to said corporation or its nominee, free of liens or other incumbrances." The street improvements were not installed as agreed. Alma Nemir conveyed her interest in the lot, together with any and all her claims and demands in connection therewith, to the plaintiff. Demand was made for the refund of the purchase price in accordance with the agreement. Upon failure of payment by the defendant, this action was brought to recover the purchase price with interest.

The court found in favor of the plaintiff and entered judgment as prayed. Three points are made on the appeal by the defendant:

First, it is contended that the plaintiff neither alleged nor proved a timely or unconditional reconveyance or offer to convey. The complaint alleged the demand for repayment and the offer to reconvey. The court found the allegation to be true. Laches on the part of the plaintiff was not an issue under the pleadings. The point is without merit.

Second, it is contended that there is no evidence to support the finding that Alma Nemir assigned her right under the agreement to repay to the plaintiff. The terms of the deed to the plaintiff were broad enough to include the assignment.

Third, it is claimed that there is no finding that the defendant failed to install the street improvements as agreed. The record does not justify the contention. The court specifically found (finding VII), that the defendant failed and refused to install the street improvements in the tract, and particularly failed to install them in front of the property conveyed. The evidence, without conflict, supports the finding as to the defendant's failure to install any street improvements in front of the plaintiff's lot. This was sufficient proof of the breach of the agreement.

The judgment is affirmed.

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217 Cal. 607

MORGAN et al. v. WALKER et al.

Sac. 4535.

Supreme Court of California.
March 31, 1933.

Rehearing Denied April 28, 1933.

1. Appeal and error 🔑1071(1).

Claim of inconsistency of findings *held* not to require reversal where trial court treated one finding as surplusage.

2. Waters and water courses 🔑152(6).

Use of water upon riparian lands is presumably riparian, and burden of proving prescriptive rights is upon person asserting them.

3. Waters and water courses 🔑152(8).

Proof of continuous occupancy and use of water for more than five years establishes prima facie prescriptive right.

4. Waters and water courses 🔑138.

Upper riparian owner may gain prescriptive right if lower riparian owner has actual knowledge of upper owner's adverse claim, or if knowledge is presumed from circumstances.

5. Waters and water courses 🔑152(8).

Evidence sustained finding that upper riparian owner acquired prescriptive right to water in creek during irrigating season, as against lower owner.

> The evidence indicated that plaintiffs and their predecessors in interest used upon their land continuously for 34 years substantially all water of creek, under claim of right, openly and adversely to lower owners, and that lower owners had knowledge of the diversion, and that plaintiffs and their predecessors for more than 20 years paid all taxes assessed against the water.

6. Waters and water courses 🔑137.

To interrupt statute as to running water, there must be resumption of possession thereof, under claim of right, brought home to adverse claimant by express notice or notorious and unequivocal conduct.

In Bank.

Appeal from Superior Court, Shasta County; Walter E. Herzinger, Judge.

Action by Myrtle M. Morgan and another against Leatha J. Walker and another. Judgment for plaintiffs, and defendant named appeals.

Affirmed.

Jesse W. Carter, of Redding (Annette Abbott Adams, of San Francisco, of counsel), for appellant.

Fred C. Pugh, of Red Bluff, for respondents.

CURTIS, Justice.

Plaintiffs are the owners of a tract of land in Shasta county known as the Childs ranch and brought this action to quiet their title to two hundred inches of water of Digger creek against one M. L. Bouton. Defendant Bouton was a lower riparian owner on said creek, whose lands were situated on the opposite side of Digger creek from the lands of plaintiffs. Digger creek forms the boundary line between Shasta and Tehama counties, and the lands of Bouton were situated in Tehama county. After the commencement of this action, the plaintiffs amended their complaint and included as one of the defendants therein the present defendant, Leatha J. Walker, a lower riparian owner whose lands adjoin those of the plaintiffs. At a still later date the plaintiffs filed a supplemental complaint alleging that since the commencement of this action they had purchased the lands of the defendant Bouton, and finally and on May 26, 1927, the plaintiffs filed a second amended complaint naming as defendants therein the defendants, Leatha J. Walker and Lillie E. Cofer. The last-named defendant, after service of process upon her, defaulted. She has, therefore, no interest in this appeal and it will not be necessary to again refer to her. We will refer to Leatha J. Walker as the defendant. Plaintiffs' second amended complaint consists of four counts, or separate causes of action. In the first cause of action plaintiffs allege that they are the owners of the Childs ranch, together with a water ditch known as the Childs ditch taking water out of Digger creek, and a right to divert through said ditch 200 inches of water as appurtenant to said lands; and that for more than thirty years last past they and their predecessors in interest had diverted that quantity of water from said stream and had beneficially used the same upon the Childs ranch. In other words, the plaintiffs plead in their first cause of action a prescriptive title to the use of said waters upon their said lands to the extent of 200 inches of water. In their second cause of action the plaintiffs allege that the Childs ranch is riparian to Digger creek and that plaintiffs, as riparian owners of said lands, "are seized and possessed of the right and entitled to divert and use the natural flow of said stream for the irrigation of said lands for the watering of stock and for domestic purposes."

The third and fourth causes of action set forth in plaintiffs' amended complaint refer and relate to plaintiffs' right to the use of water flowing in Digger creek upon the land acquired by them from M. L. Bouton, to which we have already referred. In the third cause of action plaintiffs allege a prescriptive right to take 37½ inches of water from said creek for use upon the lands acquired by them from said Bouton through the Bouton-Meeder or Bouton-Cofer ditch, which takes water out of Digger creek above the lands of the defendant Walker for the irrigation of the Bouton and Walker ranches, said amount of 37½ inches of water being one-half of the amount of water flowing in said ditch. In their fourth cause of action plaintiffs set forth that the Bouton land is riparian to Digger creek.

Defendant answered said amended complaint, and in her answer she denied the allegations of the first and second causes of action set forth therein. As a separate defense she alleged the ownership by her and M. L. Bouton of lands riparian to Digger creek, being the Bouton and Walker ranches already referred to; that they were the owners in common of the Bouton-Cofer ditch; and that for more than thirty years last past they and their predecessors in interest had diverted from Digger creek for use upon their said lands 160 inches of water and used the same beneficially upon their said lands. Defendant claimed, and so alleged, that she was the owner of an undivided one-half of said ditch and one-half of the water flowing therein. In defendant's answer to the third and fourth causes of action of the amended complaint, she denied that 37½ inches of water constitute one-half of the water flowing in the Bouton-Cofer, or Bouton-Meeder ditch, and alleged that the same carried 160 inches of water; that she and her predecessors in interest had taken and used beneficially upon the Walker ranch one-half of said water, except when wrongfully prevented by the plaintiffs. She prayed that she be adjudged to be the owner of 80 inches of water flowing in said ditch for use upon her said lands; that her rights be adjudged to be prior to those of the plaintiffs and that her title thereto be quieted. Upon the issues as thus formed by the pleadings, the cause went to trial before the court without a jury. The court made findings favorable to the plaintiffs, and upon those findings rendered judgment quieting plaintiffs' title to 119 inches of water of Digger creek, continuous flow from the 1st day of June to the 1st day of October annually, for irrigation and domestic uses and for watering stock on the Childs ranch, and prorating the remainder of the water of Digger creek between plaintiffs as the owners of Bouton ranch, and the defendant as the owner of the Walker ranch. From this judgment the defendant Walker has appealed. On this appeal the defendant makes no objection to that part of said judgment prorating the water in the creek between her and the plaintiffs, after the needs of the Childs ranch have been supplied. She does, however, attack the findings and judgment whereby the court found and awarded to the plaintiffs a prior right to 119 inches of water from said creek for use upon the Childs ranch, thus decreasing the amount of water in the creek to be prorated between her lands and those of the plaintiffs. The sole question presented on this appeal involves the judgment of the trial court quieting plaintiffs' title to 119 inches of water for use upon the Childs ranch.

[1] The first contention of defendant is that the findings are inconsistent and conflicting and for that reason the judgment cannot stand. The court found that the plaintiffs and their predecessors in interest for more than thirty years had diverted through the Childs ditch and had used upon plaintiffs' lands for the purpose of growing alfalfa and other crops thereon, for domestic use, and

for watering stock, 200 inches of the waters of Digger creek continuous flow measured under a 4-inch pressure; that said diversion continued during the irrigating season of each year, to wit, from June 1st to October 1st; that the water so diverted constituted practically all the water flowing in said creek during the irrigating season in each year, merely permitting a small amount of water which leaked through the dam to flow down the creek to lands of the defendants; that said diversion was open and notorious and adverse to the rights of defendants and made under a claim of right to divert said amount of water from said creek; and that for more than twenty years plaintiffs and their predecessors had paid all state and county taxes assessed against said 200 inches of water. Following the findings of facts in detail as just noted, and apparently as a succinct statement thereof, the court made a further finding (No. X) as follows: "That the plaintiffs have acquired a prescriptive right to, and are the owners of 119 inches of the waters of Digger creek, continuous flow, measured under a four-inch pressure, for the irrigation of 47.66 acres of the Childs ranch hereinbefore referred to and for domestic use and the watering of stock thereon, during the irrigating season of each year, to-wit: From June 1st to October 1st." The court further found, in support of plaintiffs' riparian claim as alleged in their second cause of action, "that all of the said lands of plaintiffs above described are riparian to said stream" (Digger creek) and "that plaintiffs, as the owners of said riparian lands, are seized and possessed of the right and entitled to divert and use the natural flow of said stream for irrigation of their said lands * * * for domestic purposes and watering of stock." It will thus be seen that the court found that the plaintiffs were the owners of 119 inches of water flowing in Digger creek by prescription, and also that the plaintiffs as riparian owners on said creek were entitled to divert and use the natural flow of said creek for the irrigation of their riparian lands and for domestic purposes and watering stock.

The judgment of the court, entered upon the facts found, among other things held: "That the plaintiffs have acquired a prescriptive right to divert into and through said Childs Ditch 119 inches of the waters of Digger Creek, continuous flow, measured under a four-inch pressure from the 1st day of June, to the first day of October, annually, and the right to use the same for the irrigation of the Childs Ranch and for domestic use and the watering of stock thereon * * * and that the plaintiffs' title to the use of the waters of said creek, as hereinbefore set forth, be and the same is hereby quieted as against the claims of the defendants, or either of them." There is no mention in the judgment of plaintiffs' riparian rights, or of the findings of the court respecting said riparian rights. It is apparent, therefore, that the judgment of the trial court quieting plaintiffs' title to said 119 inches of water from Digger creek is based solely upon the finding that the plaintiffs had acquired a right by prescription to the use of that quantity of water. Evidently the trial court disregarded its finding as to plaintiffs' riparian right and, treating it as surplusage, placed its judgment solely upon the finding respecting plaintiffs' prescriptive rights. Under these circumstances we fail to see how any inconsistency in the findings in the respect just referred to can have any material bearing upon the validity of the judgment based entirely upon one of such findings. We may well follow the course pursued by the trial court and treat as surplusage the finding respecting plaintiffs' riparian rights.

The next contention of the defendant is that the finding of the trial court that plaintiffs have acquired a prescriptive right to 119 inches of water during the irrigating season of each year is not supported by the evidence.

Before entering upon a discussion of this phase of the case, it might be well to state that during the trial it was stipulated that the lands of both plaintiffs and defendant are riparian and that the duty of water on all lands involved in this action is 2½ inches per acre under a 4-inch pressure. It was further stipulated that plaintiffs' engineer and defendant's engineer should go over the lands and determine the areas susceptible to irrigation and the areas under irrigation and report to the court, leaving the court to determine the respective rights of said parties to the waters of said stream. The report of these engineers showed that there were under irrigation 47.66 acres of the Childs ranch, 28.34 acres of the Bouton ranch, and 12 acres of the Walker ranch. It also showed the following acreage susceptible to irrigation: Childs ranch, 71.12 acres; Bouton ranch, 80 acres; and Walker ranch, 123 acres. But only the following susceptible to profitable irrigation: Childs ranch, 47.66 acres; Bouton ranch, 74 acres; and Walker ranch, 40.6 acres. This report explains the findings of the court referred to above relative to the amount of water allotted to the Childs ranch. In these findings the court found that there had been used adversely for thirty years 200 inches of water upon the Childs ranch. The court, however, found that the plaintiffs had acquired a prescriptive right to only 119 inches of water. This quantity of water was determined by taking the number of acres of land in the Childs ranch which was at the time of the trial under irrigation, being 47.66 acres, and multiplying that number by 2½, in pursuance of the stipulation that the duty of water on said land was 2½ inches per acre. The amount thus obtained is in even numbers 119 inches, being the amount of water allotted to the Childs ranch. All measurements of water given herein are stated in inches measured under a 4-inch pressure.

The evidence as to the use of water from Digger creek by the plaintiffs and their grantors and predecessors in interest upon the Childs ranch constitutes by far the greater part of all the testimony in this case. We will not attempt to give in detail the evidence of each witness who testified upon this subject. The father of the plaintiffs, S. M. Childs, purchased the property in 1887 and occupied it until the time of his death, which occurred a short time prior to the trial of this action. He purchased the ranch from a man named Herrick, who had lived on the property since 1872. At the time of said purchase there was a ditch leading from Digger creek to the property purchased. This ditch was known as the Herrick ditch. It was enlarged in 1887 and 1888. Water was diverted from the creek into this ditch by means of a dam constructed in the creek. This dam and ditch have not been changed since 1888. Mr. Childs conducted a hotel, feed stable, and corrals for feeding stock on the way to the mountains. The ranch was chiefly seeded to clover, alfalfa, and meadow grass and produced on an average of six tons of hay to the acre. He also had an orchard and raised considerable garden produce for the hotel. He also raised hogs and cattle and kept workstock. In 1893 or 1894 the last of the land cultivated by him was cleared, making the full acreage under cultivation and irrigation 47.66 acres. The soil is light loam, very porous, and slopes rather steeply toward the creek. All crops grown on said ranch were irrigated, and the method employed was to begin at the upper field and flood each field in succession until the field at the extreme lower end was irrigated. This required seven days. Then the water was turned in again at the upper field. The irrigating season was from about June 1st to October 1st of each year. During this entire period a continuous flow of water was used on the land. The Childs dam was constructed of rock and dirt, and its location has not been changed in forty years. The intake was constructed of 16 or 18 foot boards and has never been changed. A mark was maintained on the inside of the intake, and when the diversion was up to the mark the Childs ditch carried 207.8 inches of water. Two engineers made measurements of water during the ownership of Mr. Childs and testified that in one instance 200 inches and in another instance 207.8 inches were flowing from the creek into the ditch. Beginning in the year 1908 and continuing down to the date of the trial in 1929, the Childs ditch and 200 inches of water flowing therein were separately assessed to Mr. Childs and his daughters and they paid the taxes thereon during said time. At the trial there was a sharp controversy as to the extent of the diversion of the water of said creek by means of the Childs dam and ditch—that is, whether all of the waters of said creek were so diverted, or whether after said diversion there remained in said creek sufficient water to meet the requirements of the defendant, and her predecessors in interest. Upon this issue the court found: "That during the months of June, July, August and September of each irrigating season, and during the period of more than thirty (30) years, as aforesaid, the plaintiffs and their grantors and their predecessors in interest have taken from Digger Creek and diverted into the said Childs Dam practically all of the water flowing therein, merely permitting such amount of water as leaked through a dirt and rock dam to go down the creek to the lands of defendants. That the said diversion of the said quantity of 200 inches of water by the plaintiffs, their grantors and predecessors in interest, was continuous, open and notorious and adverse to the rights of the defendants, and made under a claim of right to divert said amount of water even when it required all of the waters flowing in Digger Creek, at the Childs Dam so to do." The evidence, in our opinion, supports this finding of the court that substantially all of the water of the creek was diverted by means of the Childs dam and ditch during the irrigating seasons of the several years mentioned herein. The testimony of the two plaintiffs and their two brothers, G. L. and Frank P. Childs, all of whom were raised on the Childs ranch and were familiar with the conditions existing there during the lifetime of their father, and the testimony of L. H. Meyer, the husband of one of the plaintiffs, who was also intimately acquainted with the Childs ranch for a number of years prior to the trial, all tend to support the finding of the court that the Childs dam and ditch diverted practically all the water of the creek during the irrigating season. There is evidence to the contrary, and there may be slight inconsistencies in the testimony of the five witnesses just referred to, but it was the duty of the trial court to weigh this evidence, and in doing so it resolved any contradictions or inconsistencies therein in favor of the plaintiffs. We are bound by its determination.

Turning now to the law of the case, we find certain principles of law well established.

[2] The use of water upon riparian lands is presumed to be riparian, and the burden of proving prescriptive rights is upon the person asserting them. Pabst v. Finmand, 190 Cal. 124, 211 P. 11; Coleman v. Le Franc, 137 Cal. 214, 69 P. 1011; Oliver v. Robnett, 190 Cal. 51, 210 P. 408; Scott v. Fruit Growers' Supply Co., 202 Cal. 47, 258 P. 1095.

[3] "While one who asserts a prescriptive right to take water from a stream or other source must assume the burden of establishing it, proof of the continuous occupancy and use of the water as though he were the own-

er, for more than five years, establishes a prima facie case. It then devolves upon the original owner to show that the use of the water was permissive only or without his knowledge." 25 Cal. Jur. p. 1155; Gurnsey v. Antelope Creek, etc., Water Co., 6 Cal. App. 387, 392, 92 P. 326; Cheda v. Southern Pacific Co., 22 Cal. App. 373, 134 P. 717.

[4] "In appropriating the water which flows across his land, the lower appropriator invades no right of the upper riparian proprietor. The latter has no right of action to prevent such use, for he is in no wise injured, and the former should not be permitted to acquire a right in this manner which the latter is powerless to prevent. The case is quite different where the upper owner appropriates the water. The lower owner is injured at once, and the law gives him a remedy; and, if he fails to avail himself of it, the appropriation may, by lapse of time, ripen into an absolute right." Bathgate v. Irvine, 126 Cal. 135, 141, 58 P. 442, 444, 77 Am. St. Rep. 158; Pyramid Land, etc., Co. v. Scott, 51 Cal. App. 634, 638, 197 P. 398. An upper riparian owner may gain a right by prescription as against the rights of the lower riparian owner by proof that the latter had actual notice of the adverse claim of the upper owner, or that the circumstances were such, as for instance the use of all the water of the creek, that the lower owner must be presumed to have known of the adverse claim. Pabst v. Finmand, 190 Cal. 124, 130, 211 P. 11.

[5] Assuming that the authorities cited above establish the law of this state upon the subject of prescriptive rights which may be gained by an upper riparian proprietor as against a lower owner to waters in the stream to which their lands are riparian, we are of the opinion that the evidence in this case is sufficient to support the finding of the trial court that the plaintiffs herein have acquired a prescriptive right to 119 inches of water in Digger creek during the irrigating season of each year. While the burden is upon the plaintiffs to establish this right, we think that they have produced abundant proof of such right. There is practically no conflict in the evidence that they, and their predecessors in interest, used upon their lands continuously for a period of over thirty-four years substantially all the water of said creek flowing therein at the intake of the Childs ditch. The amount thus diverted was in the neighborhood of 200 inches of water measured under a 4-inch pressure. The amount of the stream which was not so diverted was negligible and consisted only of the seepage through the Childs dam. The evidence is equally conclusive that the plaintiffs and their predecessors in interest made said diversion and used said amount of water upon their lands under a claim of right, openly, notoriously, and adversely to the defendant and all lower owners on said stream; that the defendants and their predecessors in interest had actual knowledge of said diversion and of the adverse claim of plaintiffs and their predecessors in interest to the amount of water so diverted; and that plaintiffs and their predecessors in interest for more than twenty years, immediately prior to the commencement of the action paid all taxes assessed against said water so used by them as aforesaid. As against this evidence of the plaintiffs, the defendant Walker has made at best an indifferent showing. She and her grantors made but slight use of the land now owned by her. Only about 12 acres had any irrigation at all. The use of the water on these few acres was intermittent and comparatively slight. A considerable part of the time the land was occupied by the village blacksmith, who used the ranch more as a place of residence and made no attempt to cultivate any part of it, except that he irrigated a small garden patch and raised hay sufficient for one cow. Prior to his occupancy the property was owned and occupied by a Mr. Meeder for 18 years from 1892 to 1910, and there is no evidence that during this period of time any attempt was made to irrigate any part of it. At least on one occasion the occupant of the property was forced to go up the stream to procure sufficient drinking water for the use of those living on the property. The lands of the defendant adjoin those of the plaintiffs on the west. The dam by which water is diverted therein is situated only one-half mile below the Childs dam. This evidence is almost conclusive proof that the defendant and her predecessors in interest knew of the Childs' diversion and acquiesced therein. Having stood by for all these years and without protest or objection having acquiesced in the use of practically the entire flow of the stream by respondents during the irrigating season, the defendant must be held to have lost any right to the waters of said stream inconsistent with the beneficial use to which said waters were put by the plaintiffs during said period of time. E. Clemens Horst Co. v. Tarr Min. Co., 174 Cal. 430, 163 P. 492.

There is one feature of the case referred to above which demands further mention. There is evidence to the effect that at intervals for some years prior to the commencement of this action, Bouton interfered with the Childs dam by removing the rocks therefrom and permitting the water to flow down the creek. Referring to one of such occasions he specified it as "the time Mr. Meyer caught us in 1917." His testimony that he frequently broke the dam is positively contradicted by G. L. Childs, a witness on behalf of the plaintiffs. It is evident that the trial court was not impressed with his evidence. It plainly shows that what he did toward the tearing out of the Childs dam was done secretly and surreptitiously and not openly under any claim of right so to do. Such an act would not break the continuity of the plaintiffs' use of said waters.

[6] "Without further citation of authorities or critical analysis of those already cited, it is clear that in order to interrupt the running of the statute of limitations, as to flowing water, there must be a resumption of the possession thereof under a claim of right brought home to the adverse claimant either by express notice to that effect or by conduct so notorious and unequivocal as to imply such notice. * * * 'A clandestine entry or possession will not set the statute in motion, because the owner of the land cannot be said to have acquiesced in the wrongful entry or possession.'" Armstrong v. Payne, 188 Cal. 585, 597, 206 P. 638, 643.

The judgment is affirmed.

We concur: WASTE, C. J.; PRESTON, J.; SHENK, J.; LANGDON, J.; SEAWELL, J.; THOMPSON, J.

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217 Cal. 708

R. BARCROFT & SONS CO. v. CULLEN et al.

Sac. 4510.

Supreme Court of California.
April 3, 1933.

1. Fixtures 🔑9.

Steel service and comfort stations, erected on land leased by buyer thereof, *held* fixtures as to claimant of mechanic's lien for installing plumbing and wiring therein (Civ. Code, § 660).

2. Fixtures 🔑1.

Generally, "fixtures" are things so attached to realty as to be legally part thereof (Civ. Code, § 660).

[Ed. Note.—For other definitions of "Fixture," see Words and Phrases.]

3. Fixtures 🔑35(3).

Whether article annexed to realty is fixture is fact question, determinable on evidence in particular case (Civ. Code, § 660).

4. Fixtures 🔑7.

Whether article is fixture depends on relationship between parties to controversy, as well as manner of its annexation to realty (Civ. Code, § 660).

5. Fixtures 🔑18(1), 21.

Rule as to fixtures is construed most strongly in favor of vendee or mortgagee as against vendor or mortgagor (Civ. Code, § 660).

6. Fixtures 🔑27(2).

Tenant's right to remove trade fixture from demised premises may be regulated by contract between him and landlord (Civ. Code, § 1019).

7. Fixtures 🔑27(1, 3).

Parties to sale contract may expressly agree that chattels annexed to realty shall remain personalty as between themselves, but such agreement cannot affect third persons without notice thereof (Civ. Code, § 1013).

8. Mechanics' liens 🔑185.

One claiming mechanic's lien on article as fixture annexed to realty is not affected by chattel mortgage or conditional sales contract, of which he has no notice (Civ. Code, §§ 660, 1013).

9. Fixtures 🔑9.

In determining whether article attached to realty is fixture as between mechanic's lien claimant and conditional vendor, rules governing as between vendor and vendee or mortgagor and mortgagee, rather than landlord and tenant, apply (Civ. Code, §§ 660, 1019).

10. Mechanics' liens 🔑185.

Steel service and comfort stations, erected for tenant purchasing them on land covered by lease providing that buildings erected thereon by tenant should become lessor's property at termination of lease and remain on premises, *held* fixtures subject to mechanic's lien for installing plumbing and wiring therein (Civ. Code, §§ 660, 1013, 1019).

11. Mechanics' liens 🔑279.

Mechanic's lien claimant's failure to offer evidence that it had no notice or knowledge of conditional sale contract, providing that service and comfort stations, erected by seller on land leased by buyer, should not become fixtures, *held* not fatal to cause of action to foreclose lien; burden of showing such notice being on defendant seller.

In Bank.

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action by the R. Barcroft & Sons Company, a corporation, against Neil J. Cullen, the Pacific Steel Building Company, a corporation, and others to foreclose a mechanic's lien, in which defendant building company filed a cross-complaint. From a judgment foreclosing the lien, cross-complainant appeals.

Affirmed.

See, also, 213 Cal. 208, 2 P.(2d) 353.

Sherman & Sherman, of Los Angeles, for appellant.

A. A. Henderson of Merced, Barcroft & Barcroft, of Madera, and Julian H. Biddle and Duncan A. McLeod, both of San Francisco, for respondent.

PER CURIAM.

Defendant Pacific Steel Building Company appeals from a judgment foreclosing plaintiff's mechanic's lien. The trial court imposed the lien on certain buildings located on the property, as well as on the real estate. The sole contention on this appeal is that the buildings are personal property belonging to appellant and, as such, are not subject to the lien of the plaintiff. The facts giving rise to this controversy are not materially in dispute, and are as follows:

Some time in April, 1928, the owners of certain real property, the defendants Thorington, leased the same to the defendant Cullen for a period of five years, which lease was recorded. By the terms of this lease, Cullen was permitted to tear down a brick gasoline service station then located on the premises and to erect thereon a new service station. The lease expressly provided that upon its termination Cullen "shall leave upon said leased premises the buildings constructed in the place of the building now being demolished from said premises." Acting pursuant to the power thus granted, Cullen caused the old brick service station to be torn down and caused to be erected in place thereof the buildings which are the subject of the present controversy. On April 18th, Cullen entered into a conditional sales contract with appellant to purchase a steel service station with canopy, the over-all dimensions of which were 40 feet by 12 feet. On April 23, 1928, Cullen entered into a similar contract with appellant for the purchase of a steel comfort station, 8 feet 6 inches by 10 feet, divided into two separate rooms. These conditional sales contracts expressly provided that as between Cullen and appellant "the buyer (Cullen) agrees that no matter in what manner said property shall be attached to real estate, it shall not become a fixture or part of real estate, and upon default * * * the seller (Pacific Steel Building Company) or its agent may take possession of and remove said property without legal process." It was further provided that title to the buildings was to remain in the seller until they were fully paid for.

On or about May 3, 1928, Cullen entered into a contract with plaintiff whereby plaintiff agreed to furnish and install certain labor and materials necessary for the plumbing and wiring of the gasoline and comfort stations. Pursuant to this contract, plaintiff installed the piping and conduits and all fixtures necessary to complete its contract. The Thoringtons, owners of the real property, did not file any notice of nonresponsibility. Cullen forfeited his lease and the Thoringtons retook possession of the property and buildings. The plaintiff, not having been paid for the labor and materials furnished by it, took all the necessary steps to perfect its mechanic's lien and brought this action to foreclose the same.

The appellant, Pacific Steel Building Company, filed an answer and cross-complaint, setting forth the conditional sales contract, and contending that the buildings erected by it were, as to all concerned, personal property and not subject to the mechanic's lien. By its cross-complaint, appellant prayed for the return of its alleged personal property, or its value. The trial court held that as to plaintiff the buildings were fixtures and as such subject to the mechanic's lien. It decreed that the buildings and, if necessary, the real estate be sold to satisfy the lien.

The Pacific Steel Building Company alone appeals, contending that its buildings did not become fixtures subject to the mechanic's lien of plaintiff, but, by virtue of the conditional sales contract, and by virtue of the fact that the buildings are removable, they remained personal property.

[1] The evidence showed that the buildings were erected as follows: First, a cement foundation and floor for the buildings were constructed. This work was done under a separate contract by a contractor not connected with this action. Before the cement was poured, plaintiff put in its piping and conduits necessary for the fixtures later to be installed. Appellant furnished large bolts to be imbedded in the cement at points designated by it. The appellant then erected its buildings on this cement floor. At the base of its buildings were angle irons with holes bored therein at the appropriate places to fit over the bolts imbedded in the cement. Nuts were then screwed on the bolts, holding the base of the building in place. The balance of the building was then erected section by section on this base. After the buildings were erected, the plumbing and electric fixtures were installed.

Under these facts, it is our opinion that as to plaintiff the buildings were fixtures attached to the realty and, as such, subject to the mechanic's lien.

[2] Generally, fixtures are those things which are so attached to the realty as to be considered in law a part thereof. They are defined by section 660 of the Civil Code as follows: "A thing is deemed to be affixed to land when it is attached to it by roots, as in the case of trees, vines, or shrubs; or imbedded in it, as in the case of walls; or permanently resting upon it, as in the case of buildings; or permanently attached to what is thus permanent, as by means of cement, plaster, nails, bolts, or screws. * * *"

[3-5] Whether or not an article annexed to the real property is a fixture is a question of fact to be determined upon the evidence in the particular case. Gosliner v. Briones,

187 Cal. 557, 204 P. 19; Bianchi v. Hughes, 124 Cal. 24, 56 P. 610. The question is determined not only by the manner in which the article is annexed to the realty, but also by the relationship between the parties to the controversy. 12 Cal. Jur. 569, § 8. Thus, as between vendor and vendee, or mortgagor and mortgagee, the rule in reference to fixtures is construed most strongly in favor of the vendee or mortgagee. Fratt v. Whittier, 58 Cal. 126, 41 Am. Rep. 251; Commercial Bank v. Pritchard, 126 Cal. 600, 59 P. 130. This strict rule has long been modified as between landlord and tenant, in reference to articles annexed for purposes of trade. The rule as to such trade fixtures is embodied in section 1019 of the Civil Code, which provides: "A tenant may remove from the demised premises, any time during the continuance of his term, anything affixed thereto for purposes of trade, manufacture, ornament, or domestic use, if the removal can be effected without injury to the premises, unless the thing has, by the manner in which it is affixed, become an integral part of the premises."

[6, 7] However, whatever may be the right of a tenant by mere force of relation and the law to remove a fixture, this right, as between landlord and tenant, may be regulated by the contract between the parties. Merritt v. Judd, 14 Cal. 59; Board of Education v. Grant, 118 Cal. 39, 50 P. 5; 12 Cal. Jur. 580, § 17. These principles are well settled. Applying them to the present case, there can be no doubt that if the action were between a vendor and vendee, or between a mortgagor and mortgagee, the service and comfort stations erected by appellant would be held to be fixtures. The buildings were attached to a cement floor and foundation imbedded in the land by means of bolts imbedded in the cement. Under such circumstances, there can be no doubt that as between the parties above mentioned the buildings have become so affixed to the land as to become fixtures within the definition embodied in section 660 of the Civil Code, supra. Oakland Bank of Savings v. California Pressed Brick Co., 183 Cal. 295, 191 P. 524. Fratt v. Whittier, supra. There can also be no doubt that as between landlord and tenant, in the absence of agreement, such buildings as are here involved would be deemed to be trade fixtures and removable by the tenant. Murr v. Cohn, 87 Cal. App. 478, 262 P. 768. As between Cullen, the tenant, and appellant, the buildings, by virtue of the contract between them, were personalty. The parties, as between themselves, may, by express agreement, fix upon chattels annexed to realty whatever character they may agree upon. This right is recognized by the Code (Civ. Code, § 1013), but such agreement cannot affect third persons without notice thereof. Thus it has been held that where there is a contract between the landlord and tenant permitting the tenant to remove a structure erected on the premises, such contract, although binding between the landlord and tenant, cannot affect the rights of a mechanic, who, without notice, constructs the fixture in question. As to him, the structure is realty, subject to his lien. West Coast Lumber Co. v. Apfield, 86 Cal. 335, 24 P. 993.

[8] Keeping these general principles in mind, we turn now to an application of them to the facts of the present case. The first question to be determined is whether or not the conditional sales contract between Cullen and appellant in any way affects the rights of plaintiff, a mechanic's lien claimant. No case seems to have been decided in this jurisdiction. Although there is some conflict in the authorities from other jurisdictions, the better rule, supported by the weight of authority, is to the effect that one claiming a mechanic's lien on an article annexed to the realty is not affected by a chattel mortgage or conditional sales contract of which he has no notice. Thus in Security Stove & Mfg. Co. v. Stevens, 222 Mo. App. 1029, 9 S. W.(2d) 808 (second case), the action was to enforce a mechanic's lien on sixteen gas stoves. These ranges had been sold by the mechanic to a contractor and installed in the building as part of the remodeling. The contractor sold the stoves to the owner of the premises and took back a chattel mortgage thereon as security. He then went into bankruptcy. The seller of the stoves by this action sought to enforce his mechanic's lien. The owner contended the stoves were personalty. The court held they were fixtures and, therefore, subject to the lien. At page 812 of 9 S.W.(2d), 222 Mo. App. 1029, it is stated: "It has been held that where an article is so attached to the freehold as to become a fixture and a part of the freehold, but may be removed without damaging the premises, the fact that a chattel mortgage is given by the owner of the premises on the fixture is binding between the parties as to the fixture being personalty but it is not binding upon the rights of the person who furnished the fixture to have a mechanic's lien upon the premises in the absence of knowledge, actual or constructive, of the chattel mortgage. One cannot be deprived of his lien by any concealed purpose held by the owner of the premises."

In Northwestern Lumber & Wrecking Co. v. Parker, 125 Minn. 107, 145 N. W. 964, one Parker leased premises to a tenant Whitney, the lease providing that the lessee should make repairs at his own expense. Whitney purchased an engine, boiler, and steam radiator, and employed the Roberts Company to install them. These had been purchased under an agreement between Whitney and the seller that they were to remain personalty, Whitney giving the seller a chattel mortgage as security. The court held that this agreement made the articles personal property between the parties, but that these agreements could not change the character of the annexations as far as the Roberts Company was concerned. As to the Roberts Company, the articles were fixtures and subject to its lien. See, also, Fulp & Linville v. Kernersville Light & Power Co., 157 N. C. 157, 72 S. E. 867; King v. Blickfeldt, 111 Wash. 508, 191 P. 748; Landreth Machinery Co. v. Roney, 185 Mo. App. 474, 171 S. W. 681.

[9, 10] The next question to be determined is what test is to be applied in determining whether an article has become annexed to the realty, in a controversy between a mechanic's lien claimant and the conditional vendor of the article. The uniform weight of authority in other jurisdictions is to the effect that in determining whether or not a disputed item, attached to real estate, is personalty or realty, the rules governing the subject between vendor-vendee, or mortgagor-mortgagee, are applicable and not those which govern the subject between landlord and tenant. Security Stove & Mfg. Co. v. Stevens, supra; Fehr Construction Co. v. Postl System of Health Building, 288 Ill. 634, 124 N. E. 315; note, Ann. Cas. 1912B, p. 21, and cases cited. The reasoning in the above cases seems to embody a fair and just rule and one that is in accord with the general rules applicable to mechanic's liens. Appellant contends, however, that the above standard has not been adopted in this state, but that in Jordan v. Myres, 126 Cal. 565, 58 P. 1061, 1063, this court in effect held that the rules applicable to landlord and tenant govern a controversy between a mechanic's lien claimant and a conditional vendor. We do not so interpret the rule therein enunciated. In that case, the action was to foreclose a mechanic's lien. One Myres owned a certain mine property, which he agreed to sell to Berry. In the contract of purchase it was expressly agreed that if Berry failed to complete his purchase *he could remove all machinery installed by him.* A machine company sold certain machinery to Berry under a conditional sales contract. This machinery was installed on the premises. A mechanic furnished labor and material in working at the mine. He sought to include within his mechanic's lien the mining machinery. The court held that the mechanic's rights were *limited by the rights of the owner of the premises*, and that since, as to the owner, the property was personalty, by virtue of the owner's contract with Berry, the mechanic had no lien thereon and that, as to the mechanic, the property was personalty "whatever may be the rule as to a bona fide purchaser or mortgagee of the land without notice." The court cited no authority for this dictum to the effect that a different rule might apply to a mechanic than applies to a vendee or mortgagee. Such a distinction seems out of line and inconsistent with the development of our mechanic's lien law, and contrary to the weight of authority in other states. However, even if the holding in that case is still the law in California, it would not affect the decision in the present appeal. In that case, the court held that the mechanic had the same rights as the owner and that, since the owner had by contract agreed that the property should be personalty, it was personalty as to the mechanic. In the present case, the lease expressly provided that these buildings, erected in place of the old buildings by the tenant, should, at the termination of the lease, become the property of the lessor and should remain on the premises. In fact, when Cullen defaulted, the Thoringtons took possession of the premises, including the buildings herein involved. As between the tenant and the owners of the real property, these buildings were clearly realty as a result of this contract. It, therefore, follows that whether the test in Jordan v. Myres or the vendor-vendee test be applied, the buildings here involved, as to plaintiff, are fixtures and, therefore, subject to its mechanic's lien.

Appellants contend that during the trial plaintiff's counsel abandoned his lien on the buildings. Although such abandonment might be inferred from a sentence or two in the record, when such sentences are read in connection with their context, it is apparent that no such abandonment took place.

[11] One other point, although not mentioned by counsel, should be briefly referred to. The trial court made no finding as to whether or not plaintiff had knowledge of the conditional sales contract when it performed the work, although in its "Opinion and Order" the trial court stated "there is no proof that plaintiff had any notice or knowledge of the contract of Pacific Steel Building Company with Cullen." We have read the record and neither plaintiff nor defendant introduced any evidence on this point. However, the failure of plaintiff to offer such evidence is not fatal to its cause of action. It seems clear that the burden of showing such notice was on defendant, it being a matter of defense.

For the foregoing reasons, the judgment appealed from is affirmed.

SHIMPONES v. STICKNEY et al. *

L. A. 12822.

Supreme Court of California.

March 28, 1933.

Rehearing Granted April 27, 1933.

1. **Mortgages 🔑335.**

Sale under trust deed was void where notice of breach and election to sell was not recorded (Civ. Code, § 2924).

2. **Mortgages 🔑335.**

Notice of breach and election to sue, recorded some three years before sale under trust deed, did not warrant sale where payments of interest after default and before sale had been accepted (Civ. Code, § 2924).

3. **Mortgages 🔑369(7).**

Evidence *held* to show that sale under trust deed was fraudulently conducted by trustee and attorney who took property in name of his clerk, who did not attend sale or make bid.

4. **Mortgages 🔑360.**

Sales under deeds of trust will not be sustained unless conducted with regularity and scrupulous integrity.

5. **Trial 🔑377(1).**

Trial court acted within its province when it accepted testimony first given by clerk of defendant instead of modification three days later.

6. **Mortgages 🔑369(8).**

Where mortgagees and trustee under trust deed disclaimed, and court found trustee had attempted to deprive mortgagor of property by fraudulent sale and that pretended purchaser had no interest, conveyance to mortgagor was properly directed without requiring repayment of principal sum borrowed on security of property.

7. **Appeal and error 🔑1119.**

Rights of persons not parties cannot be adjudicated.

8. **Parties 🔑75(1).**

Motion to reopen case so that person not party may assert his interest is addressed to sound discretion of trial court.

9. **Parties 🔑75(1).**

Refusal to open case so that attorney who represented defendants might assert his right to property in controversy was not abuse of discretion.

10. **Quieting title 🔑43.**

In action to quiet title, plaintiff was not required to plead fraud in trustee's sale, and where sale was relied on by defendant, plaintiff could prove that sale was fraudulent.

11. **Evidence 🔑332(1).**

Where sale under trust deed was claimed to be fraudulent, files in case where trustee and father represented execution creditors were admissible.

12. **Appeal and error 🔑1054(1).**

Appellants cannot complain of admission of evidence where other evidence is sufficient to sustain judgment of trial court.

In Bank.

Appeal from Superior Court, San Diego County; S. M. Marsh and V. N. Thompson, Judges.

Action by Edith Shimpones against Jefferson K. Stickney and others. From a judgment for plaintiff, defendants appeal.

Affirmed.

Wright & McKee and C. M. Monroe, all of San Diego, for appellants.

Edward J. Kelly, of San Diego, for respondent.

WASTE, Chief Justice.

Defendants appeal from a judgment in favor of plaintiff in this action brought to set aside a conveyance of real property and to quiet plaintiff's title thereto.

In 1925 the plaintiff, then unmarried, borrowed $1,400 from the defendants Lane, giving as security therefor her promissory note and a deed of trust covering the real property here involved. Several changes of trustee occurred; the defendant Stickney, an attorney at law, succeeding to the office prior to the purported sale under the trust deed to the defendant Linley, a clerk in the defendant Stickney's law office. The trial court found and decreed the sale to be invalid and fraudulent and set the same aside. Inspection of the record satisfies us as to the propriety of this conclusion.

[1, 2] The sale was invalid because of the failure to record a notice of breach and election to sell as required by section 2924 of the Civil Code. The trustee's reliance on such a notice recorded in 1926, three years prior to the sale, is unavailing for the default then occurring was, under well-settled principles, waived by the subsequent acceptance of instalment interest payments for a period of approximately three years.

[3] An additional reason warranting the setting aside of the sale is the fraudulent manner in which it was conducted. Though the deed executed by the defendant Stickney, as trustee, to the defendant Linley, his law clerk, recites on its face that the property was struck off to Linley at public auction for the sum of $1,550, the evidence discloses that Linley did not attend any auction, public or private, at which the property was offered for sale; that Linley, the reputed purchaser, neither bid nor paid the sum of $1,550, or any other sum for the property; and that

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🔑For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 28 P.2d 673.

the defendant Stickney, the trustee, merely showed Linley the deed to the property and informed him that he (Stickney) was taking the property in Linley's name. The deed was thereupon placed in the defendant Stickney's safe. Upon this evidence the court below found that the purported sale and transfer of the property under the deed of trust was fraudulent in character, was unsupported by a valuable or any consideration, and that the defendant Linley was acting solely and entirely for the defendant Stickney who by his purported conveyance, as trustee, attempted to fraudulently deprive the plaintiff of her property.

[4, 5] Examination of the evidence indicates that these findings are amply supported. Sales under deeds of trust are scrutinized by the courts with great care and will not be sustained unless conducted with all fairness, regularity and scrupulous integrity. They will be set aside upon proof of fraud or unfair conduct. More v. Calkins, 85 Cal. 177, 24 P. 729; Kinard v. Kaelin, 22 Cal. App. 383, 391, 134 P. 370. Appellants direct our attention to certain testimony given by the defendant Linley when recalled to the stand. The trial was reopened on the appellants' motion to permit Linley to modify the testimony originally given by him. He then testified that it was not the defendant Stickney (the trustee) who had spoken to him of the property, but the latter's father, also an attorney at law, and that it was for the senior Stickney he was holding the property. We cannot say that the court below erred or exceeded its jurisdiction in rejecting this modified version of Linley's testimony. The trial court was acting well within its province when it determined that Linley's original testimony more nearly approximated the truth than that given three days later upon the reopening of the cause.

[6] It is next urged that the court below erred in directing a reconveyance of the property to the plaintiff and quieting her title thereto without first requiring a repayment of the principal sum borrowed upon the security of said property. In support thereof reference is made to the familiar maxim that he who seeks equity must do equity. The point is without merit. As indicated above, the loan to the plaintiff was made by the defendants Lane. These defendants apparently have been reimbursed, for by their answer to the complaint they have disclaimed all interest in the property and have displayed but a passive, if any, interest in the litigation. This is conceded in the appellants' brief. The Lanes seek no relief herein and are not, therefore, prejudiced by the judgment as entered. The same may be said of the defendant Stickney for he, too, in his answer to the complaint disclaimed all interest in the property. Moreover, the court below has found, upon competent evidence, that the defendant Stickney, as trustee, attempted to deprive the plaintiff of her property by a fraudulent sale thereof. This being so, the defendant Stickney has no equities, and he cannot call to his aid the maxim that he who seeks equity must come prepared to do equity in return. Hibernia S. & L. Soc. v. Ordway, 38 Cal. 679, 683. Inasmuch as the court below found that the deed to Linley, the remaining defendant, was fraudulent and unsupported by a consideration, he is in no position to assert that the judgment should provide for a repayment by the plaintiff. The defendant Linley expended nothing in "acquiring" the property and is, therefore, not affected by the omission of the judgment to provide for such repayment.

[7] We are not here concerned with the asserted rights of the senior Stickney or the Bay City Building & Loan Association, from whom it is asserted that Stickney senior, on the security of the property here involved, borrowed the money to pay off and discharge the plaintiff's obligation to the Lanes. The senior Stickney and the loan association are not parties to this suit and, consequently, their rights cannot be herein adjudicated.

[8, 9] Nor do we think the court below erred in refusing to reopen the case after the close of the trial, to permit the senior Stickney to assert whatever rights, if any, he has in the property. Such a motion is addressed to the sound discretion of the trial court. S. F. Breweries v. Schurtz, 104 Cal. 420, 428, 38 P. 92; Consol. Nat. Bank v. Pac. Coast S. S. Co., 95 Cal. 1, 16, 30 P. 96, 29 Am. St. Rep. 85; Houghton v. Lawton, 63 Cal. App. 218, 224, 218 P. 475. We cannot say that it abused that discretion. The record discloses that the senior Stickney, throughout the trial of the cause, acted as attorney for the defendants. He was therefore in a position, at all times, to assert and protect any rights he might have in the premises. His failure to ask leave to intervene until after the close of the trial is inexcusable. We have examined the affidavits offered in support of the motion to reopen the case and find nothing therein suggesting any impropriety in the trial court's order denying the relief prayed for.

[10] The case of Jose Realty Co. v. Pavlicevich, 164 Cal. 613, 616, 130 P. 15, 16, sufficiently answers the contention that the findings of fraud in the trustee's sale are without the issues raised by the pleadings. It is there declared: "It was not necessary for plaintiff to plead fraud in its complaint. The trustee's sale was set up by the defendant as a defense to the action of the plaintiff. In such a case, proof of fraud, sufficient to avoid the trustee's sale and deed was admissible without further pleading; it being matter in avoidance of the defense set up in the answer."

[11, 12] We perceive no error in the court's ruling admitting in evidence the file of an action entitled Reavis v. Shimpones, in which, prior to the commencement of the present action, an execution issued against the property here involved. The judgment in that case was subsequently vacated upon the motion of the defendant, plaintiff herein. In the Reavis Case the Stickneys (father and son) appeared as attorneys for the execution creditor. Plaintiff offered the file of that case in evidence in the present action to support her theory that either or both of the Stickneys have consistently sought by irregular means to deprive her of her property. The record was admissible for whatever value it might have in establishing plaintiff's theory. However, even if improperly admitted, the error could not have prejudiced the defendants' cause. As already shown, there is sufficient independent evidence to establish the invalidity and fraudulent character of the trustee's sale.

The judgment is affirmed.

We concur: PRESTON, J.; LANGDON, J.; SEAWELL, J.; SHENK, J.; CURTIS, J.; THOMPSON, J.

217 Cal. 581

OLDFIELD v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

L. A. 13906.

Supreme Court of California.
March 29, 1933.

Rehearing Denied April 27, 1933.

Assignments ⟹71.
Judgment ⟹732.
Prohibition ⟹5(2).

Ostensible assignor of money and securities levied on by execution creditor of assignee's husband *held* concluded by assignment, and by final judgments in antecedent litigation determining that husband was real owner; hence prohibition lay to restrain court from determining title as between assignor and execution creditor.

In Bank.

Petition by Barney Oldfield for a writ of prohibition to restrain the Superior Court in and for the County of Los Angeles and Lucius P. Green, judge thereof, from trying issues claimed to have been finally determined in former proceedings.

Writ issued.

Carroll Allen and A. E. McManus, both of Los Angeles, for petitioner.

Patterson & Montgomery and Charles C. Montgomery, all of Los Angeles, for respondents.

TYLER, Justice pro tem.

Petition for prohibition to restrain respondent court from proceeding to try issues claimed by petitioner to have been finally determined in former proceedings.

The present petition arises out of protracted litigation between different parties to acquire possession of certain securities and funds held by the California Bank. A history of that litigation is found in California Bank v. Traeger, 215 Cal. 346, 10 P.(2d) 51, which was an action in interpleader to have the conflicting claims determined. For an understanding of the present petition a brief review of such litigation is necessary. In 1926, Barney Oldfield, petitioner herein, obtained a judgment against J. M. Danziger, husband of Edith Wake Danziger. Oldfield then sought to levy execution against the funds in question, upon the claim that although the ostensible title was in Edith Wake Danziger by virtue of an assignment from a corporation known as Wake Development Company, J. M. Danziger, the judgment debtor, was the real owner thereof. Edith Wake Danziger, after the levy and on November 7, 1927, commenced an action against J. M. Danziger, her husband; Barney Oldfield, as a judgment creditor of J. M. Danziger; and Wm. I. Traeger, as sheriff of Los Angeles county, in which action she claimed title to the property under an assignment of a note and mortgage executed by Milton Sills to Wake Development Company, in the hands of the California Bank, which assignment ran from Wake Development Company to her.

The case was tried and judgment was entered in favor of defendants, including defendant Barney Oldfield. The judgment decreed that Edith Wake Danziger was never the owner of the note and mortgage, but that the same belonged to J. M. Danziger. This action was numbered 237604. An appeal from such judgment was taken by Edith Wake Danziger to this court, and afterwards dismissed, and the judgment became final.

On February 19, 1929, the California Bank, the custodian of said mortgage and money and upon which levy was made by Traeger in the cause last mentioned, filed an action in interpleader in the Superior Court of Los Angeles county against Wm. I. Traeger and others. This action was numbered 272076. The bank deposited the money and securities it held in court. The money and securities so deposited were the subject-matter of case numbered 237604. The parties defendant to the interpleader action were Wm. I. Traeger, sheriff, who had levied execution upon the bank and said property upon the

Oldfield judgment; also Edith Wake Danziger, who claimed all of said moneys and securities by virtue of the assignment to her from Wake Development Company, subject to a lien of Lina Danziger for $4,400. This assignment was based on the same instrument under which she claimed title in her action against Traeger, numbered 237604 above referred to, where it was adjudged that she had no title. Other parties to the action in interpleader were Lina Danziger, who claimed under an assignment to the extent of $4,400 from Edith Wake Danziger; Barney Oldfield, petitioner herein, who claimed that the levies of the execution above referred to constituted a lien on said moneys and securities. Claim was also made by Oldfield under the action filed by Edith Wake Danziger against Traeger, sheriff, J. M. Danziger and Barney Oldfield, also above referred to as No. 237604, in which judgment it was decreed that the property in question belonged to J. M. Danziger, and that Oldfield and Traeger were entitled to judgment. In this interpleader action No. 272076, judgment was entered on the 25th day of April, 1930.

The real controversy in said action was between the claims of Edith Wake Danziger, Lina Danziger, and Barney Oldfield. In this action the Wake Development Company appeared by J. M. Danziger. It filed an answer setting up the assignment of said company to Edith Wake Danziger. This assignment was absolute and contained no reservation of title. The court found in favor of Edith Wake Danziger and against the other defendants, and held that the former judgment, No. 237604, affecting the same subject-matter, adjudicated nothing against her except a dismissal. The court further held that the judgment pleaded by Oldfield in that case adjudicated nothing with respect to the moneys and securities, and that said judgment was without the issues, and the levies of the sheriff under the executions be vacated and set aside. Petitioner herein, Barney Oldfield, appealed from said judgment to this court. Thereafter the judgment was reversed (California Bank v. Traeger, 215 Cal. 346, 10 P.(2d) 51) this court holding that the judgment in favor of Barney Oldfield and the sheriff in the case of Edith Wake Danziger v. Wm. I. Traeger et al., No. 237604, adjudicating that J. M. Danziger was the owner of the moneys and securities, was res adjudicata and determinative in this action and binding upon Edith Wake Danziger and Lina Danziger as to the title and ownership thereof. The Wake Development Company, which appeared in such action, had not appealed.

Upon the going down of the remittitur from this court, the case was set for trial. Danziger did not then appear for the Wake Development Company, but appearance was had by such company by the same attorney who represented Edith Wake Danziger. The opinion of this court, together with the remittitur and judgment roll, was presented to the trial court, and attention was called to the answer of Wake Development Company, in which it was alleged that that company had assigned all its interest in the money and securities to Edith Wake Danziger. No other evidence was presented. The court thereupon decided to determine the issue of title as between petitioner and the Wake Development Company, notwithstanding the judgments in Danziger v. Traeger and Oldfield, No. 237604, and California Bank v. Traeger, No. 272076, in which cases it was held that Wake Development Company had no right or title to said property.

Petitioner claims there is nothing for the trial court to adjudicate as far as the Wake Development Company is concerned, as it had its day in court and final judgments adjudicated its rights. We are of the opinion that petitioner is correct in his contention, and that he is entitled to the writ prayed for. The Wake Development Company had full opportunity to assert in the actions above referred to any and all title it may have had to the money and securities. Instead of doing so, it, by appropriate pleadings, disclaimed any right by reason of its admitted absolute assignment of all its interest to Edith Wake Danziger. Moreover, the judgments referred to are conclusive to the effect that neither Edith Wake Danziger nor Wake Development Company ever had any title to the property in question, but that the same was at all times the property of J. M. Danziger.

This court has expressly held in California Bank v. Traeger, supra, that the judgment in the suit instituted by Edith Wake Danziger to quiet title to the property concluded her rights in the money and securities. Wake Development Company had assigned to her without reservation all of its right, title and interest in the property, and it was likewise concluded by reason of this assignment. It was also concluded by final judgments determining that it had no title. A court is without jurisdiction to try issues which have become finally determined by former judgment (Granger v. Superior Court, 159 Cal. 1, 112 P. 854), and a party affected thereby is entitled to a writ of prohibition, where a court is about to try such issues. Robson v. Superior Court, 171 Cal. 588, 154 P. 8. This being so, it is ordered that a writ of prohibition issue to respondent judge, prohibiting and restraining him from proceeding with the taking of any evidence in support of the pretended claims of Wake Development Company.

We concur: **WASTE, C. J.; CURTIS, J.; LANGDON, J.; PRESTON, J.; SHENK, J.; SEAWELL, J.**

217 Cal. 618

COUNTY OF SAN BERNARDINO v. STATE INDUSTRIAL ACCIDENT COMMISSION et al.

L. A. 13918.

Supreme Court of California.
March 31, 1933.

1. Master and servant 🔑367.

Deputy registrar of voters allowed to follow her own methods and furnish her own transportation in securing registrations and paid at rate of eight cents per capita for registrations secured, *held* "employee" of county and not "independent contractor" (St. 1917, p. 835, § 8 (a); Pol. Code § 4237 as amended by St. 1927, p. 1075).

[Ed. Note.—For other definitions of "Employé" and "Independent Contractor," see Words and Phrases.]

2. Master and servant 🔑417(7).

Ordinarily, unless but one inference can reasonably be drawn from facts, question whether workman is employee is for Industrial Commission whose finding is conclusive.

3. Master and servant 🔑416.

Whether injury arose in course of employment is primarily question for Industrial Commission (St. 1917, p. 831, as amended).

4. Master and servant 🔑417(7).

Industrial Commission's findings on question whether injury arose in course of employment will not be disturbed when supported by substantial evidence.

5. Master and servant 🔑375(1).

Employee is in "course of employment" when he does those reasonable things which his contract with employer permits.

[Ed. Note.—For other definitions of "Course of Employment," see Words and Phrases.]

6. Master and servant 🔑375(1).

Deputy registrar of voters, struck by automobile while en route to consult deputy city clerk who had assigned her to duty, sustained injuries in "course of employment" (St. 1917, p. 831, as amended).

7. Master and servant 🔑385(17).

Employee's private settlement with third party causing injuries, made without notice to employer, *held* valid as against employee but voidable and not void as to employer where result would be injurious to his interests; hence employer was entitled to credit for amount of settlement covering compensable elements, against liability for compensation (St. 1917, p. 854, § 26, as amended by St. 1931, p. 2370).

8. Master and servant 🔑385(17).

Statutory amendment entitling employer to credit on liability for compensation for amount recovered by employee from third party causing injuries, *held* applicable to injuries sustained prior to enactment of amendment but before Industrial Commission's decision (St. 1917, p. 854, § 26, as amended by St. 1931, p. 2370).

9. Constitutional law 🔑190.

Retrospective law does not violate Constitution unless it is ex post facto law, law impairing obligation of contract, or law depriving person of vested right.

10. Constitutional law 🔑191.
Master and servant 🔑347.

Statute entitling employer to credit on liability for compensation for amount recovered by employee from third party causing injuries, *held* not unconstitutional because applicable to injuries sustained prior to enactment of statute, since it applied only to procedure (St. 1917, p. 854, § 26, as amended by St. 1931, p. 2370).

In Bank.

Proceedings under the Workmen's Compensation, Insurance and Safety Act by Sarah D. Allen, employee, opposed by the County of San Bernardino, employer. To review an order of the Industrial Accident Commission awarding compensation, the employer brings certiorari.

Award annulled and cause remanded with directions.

Prior opinion, 13 P.(2d) 829.

Stanley Mussell, Dist. Atty. of San Bernardino County, and James L. King, Chief Deputy Dist. Atty. both of San Bernardino, for petitioner.

A. I. Townsend, of San Francisco, for respondent Industrial Accident Commission.

Robert M. Bradley, Jr., of Redlands, for respondent Sarah D. Allen.

Redman, Alexander & Bacon, R. P. Wisecarver, and Daniel W. Burbank, all of San Francisco, amici curiæ.

PER CURIAM.

This is a petition to review an award of the Industrial Accident Commission. The cause was before the District Court of Appeal, Fourth Appellate District, and an opinion was rendered therein by Mr. Justice pro tem. HARDEN, which we incorporate in part as a correct presentation of the facts and a proper determination of certain issues. The portions of said opinion which we incorporate are as follows:

HARDEN, Justice pro tem.

Some time prior to January 24, 1928, Mrs. Sarah D. Allen was appointed by the county of San Bernardino as deputy registrar of voters of said county. She was of the age of about seventy-five years at that time. Joseph C. P. Hook, deputy city clerk of Redlands in said county, administered the oath of office. No particular term of employment was fixed in her appointment, but it was contemplated that she would act until thirty days prior to the presidential primary election on May 1, 1928. It was stipulated by the parties hereto that the relation existing between Mrs. Allen and the county could have been terminated at any time without liability to either party. While she had the legal right to register any qualified elector in the county, she was assigned by said deputy city clerk to a certain district in the city of Redlands, definitely marked by reference to designated streets, for the purpose of securing registrations. Other persons were engaged by the county to perform similar services in districts assigned to them. Mrs. Allen was not required to work any particular number of hours, nor on any particular days. Aside from the assignment to the particular district, the only instructions given her were printed on a pad of registration blanks and covered the law upon the subject of the registration of electors. She had had previous experience in the same work. In securing registrations she followed her own methods and furnished her own transportation. Payment for services rendered was at the rate of eight cents per capita for registrations secured; and up to the time of the accident involved herein she had earned an average of about $1.50 per day for the time devoted to the work, amounting in all to $28. On January 24, 1928, while engaged in securing registrations within her district, a question arose as to whether she should register certain school teachers who resided within the district but were employed at the time at a point beyond the boundaries thereof. Being uncertain as to her rights and duties under the circumstances, Mrs. Allen proceeded toward the office of said deputy city clerk to secure advice and directions from him upon the subject. While walking upon the sidewalk within the boundaries of the district assigned en route to consult said deputy city clerk for said purpose, she was struck by colliding automobiles, with the result that she sustained serious injuries. The county had no connection with either automobile involved in the collision. No action was filed to recover damages for the injuries sustained. On July 20, 1928, Mrs. Allen effected a settlement and was paid $3,500 by an insurance company in behalf of one of the parties involved in the collision, in consideration of which payment she signed a full release of said party from all claims and causes of action on account of injuries sustained by her and damage to her property. The settlement was made without the knowledge or consent of the county; neither did the Industrial Accident Commission nor any court consent thereto.

Pursuant to proceedings instituted by Mrs. Allen before the Industrial Accident Commission on January 10, 1929, for compensation for said injuries, a final decision was rendered by the commission in favor of the petitioner therein on March 7, 1932. It was found by the commission that, at the time of the injury, Mrs. Allen was employed as a deputy registrar of voters by the county of San Bernardino; that the injuries sustained arose out of and in the course of her employment; that the employer was uninsured, and that both employer and employee were subject to the provisions of the Workmen's Compensation, Insurance and Safety Act (St. 1917, p. 831, as amended); that Mrs. Allen was entitled under the provisions of said act to $675.54 for permanent disability and to $2,225.70 for her reasonable medical expenses, making a total of $2,901.24; and an award was made against the county of San Bernardino for that amount, less $75 payable to her attorney. The decision further recites: "The said applicant received the sum of $3,500.00 under a settlement with the third party causing the injury, no part of which sum has been received by the defendant herein, (the County of San Bernardino). Testimony was duly presented to this Commission tending to establish that of the said amount of $3,500.00 the sum of $1,000.00 represented, under agreement of the parties to said settlement, the element of pain and suffering caused by said injury as distinguished from compensable disability and expenses." The commission held, however, that it had no jurisdiction to make a judgment segregating any portion of the amount received in the settlement, nor to grant any credit to the county upon its liability. The county has not paid Mrs. Allen anything as compensation under said act.

[1, 2] The first point raised in this proceeding is that at the time of the injury Mrs. Allen was not an employee within the meaning of that term as defined by the Compensation Act; that, on the contrary, she was an independent contractor. By the terms of section 8(a) of said act (St. 1917, p. 835) the term "employee" is defined to mean: "* * * all elected and appointed paid public officers, * * * but excluding any person whose employment is both casual and not in the course of the trade, business, profession or occupation of his employer." An "independent contractor" within the meaning of said act is held in Fidelity & Casualty Co. v. Industrial Acc. Com., 191 Cal. 404, 407, 216 P. 578, 579, 43 A. L. R. 1304, to be: "One who renders service for a specified recompense for a specified result, under the control of his principal as to the result of his work only, and not as to the means by which such result is accomplished." There is no claim that Mrs. Allen's employment was casual. We think the language of the statute is a

complete answer to the contention that she was not an employee. At that time a deputy registrar of voters of said county was a deputy county clerk and was an appointed, paid public officer. Section 4237, Pol. Code, amended by St. 1927, p. 1075. If more need be said upon this phase of the case, we think that, aside from the fact that an appointed, paid public officer is declared to be an employee, the nature of the relationship existing between Mrs. Allen and the county would prevent a holding that she was an independent contractor. Ordinarily, unless but one inference can reasonably be drawn from the facts, the question whether a workman is an employee within the meaning of the act is one of fact for the commission, upon which its finding is conclusive. Roman Catholic Archbishop v. Industrial Acc. Com., 194 Cal. 660, 230 P. 1. Stress is laid upon the mode of payment adopted as indicating that Mrs. Allen was not an employee. "A workman who is paid wages by the piece or quantity comes within the provisions of the Workmen's Compensation Act the same as one who is paid by the day. Wages may be measured by time, by the piece, or by any other standard. * * * One of the best tests to determine whether the relation is that of an independent contractor or that of employer and employee is the right of control. It is not the fact of actual interference with the control, but the right to interfere, that makes the difference between an independent contractor and a servant or agent. * * * Coincident with the right of control is the right of either the employer or the employee to terminate the relation without liability. This is but another way of stating the rule, for the right to immediately discharge involves the right of control." Hillen v. Industrial Acc. Com., 199 Cal. 577, 581, 250 P. 570, 571. The mode of payment did not make Mrs. Allen an independent contractor, and the fact that the county retained the right to discharge her at any time was inconsistent with the creation of that relation. The commission has found that she was an employee and not an independent contractor. The finding is proper.

[3-6] The second point raised is that Mrs. Allen was not engaged in the course of her employment at the time she was injured. Whether an injury arose in the course of the employment is primarily a question for the commission to determine, and its findings on such question will not be disturbed when there is substantial evidence to support them. Myers v. Industrial Acc. Com., 191 Cal. 673, 218 P. 11; Crockett v. Industrial Acc. Com., 190 Cal. 583, 213 P. 969. As stated, at the time of the injury Mrs. Allen was within the district assigned her en route to consult the deputy city clerk of Redlands, who had sworn her to the performance of her duties and who had assigned her to duty in her district. It is claimed she had no lawful right to look to Mr. Hook for advice or instructions; that he had no connection with the county of San Bernardino. While no legal relation existed between him and the county of San Bernardino, so far as the record discloses, still Mr. Hook was not a total stranger to the county. The county either authorized or permitted him to assign Mrs. Allen to her district. She might naturally have been expected to look to him for directions under the circumstances. We see nothing in the fact that Mr. Hook was not a county official. There is no claim that Mrs. Allen was loitering along the street when injured. The nature of her employment would naturally take her upon the streets, and it may be assumed that it was within the contemplation of both parties that she would go upon the streets to secure registrations. The risks common to travel upon the streets are recognized as incidental to many kinds of employment. The cases of messengers and solicitors furnish close analogies. Frigidaire Corp. v. Industrial Acc. Com., 103 Cal. App. 27, 283 P. 974; Real Silk Hosiery Mills, Inc., v. Industrial Acc. Com., 86 Cal. App. 189, 260 P. 807; Makins v. Industrial Acc. Com., 198 Cal. 698, 247 P. 202, 49 A. L. R. 411. In the last-mentioned case the district assigned to a carrier of newspapers was held to be the employee's place of employment within the meaning of the Compensation Act. Ordinarily, the purpose of the act of the employee out of which the injury arose, rather than the method of its performance, determines whether he was injured while within the course of his employment, unless the act, even though intended to forward the purpose of the employer, was of such an exceptional and unusual nature that it could not reasonably be said to be within the scope of the employment. Standard L. Co. v. Industrial Acc. Com., 60 Cal. App. 331, 212 P. 720. In this case we may inquire whether the trip undertaken by Mrs. Allen was personal to her or in behalf of her employer. In view of her assignment to a particular district by the deputy city clerk, the restriction thereby put upon her in the matter of registering electors, and the particular question that arose as to the registration of the teachers we think there was nothing personal about the inquiry she proposed to make of the deputy city clerk and the trip undertaken for that purpose. It had to do only with the employment and was in behalf of the employer. "An employee is in the 'course of his employment' when he does those reasonable things which his contract with his employer expressly or impliedly permits him to do." Hartford A. & I. Co. v. Industrial Acc. Com., 202 Cal. 688, 691, 692, 262 P. 309, 310, 58 A. L. R. 1392. On what we regard as sufficient evidence the commission has determined in effect that the employee was engaged in the performance of an act impliedly permitted

by her employer, and has concluded that she was then in the course of her employment. With that decision of the commission we cannot interfere.

Petitioner also makes the point that the commission erred in allowing certain charges made for medical care and treatment. We are satisfied, from a careful study of the record, that the evidence before the commission was sufficient to justify its determination in this regard, and that no useful purpose would be served by a detailed enumeration of the items and the supporting evidence.

[7] The important question in this appeal, for the consideration of which this court granted a hearing, is whether the commission should have granted to petitioner, the employer, a credit for a portion of the amount received by settlement with the third party. It appears that in making the settlement, the parties had in mind the sum of $2,500 as compensation for the injury, and $1,000 for pain and suffering. Since the elements of pain and suffering are not compensable by the commission (see Jacobsen v. Industrial Acc. Com., 212 Cal. 440, 299 P. 66), the county makes no claim for credit as to that sum which represents these elements, but does seek a credit in the sum of $2,500, on its liability for compensation under the Workmen's Compensation Act.

Prior to the decisions of this court in Jacobsen v. Industrial Acc. Com., supra, and Zurich Gen. Acc., etc., Ins. Co. v. Industrial Acc. Com., 212 Cal. 451, 299 P. 70, the commission had established the practice of granting credit to the employer on his liability for compensation, for the purpose of avoiding a double recovery by the employee. In the Jacobsen Case we held that this practice was unauthorized by the statute, which gave the employer the remedy of asserting a lien in any action brought by the employee against the third party. We held also that failure to assert the lien in that manner was a waiver thereof, and that the commission had no power to take care of this omission by a mere rule of practice. It will be observed that the Jacobsen Case differs from the instant case in two important particulars. First, in the instant case there was no action brought by the employee; a private settlement was effected by her. Hence there was no opportunity for the employer to assert a lien as provided by the statute. Second, the employee made the settlement without notice to the employer, in violation of the express terms of the statute, and hence the employer was not in a position to assert and protect its rights. That these distinctions are of importance is indicated by the language of the Zurich Gen. Acc., etc., Ins. Co. Case, 212 Cal. 453, 299 P. 70, 71, supra, as follows: "From what has been said in the Jacobsen Case and in this opinion, it should be understood that the problem presented and determined applies only to cases where the employee recovers a judgment against a third party tort-feasor in an action for damages for the negligence of the latter. The powers of the commission otherwise to order credits and liens under the act are not affected." There is nothing in these decisions which denies to the commission the power to grant a credit in cases where no action is brought by the employee, and no waiver of the employer's lien may be implied.

It is suggested, however, that since the employee entered into the settlement without notice to the employer and consequently in violation of the act, the settlement agreement was void, and the employer could claim no credit based upon receipt by the employee of money under such settlement. The implications of such a conclusion are somewhat startling. On its face it results in a double recovery by the employee as a reward for her own violation of the law. In theory, of course, the employer could sue the third party for reimbursement of its expenditures for compensation, provided that the statute of limitations had not already run; as a practical matter, it would seem that the statute had already barred this right of action. However, the statute may not, perhaps, have run upon the right of the third party to recover money paid to the employee under a void contract, in which case the responsible third party might be wholly absolved, and the innocent employer held responsible for full compensation, and all because of the wrongful act of the employee. The absurdity of this result, both on the merits and because of the multiplicity of suits which it engenders, indicates the unsoundness of the view contended for. In our opinion, the provision of the statute requiring notice to the employer is intended solely for his benefit, and a violation thereof should, no doubt, render the settlement voidable at his election, but certainly not void where the result would be injurious to his interests. It should not be possible for the employee, having received the benefits of the settlement, thereafter to assert its invalidity in order to reap a further profit. The settlement must, we think, be considered valid as against the employee, because the employer does not attack its validity, and the employee has received a benefit therefrom.

No positive statutory provision operates, as it did in the Jacobsen case, to prevent the granting of a credit in this proceeding. The evidence of segregation made by the parties of the sums received in settlement was sufficiently clear and definite for the commission to determine that $1,000 thereof was allocated to pain and suffering, and that this item should not be included in the credit. It would seem, therefore, that the commission, in order to prevent a gross perversion of the purpose of the statute, should grant the requested credit.

[8] We reach this same conclusion on another ground. In 1931, following the decision in the Jacobsen Case, the Legislature amended section 26 of the Workmen's Compensation Act (St. 1931, p. 2370) to provide expressly for the power denied in that case. The relevant provision now reads: "The commission is empowered to and shall allow a credit to the employer to be applied against his liability for compensation the amount of any recovery by the employee for his injury, either by settlement or after judgment, that has not theretofore been applied to reimburse the employer." While the injury to Mrs. Allen was sustained prior to the enactment of this amendment, the decision and award of the commission, which are here attacked, were made after the amendment went into effect. How, then, could the commission disregard it in arriving at its determination? As a matter of interpretation, the amendment in its language plainly applies to any case before the commission at the time of its effective operation. There is nothing in its wording to suggest that it was not intended to apply to cases where the injury occurred prior thereto. Nor is there any policy opposed to such application. The amendment was designed to permit the commission to do what the court theretofore alone could do—prevent double recovery by crediting the employer with the employee's recovery against the third party. Its application in the instant case would avoid a multiplicity of actions and the unfair result already discussed.

[9, 10] The same factors determine the question of constitutionality. Assuming that the statute, as above interpreted, may be called a retrospective law because it applies to a situation which took place before its enactment, this by no means leads to the conclusion that its application violates the Constitution. Invalid retrospective legislation falls into three classes: Ex post facto laws, or retrospective criminal statutes; laws impairing the obligation of contract; and laws which deprive a person of a vested right. See Los Angeles v. Oliver, 102 Cal. App. 299, 283 P. 298. It is obvious that no contract obligation would be impaired by the construction herein placed upon the statute, and the only remaining question is whether a vested right has been curtailed or destroyed, in violation of the constitutional guaranty of due process of law. Here it is also obvious that the constitutional inhibition does not apply, for the amendment to the statute applies solely to procedure, and does not affect the substantive rights of the employee. As already pointed out, the employee has no right, under the statute, to a double recovery for the injury; and the statute in force at the time of the injury gave the employer the right to obtain, and the court the power to grant, a lien upon the judgment in reimbursement of expenditures for compensation. This lien, in purpose and effect, is the exact equivalent of the credit which is now granted by the commission. The change is simply in the manner in which and the body by which it is granted. Nothing to which the employee was formerly entitled has been taken away. A limitation upon his rights which formerly existed is simply made easier to apply, in the same proceeding in which compensation is sought, instead of solely in a court in which an action may be brought.

In Los Angeles v. Oliver, 102 Cal. App. 315, 283 P. 298, 305, supra, numerous cases were reviewed, and the governing principle was correctly stated, as follows: "It is a well-settled rule of law that the Legislature may change rules of procedure, or remedies, and that such changes may be made applicable to pending actions, provided, of course, that under the guise of a mere change of procedure or substitution of remedies vested rights are not destroyed or the obligation of contracts impaired (Buck v. Canty, 162 Cal. 226, 121 P. 924; Aikins v. Kingsbury, 170 Cal. 674, 151 P. 145; Bassford v. Earl, 172 Cal. 653, 158 P. 124), and so long as a reasonably efficient remedy remains (Kerckhoff-Cuzner Mill & Lumber Co. v. Olmstead, 85 Cal. 80, 24 P. 648; Lantz v. Fishburn, 17 Cal. App. 583, 120 P. 1068). As said by Judge Cooley in his work on Constitutional Limitations, 'The bringing of suit vests in a party no right to a particular decision.' Cooley, Const. Lim. (8th Ed.) p. 789. When a law only affects the remedy or procedure, 'all rights of action will be enforceable under the new procedure, without regard to whether they accrued before or after such change in the law and without regard to whether the suit had been instituted or not, unless there is a saving clause as to existing litigation.' People ex rel. Foote v. Clark, 283 Ill. 221, 119 N. E. 329."

The above-quoted opinion, which dealt with the application of a statutory change to pending proceedings in eminent domain, contains other language which seems peculiarly applicable here. Quoting first from Pacific Gas & Electric Co. v. Chubb, 24 Cal. App. 265, 141 P. 36, it is said: " * * * The procedure by which this just compensation is to be ascertained is as much the subject of statutory law as is the procedure by which the property is to be taken. There is no way to exercise the right of eminent domain except as prescribed by statute, and there is no way for the property owner to secure just compensation for his property except by statute law." The court in the Oliver Case continues: "It would thus appear that the procedure by which the amount of compensation is to be ascertained and determined is not within, or a portion of, the right, guaranteed by the Constitution and therefore vested in the property owner."

Other illustrations of this principle may be easily found. Thus, in City of Chicago v. Industrial Commission, 292 Ill. 409, 127 N. E. 46, an amendment to the Workmen's Compensation Law, limiting the time within which a writ of error to review the cause might be obtained, was applied to a case where proceedings for compensation were instituted prior to the amendment. In Rice v. Dunlap, 205 Cal. 133, 270 P. 196, this court held that a change in section 438 of the Code of Civil Procedure, enlarging the scope of counterclaim by a defendant, would be applicable to a new trial after a reversal, even though the plaintiff's cause of action accrued and the original action was filed before the amendment. We there said (205 Cal. 137, 270 P. 196, 198): "* * * The defendant * * * will be entitled to the benefit of any changes in the adjective or procedural law which have been made by the Legislature up to the time of the new trial." In Maguire v. Cunningham, 64 Cal. App. 536, 222 P. 838, it was held that the amendment of 1921 to section 738 of the Code of Civil Procedure, giving the remedy of quiet title in actions concerning personal property, was to be retroactively applied to a pending action. See generally, note, 35 Harv. L. Rev. 193.

The conclusion necessarily follows that the commission erred in refusing to credit the employer on its liability for compensation, in the amount claimed. It is therefore ordered that the award be annulled, and the cause is remanded for further proceedings not inconsistent with this opinion.

Mr. Justice CURTIS, deeming himself disqualified, does not participate in the foregoing opinion.

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217 Cal. 600

MANNION v. BALDWIN et al.

L. A. 11929.

Supreme Court of California.

March 30, 1933.

1. Licenses 🔑18½.

Permits issued by corporation commissioner for sale of stock must be strictly complied with (St. 1917, p. 673, as amended).

2. Licenses 🔑39.

Evidence *held* to sustain finding that stock issued to incorporator was for partnership business in violation of permit under Corporate Securities Act providing stock should be issued only for cash (St. 1917, p. 673, as amended).

3. Licenses 🔑39.

Director selling stock which she knew was void *held* liable to innocent buyers (St. 1917, p. 673, as amended).

4. Licenses 🔑39.

Directors present at meeting voting to issue stock in violation of Corporate Securities Act *held* liable to innocent buyers thereof, although not participating in sale (St. 1917, p. 673, as amended).

5. Licenses 🔑39.

Presumptively corporation received par value for stock sold to incorporator who knew stock was issued in violation of Corporate Securities Act (St. 1917, p. 673, as amended).

6. Licenses 🔑39.

Corporation receiving par value for stock issued in violation of Corporate Securities Act *held* liable with directors to innocent buyers of stock (St. 1917, p. 673, as amended).

7. Licenses 🔑39.

Partner receiving, from director of corporation taking over partnership, money derived from sale of void stock, in payment of partnership interest, *held* not liable to innocent buyers of stock (St. 1917, p. 673, as amended).

Such partner was not liable to the innocent buyers of such void stock which was issued in consideration of the partnership business transferred to the directors in violation of the Corporate Securities Act (St. 1917, p. 673, as amended), providing stock should be issued only for cash, since he was not connected with the issuing thereof.

8. Licenses 🔑39.

Stock issued contrary to permit granted by corporation commissioner is void, so that buyer of stock may recover purchase money (St. 1917, p. 673, as amended).

In Bank.

Appeal from Superior Court, Los Angeles County; Clair S. Tappaan, Judge.

Action by Josephine Mannion against Simeon Baldwin and others. From the judgment for defendants, plaintiff appeals.

Reversed.

Prior opinion, 13 P.(2d) 948.

Fred N. Arnoldy, of Los Angeles, for appellant.

John Perry Wood and Hugh Carter, both of Los Angeles, for respondents Simeon Baldwin and Helen D. Baldwin.

Walter A. Ham, of Los Angeles, for respondents Gladys Hess Sykes et al.

Harrison S. Robinson, Harry L. Price, and R. W. Macdonald, all of Oakland, amici curiæ.

PER CURIAM.

A hearing was granted in this case in order to consider more fully the issues therein involved. Upon such consideration, we are satisfied that the opinion of Mr. Justice pro tem. Tuttle correctly decides said issues, and we therefore adopt said opinion as the opinion of this court. It reads as follows:

This is an action brought to recover the sum of $7,500 which it is contended was paid for stock issued and sold in violation of a permit granted under the Corporate Securities Act (St. 1917, p. 673, as amended). The trial court found to the contrary, and judgment was entered in favor of defendants. The appeal is taken from the judgment.

The sole question before this court is the sufficiency of the evidence to support the findings.

In May, 1927, respondent Sherman M. Sykes and respondent Simeon Baldwin entered into a partnership to conduct a retail clothing business. Baldwin furnished some $800. Sykes advanced no money whatever. Each owned a half interest in the business. From time to time Baldwin advanced more money for the business, until there was owing him some $10,000. Eventually he became dissatisfied with the manner in which the business was being conducted, and agreed to sell his interest in the partnership to Sykes for the sum of $10,000 and to accept in payment thereof two promissory notes for $5,000 each. In the meantime a corporation known as "The Trousseau Shop, Inc.," was formed by Baldwin and his wife, Helen D. Baldwin, and Gladys Sykes, the wife of Sherman Sykes, for the purpose of taking over the partnership business, and on October 24, 1927, the commissioner of corporations granted a permit authorizing the corporation to sell 200 shares of its capital stock at par ($100) for cash. On December 1, 1927, Sykes, his wife, and his mother executed and delivered to Baldwin the two promissory notes above mentioned for $5,000 each in payment of his share in the partnership; and on the same day the directors of the corporation authorized Baldwin as president and Mrs. Sykes as secretary to issue five certificates calling for a total of 160 shares of stock. Certificates numbered 1, 2, and 3 were issued for one share, each, as qualifying shares to the incorporators; and certificates numbered 4 and 5 were issued to Gladys Sykes for 75 and 82 shares, respectively. Certificate No. 5 was thereupon delivered to Baldwin as security for the payment of said promissory notes; and certificate No. 4 was reissued as certificate No. 6, for the same number of shares, 75, with the name of the holder thereof left blank. Baldwin and his wife and Mrs. Sykes as directors of the corporation thereupon adopted a resolution authorizing the purchase from themselves and Sherman Sykes of the partnership business, subject to its obligations, for $16,000 cash; and Baldwin, his wife, Sykes, and his wife then joined in an instrument transferring to the corporation the partnership assets subject to its obligations.

On the next day, December 2, Baldwin and Mrs. Sykes met at the bank and Baldwin delivered his certified check for $16,000, payable to the defendant corporation. This check was then and there deposited to the account of the corporation and immediately withdrawn therefrom and paid back to Baldwin in the form of a cashier's check for a like amount.

On December 5, 1927, defendant Gladys Sykes met plaintiff at the bank. Mrs. Sykes signed certificate No. 6 as secretary (it had already been signed by Baldwin as president of the corporation) and delivered the same to plaintiff and received from plaintiff a check for $7,500, which was deposited to the account of the corporation. The sum of $5,000 was thereupon withdrawn from said account and paid over to Baldwin in payment of one of his notes. The balance, $2,500, remained in the bank account of the corporation.

It appears that plaintiff had a nephew for whom she was desirous of securing a position, and the understanding was that he would be given work if she made the investment. In any event, as soon as she paid for the stock the nephew started to work for defendant corporation. Within about a year's time after the trial of this cause, defendant corporation was adjudicated a bankrupt.

[1] It is the rule in this state that permits, issued by the corporation commissioner for the sale of stock must be strictly complied with. Parrish v. American Ry. Emp. Pub. Corp., 83 Cal. App. 298, 256 P. 590. No "thinly-veiled attempt to circumvent the manifest purpose of this salutary legislation [Blue Sky Law] should go unwhipped of justice." People v. McCalla, 63 Cal. App. 783, 220 P. 436, 439. Speaking of the Corporate Securities Act, and evasions of the provisions thereof, our courts have said: "If such subterfuges were permitted, the statute would soon become a dead letter, and the object it was designed to accomplish would be frustrated by the very persons against whose practices it is directed." Domenigoni v. Imperial Live Stock, etc., Co., 189 Cal. 467, 474, 209 P. 36, 39.

As we have stated, on December 1st all the 160 shares (except qualifying shares to incorporators) were issued to Mrs. Sykes, and the transfer of the partnership assets to the corporation was made. No cash whatever was paid for the stock. This constituted a direct violation of the permit to sell for cash. It is true that on the following day Baldwin handed Mrs. Sykes a check for $16,000, but this was immediately returned to Baldwin. Here is what he had to say about it:

"Q. * * * When you gave this $16,000 check of yours, payable to the Trousseau Shop, Inc., it was your intention and the understanding, that you would receive right back— A. You bet your life it was. * * *

"Q. You were not letting go of this money? A. I should say not; no, sir."

There is evidence upon the part of defendants that this $16,000 was loaned to Mrs. Sykes so that she could pay for the stock. No note or any other evidence of the indebtedness was produced.

It is a significant fact that just as soon as this $7,500 was received from plaintiff, defendant Baldwin was on the spot to take $5,000 thereof in payment of one of his notes against Mrs. Sykes. Defendants contend that this stock (sold to plaintiff) was the personal property of Mrs. Sykes, and that she therefore did not need a permit to sell the same. Why was the whole amount deposited in the account of the corporation, and the sum of $2,500 allowed to remain there?

[2] The only reasonable conclusion and inference which can be drawn from the facts in this case is that the stock issued on December 1st was in violation of the terms of the permit, the consideration being not cash, but the partnership business.

[3-7] It is earnestly contended by respondents that there is substantial evidence to support the finding that the stock in question was the personal property of Mrs. Sykes, hence her sale to plaintiff did not come within the purview of the Corporate Securities Act. People v. Pace, 73 Cal. App. 548, 238 P. 1089. The answer is that Mrs. Sykes was a director of the company and present when the unauthorized issue of the stock was made. It does not lie in her mouth to now say that her sale was a private one. She knew that the stock was void, and sold it to an innocent party with this knowledge, and must be held liable for any loss which resulted. Defendants Baldwin and his wife and Gladys Sykes were all directors who were present at the meeting which voted to issue the stock in violation of the permit. They are active participants, and equally liable. O'Connell et ux. v. Union Drilling & Petroleum Co. et al. (Cal. App.) 8 P.(2d) 867. It is true that they did not actually participate in the sale to plaintiff, but the uncontradicted evidence shows that at the meeting of December 1st, when the stock was issued, the directors knew that it was going to Mrs. Mannion. We must assume that the corporation received value in an amount equal to the par value of the stock which it sold to Mrs. Sykes, who had knowledge of the fact that it was issued in violation of the permit. Under such conditions the corporation should share the liability for reimbursement. It does not appear that defendant Sherman M. Sykes was in any manner connected with the issuing of the stock, and he therefore cannot be compelled to reimburse plaintiff.

Manifestly the transaction which took place on December 2d was a sham and was designed and carried out to circumvent the conditions of the permit and thereby make it possible to solicit and obtain from Mrs. Mannion the cash with which to pay Baldwin part of the money he had advanced to the partnership.

We are aware of the rule that where the evidence is conflicting on issues of fact, the finding of the trial court will not be disturbed. There is no pretense, however, that any cash was paid for the stock when it was issued to Mrs. Sykes on December 1st, and consequently the trial court's decision sustaining the legality of the transaction obviously violates the rule enunciated in the cases we have cited, which, as shown, require strict compliance with the terms of the permit.

[8] It is not disputed that stock issued contrary to the terms of a permit granted by the commissioner of corporations is illegal and void, and that the purchaser is entitled to recover the money paid therefor. Tatterson v. Kehrlein, 88 Cal. App. 34, 263 P. 285, and cases cited therein.

There is no evidence to show that plaintiff knew that she was buying stock which had been sold in violation of the permit. This contention of respondents is without merit.

Summing up the entire matter, the evidence shows, without substantial conflict, that the stock issued on December 1st was not sold for cash, but that the consideration therefor was the transfer of the assets of the partnership, and hence in contravention of the terms of the permit; that all defendants except Sherman M. Sykes participated in such issue and knew at the time that the 75 shares were to be sold to plaintiff; that the sum of $7,500 paid by plaintiff for such stock was deposited in the bank account of the corporation.

The judgment is reversed.

217 Cal. 585

BROWNING v. EVANS et al.

L. A. 12787.

Supreme Court of California.
March 29, 1933.

1. **Trusts** 🔑86.

Presumption of resulting trust does not arise where party paid purchase price to provide home for person taking title (Civ. Code, § 853).

2. **Gifts** 🔑49(4).

Evidence *held* to support finding that real property was intended as gift by person paying consideration, where title was taken by another (Civ. Code, § 853).

In Bank.

Appeal from Superior Court, Los Angeles County; George H. Cabaniss, Judge.

Action by Walter J. Browning against Iris Ashton Evans and another. From judgment for defendants, plaintiff appeals.

Affirmed.

Cruickshank & Armstrong, Lewis Cruickshank, and Donald Armstrong, all of Los Angeles, for appellant.

Mitchell, Silberberg & Davis and Peery Price, all of Los Angeles, for respondents.

SEAWELL, Justice.

Plaintiff seeks to establish a resulting trust in his favor and to quiet title to real property situate in the city of Los Angeles, which was purchased in 1922 at a price of $17,000 with funds furnished entirely by him. Title thereto was taken in the name of Cora Ashton, who in 1924 conveyed to her daughter, Iris Ashton Badger, now Iris Ashton Evans. The trial court found that it was the intention of plaintiff and appellant to make a gift of said real property to defendant and respondent Iris Ashton Evans, and that title was originally taken in the name of her mother, Cora Ashton, to be held by her until it could be transferred to her daughter without danger of clouding the title by reason of the then existing marriage between the daughter and one W. G. Badger. The conveyance to the daughter was executed after she had procured a divorce from Badger. Because of the fact that defendant and respondent Iris Ashton Evans has had three names, her maiden name and two married names, during the period covered by the facts herein related, for convenience we will refer to her by her maiden name, Iris Ashton.

The sole contention of appellant is that the evidence which the trial court relies on to support the finding of gift as a matter of law is too insubstantial to overcome the presumption declared in section 853, Civil Code: "When a transfer of real property is made to one person, and the consideration therefor is paid by or for another, a trust is presumed to result in favor of the person by or for whom such payment is made." For discussion of purchase-money resulting trusts, with citation of authorities, see 25 Cal. Jur. 191 et seq.

Plaintiff Walter J. Browning is a mining engineer by profession, and at the time of the transaction herein related was a middle-aged man. He and Frank Ashton, father of the defendant Iris Ashton, and husband of Cora Ashton, had been associated together in some sort of a mining enterprise in Mexico in 1899, where Frank Ashton and his family, including defendant Iris, then two years of age, had resided. A close and intimate friendship, as well as a business relationship, was established between plaintiff and the Ashton family at that time. For some years preceding the purchase of the property herein involved, plaintiff had spent part of his time in England, and the balance in Spain, where he was one of the managing executives directing a large copper mine, but the contact between the two men seems to have been maintained through their joint ownership of speculative mining properties in Mexico.

Plaintiff did not see defendant Iris Ashton nor her mother from the time Iris was four years old until he visited them in Los Angeles in 1922. However, before that visit they had become friends through a correspondence initiated by Iris Ashton in June, 1919, when she wrote plaintiff a letter of condolence upon the loss of his wife and only child. In his bereavement plaintiff turned to the Ashtons. Several letters written by him to Iris Ashton between July, 1919, and April, 1922, when he came to Los Angeles to visit the Ashtons, and also a letter written by him to Cora Ashton, mother of Iris Ashton, appear in the record. These letters are replete with expressions of affectionate regard for his old friends, the Ashtons, and of his desire to renew and strengthen the friendship by visiting them in Los Angeles. The thought which he reiterates in these letters is that it is the privilege of loving, caring for and working for others which makes life worth while. His family gone, the future seemed empty. In his first letter to Iris Ashton, written on July 25, 1919, he said: "A future which is blank and robbed of all possibilities and so different from one in which there are endless chances to do things, to accomplish something, to care and to feel that one is cared for and loved. When all this goes child, what remains except memories?"

It is very plain from the tenor of these letters that although memories of the old friendship with Mr. and Mrs. Ashton remained vivid, his interest in their daughter had come to be the predominating motive in his relations with the family even before his visit to Los Angeles. The daughter was then about twenty-five years of age and seems to have possessed considerable beauty and charm. She had ambitions to become a motion picture actress. She was not meeting with much success in this endeavor, but had some employment as a fashion model. She had separated from her first husband, W. G. Badger. She and her mother were living in a single rented room in a condemned house in Los Angeles. Plaintiff was much impressed with her account of her difficulties. She sent him her photograph and snapshots of herself and seems to have made a confidant of him. On October 19, 1919, three months after the commencement of the correspondence, he wrote to her: "I can see by your photograph that you have beauty and your mirror tells you this, but I can also see that you have the sweet artistic temperament of your Southern mother combined with the romantic and semi-poetic nature of your father, and I am so longing to know you again—for a girl, for that is all you are in years, you have had a hard trail to follow at times, but fortunately you have had a devoted, sacrificing Mother and a loving fighting Father to help you, and now Iris you have another big friend too. Yours and your father's old friend, who now comes into your life."

On August 20, 1920, plaintiff wrote: "I am sure that somehow or other if I went to Los Angeles I could keep [help?] you along in your work. I do not know how, but I feel that it is so, hence my wish to go there. * * * Write to me, tell me your hopes, dreams, and wishes. Remember that I am always your friend."

In April, 1922, the projected visit became a reality. Plaintiff in his testimony would make it appear that he went to Mexico from Spain to see Frank Ashton, father of Iris Ashton on business, and went from there to Los Angeles solely at the request of Frank Ashton to see what he could do to relieve the necessitous condition of the family, and that his principal concern was for the wife and mother, Cora Ashton. In the light of the letters written by plaintiff to Iris Ashton his explanation probably did not carry convincing weight with the trial court. A letter written by plaintiff to Iris Ashton on January 7, 1922, makes it plain that the Los Angeles visit had been definitely planned for some time.

While in Los Angeles plaintiff stayed at a hotel across the street from where the Ashtons roomed. A round of good times followed. He was with them almost constantly during his stay from April 20 to May 7, except for a few days when he made a business trip to Oregon. In retrospect, plaintiff wrote to Iris Ashton of his visit as an oasis in the desert of his life, a glorious happy few days, when he glimpsed the blue sky through sullen heavy clouds with a little sunshine coming through to wake him from his dreams. He and Iris Ashton were fond of dancing, and went to cafes and hotels, took trips to the beaches, and otherwise devoted themselves to entertaining each other. The mother and brother were included in some of the outings, but it was to the daughter that plaintiff devoted himself most attentively. This is apparent from the letters written by him after his visit, as well as from the oral testimony upon the trial.

When plaintiff left Los Angeles for the east coast to embark for Europe, Iris Ashton accompanied him on the train as far as San Antonio, Tex., where she was to visit relatives. He paid her fare on this trip. Before leaving Los Angeles he had purchased a coupé automobile as a gift for her, to be delivered on her return from San Antonio. He also gave her an emerald ring. According to Iris Ashton, plaintiff made his first definite offer to provide a home for her and her family upon this trip, when he asked her what she wanted more than anything else in the world, and she replied that she desired a home of her own. Plaintiff claimed in his testimony that a large part of the time on his visit was given over to looking for a house which he should rent or buy to provide the Ashton family with a more suitable home. The letters which passed between plaintiff and Iris Ashton strongly tend to confirm her testimony in every particular. But whether the first definite offer was made upon this trip or had been made prior thereto, it had been definitely arranged before Iris left the train at San Antonio that upon her return to Los Angeles she should select a suitable home, and that plaintiff should provide funds with which to purchase it.

On May 31, 1922, Iris Ashton cabled plaintiff in Spain: "Found ideal seventeen thousand advise Iris." On June 3, he replied: "Telegram received. Have mailed drafts for $12,000 and could if your wish send another five at end of July." He sent drafts for $12,000 to a Los Angeles bank for the account of Iris Ashton, and later sent drafts for $5,000. The purchase was completed on July 31, 1922. Title was taken in the name of Cora Ashton, and in 1924 she conveyed to her daughter, Iris.

Plaintiff filed the complaint to establish a resulting trust in his favor on August 23, 1929. He alleged that it was agreed between him and Iris and Cora Ashton that title to the property should be held in trust for him in the name of Cora Ashton, and that Iris Ashton, on August 27, 1924, with full knowledge of this agreement, wrongfully and without right caused Cora and Frank Ashton to convey it to her; that he did not learn of this transfer until early in 1928, and that he had demanded of Iris Ashton that she transfer said property to him, but that she had refused. In December, 1924, plaintiff had married a second time in England, but Iris Ashton did not learn of his marriage, according to her testimony, until some time in 1927, notwithstanding the correspondence continued.

The letters written by plaintiff to Iris Ashton conclusively demonstrate the falsity of the charge that the transfer of record title was made without his knowledge and consent, and show that the record title was at all times vested exactly as he had authorized and directed. They did not believe it advisable to take title originally in the name of Iris Ashton because she had not then procured a divorce from W. G. Badger. On May 28, before receipt of the wire advising him that a house had been found, plaintiff wrote: "If there should be any difficulty in the annulment or divorce proceedings you might ask Mr. Ellis (without saying that it is a purchase contemplated) whether a little piece of property would be all right to stand in your name as Iris Ashton, or whether it had best be in your mother's or mine as your guardian." On June 25, 1922, he wrote: "To put it in your mother's name dear is quite the best thing, until you are able to resume your own name and then she can transfer it to you or do whatever you think best." In accordance with this intention, the transfer of August, 1924, to Iris Ashton was made, and, on being informed of it, plaintiff wrote, on October 8, 1924, "The dream-house must look pretty and now it stands recorded in your name and it has been the means of your keeping the family together, bringing smiles to C. B.'s [Cora Ashton] lips, a lot of pleasure and happiness to you both and so it has fulfilled its mission. The only condition I made was that the house must never under any circumstances be placed in danger. It must never be given as security no matter how safe the investment looks it must always remain free-free-free.

"Standing as it does in your name alone, no one can pledge it without your consent, and that I know will never be given."

[1] Plaintiff's claim that the record title was not to be transferred to Iris Ashton is shown by his letters to be unfounded. That plaintiff intended the record title to be vested in Iris Ashton, and that he provided the funds for the purchase of the property for the avowed purpose of providing the Ashtons with a home is indisputable. The only question as to which there can be any possible doubt is whether he intended to make a gift of the fee title to the property to Iris Ashton, or merely to give the Ashtons the use of the property as a home, retaining ownership of the fee himself. Plaintiff offers no explanation as to why, if he intended to give them only the use of the house, he directed legal title to be vested in Cora Ashton, rather than in himself, nor why, if they were to have only the use, it should be his intention that the legal title be transferred from Cora Ashton, in whom he is shown to have reposed full confidence, to Iris Ashton. Although a presumption of resulting trust ordinarily arises where property is purchased with funds of one person and title taken in the name of another, nevertheless, where it is shown that the party paying the purchase price did so with the express object of providing a home for the person in whose name title is taken, the presumption of resulting trust does not prevail, but the fact that title is taken in the name of the person for whom the home is provided, is some evidence that a gift of the fee was intended.

The situation of the parties and the statements and declarations of plaintiff contained in the letters he wrote to Iris Ashton at the time of and after the purchase of the property strongly confirm the finding of the trial court that a gift of the fee title was intended, if, indeed, they are not absolutely inconsistent with any other interpretation. The Ashtons made their home in this property from the time of its purchase, and were still residing in it when the present action was filed. Plaintiff made absolutely no claim to it until some time in 1928, after his second marriage, which occurred in 1924. Iris Ashton married one Arthur Evans in November, 1927. Plaintiff was a middle-aged man when the property was purchased in 1922. He had lost his wife and child, and had no close relatives except a brother, a retired English army officer of high rank, who was financially independent. Plaintiff had lived for many years in a mining district in a foreign country. He seems to have been a man of considerable means. His services at the mine were performed under a twenty-year contract, which yielded him $12,500 annually. The Ashtons were dear friends of years' standing, and were in straitened circumstances. In addition, his letters plainly reveal that he had developed a romantic attachment for the daughter.

Appellant had made the happiness of the Ashton family, and of Iris Ashton in particular, his chief concern. In a letter written on the train after he had left Iris at San Antonio, he said: "You owe me nothing, you have given me far more than I have given you, so much more that I feel a great debt of gratitude. I feel that you and your mother put too much value on the little things I have done for you and I would have you minimize them and think only of me as a great old friend who wants to bring happiness and joy into the home of a brave family where all have suffered in so many ways."

On June 25, 1922, he wrote to Iris Ashton: "It is so like you to want to thank me for these odds and ends, you attribute all your happiness and much more to me and what I have done. You are a dear Ma Mie and I know you feel every word you write, but a great big 'but' it is selfishness on my part really, because I want to feel sometime a little ray of happiness and how can I do this, how can I get this except by reflection from those who are happy. To know that a load has been lifted from your young life—to know you see life differently now, to know that you have courage, hope and have found your own ideals again, to know your mother will again smile and sing—are these not the only ones that matter—they all make me want to live, to recover my almost dead self, to feel, to dream, to live again—selfishness at the bottom of it all, and I am still heavily in your debt."

These quoted statements are not isolated remarks, but strike the keynote of the entire correspondence. Appellant also expressed the wish in a letter written to Mrs. Ashton, as well as in one of his letters to Iris Ashton, that he might help the son Dolph Ashton to become established in some sort of a business.

[2] In none of the letters written by plaintiff is there the slightest suggestion that plaintiff intended to retain any interest in or control over the property. Iris Ashton was to have a home "which no one could take from her." The "only condition" attached by plaintiff was that the house must never be incumbered. He wrote: "Standing as it does in your name alone, no one can pledge it without your consent, and that I know will never be given." Prior to the purchase he had suggested that the title be in her mother's name or his name as her guardian until the conclusion of the divorce proceedings. That he should hold as her guardian is some evidence that the entire beneficial interest was to be vested in her. In it our conclusion that the trial court's finding that a gift was intended finds support in the evidence.

We are not unmindful of certain statements made by Iris Ashton in her letters to plaintiff upon which he relies in the case herein as indicating that she understood that he had bought the property as an investment, with the idea that the Ashtons should make their home therein so long as it should be mutually agreeable. It is significant that these statements, from which it might be inferred that a gift of the fee was not intended, emanate from Iris Ashton rather than from plaintiff, the donor. Standing alone, said statements lend support to appellant's contention. But before the conclusion of the trial court can be disturbed it must appear as a matter of law that a gift of the fee was not intended. When the record as a whole is considered, the statements relied on fall far short of grounds for reversal.

We have also read the letter written by Frank Ashton to his daughter, in which he expressed his view that the house was not a gift to Iris Ashton. The premise of his argument is that if a gift to Iris Ashton were intended title would not have been taken in the name of Cora Ashton. He writes: "It is certain that Mr. Browning had no matrimonial intentions, therefore the principal object of his generosity viz. to relieve Cora and at the same time show me a mark of thoughtful consideration would certainly not have been achieved by making the house a gift to you." And again:

"At the time I thought it very strange that the place should be a gift to you when it was placed in Cora's name.

"If his kindness and behavior towards you were flattering it is no evidence that he intended the house as a gift to you. If he had so intended it would have been at once so deeded."

The father was in Mexico when the house was purchased, and did not participate in the transaction. The statements in Frank Ashton's letter reveal a lack of knowledge of plaintiff's intention, as expressed in his letters, that the property should be taken in the name of Cora Ashton only because of the contemplated divorce proceedings, and should be transferred to Iris Ashton upon the conclusion of such proceedings.

The letters written by plaintiff, as previously quoted, tended strongly to refute the contentions that the conveyance to Iris was wrongful and made without his knowledge and consent, and that he did not learn of it until 1928. This circumstance of itself may have influenced the trial court to reject other portions of his testimony to the effect that he did not intend to make a gift of the property, and to accept the testimony of Iris Ashton, which finds corroboration in the letters written by plaintiff. The evidence supports the judgment.

Judgment affirmed.

We concur: WASTE, C. J.; PRESTON, J.; SHENK, J.; LANGDON, J.; CURTIS, J.; IRA F. THOMPSON, J.

217 Cal. 716

LOEB et al. v. BERMAN et al.

L. A. 13996.

Supreme Court of California.

April 3, 1933.

1. Appeal and error ⚷151(2).

Where corporation by cross-complaint in good faith declared on same cause of action set forth in complaint of stockholders on behalf of corporation and thereby supplanted original plaintiffs and was itself supplanted by its receiver, original plaintiffs could not appeal as "parties aggrieved" from orders approving compromise and settlement and fixing attorney's fees.

> The facts disclosed that plaintiffs, a group of stockholders, urged that cause of action existed against certain persons growing out of alleged issuance and sale of spurious stock certificates, producing great profit to wrongdoers at corporation's expense, and on corporation's failure to act on their demand to sue such persons, plaintiffs brought suit in behalf of corporation. Thereafter, corporation reconsidered its position and filed cross-complaint urging same cause of action and seeking same relief, but asking no relief against plaintiffs.
>
> [Ed. Note.—For other definitions of "Aggrieved Party," see Words and Phrases.]

2. Judgment ⚷742.

Judgment that plaintiff stockholders were supplanted as parties by corporation and corporation's receiver by corporation's filing cross-complaint seeking same relief *held* res judicata in subsequent litigation.

In Bank.

Appeal from Superior Court, Los Angeles County; Clair S. Tappaan, Judge.

Action by Arthur M. Loeb and others against Jacob Berman, sometimes known as Jack Bennett, and others in which F. H. Rolapp, as receiver of the Sunset Pacific Oil Company filed cross-complaint. From orders approving a compromise and settlement and fixing attorney's fees, plaintiffs appeal. On motion to dismiss appeal.

Motion granted.

Rollin L. McNitt, of Los Angeles, and Stanislaus A. Riley, of San Francisco, for appellants.

Joseph L. Lewinson, Hewitt, McCormick & Crump, and Mitchell, Silberberg & Davis, all of Los Angeles, for respondents.

PRESTON, Justice.

Motion to dismiss appeal taken from certain orders entered in the minutes of the court in the above-entitled cause on August 9, 1932. Several grounds are urged for the dismissal but, being satisfied that appellants are not aggrieved parties within the meaning of the statute governing appeals, we rest our action upon a brief discussion of this question alone.

The Sunset Pacific Oil Company, a corporation, is the successor of the Julian Petroleum Corporation. Appellants, a portion of a group of stockholders of said corporations, urged that a cause of action existed against Jacob Berman and a vast number of other persons, growing out of alleged issuance and sale to the public of spurious stock certificates in said Julian corporation, which produced great profit to the wrongdoers at the expense of the corporation. Accordingly, they demanded of the said renamed corporation that it sue said parties for an accounting as to these profits. The corporation at first failed to act on this demand and appellants, together with two other stockholders, on October 8, 1929, instituted on behalf of the corporation an action against said parties in the superior court of the county of Los Angeles for the purpose of regaining for the corporation said alleged profits. The corporation itself was made a party, but no relief against it was sought nor was any director or other officer thereof made a party. On May 2, 1930, however, the corporation reconsidered its decision and filed a cross-complaint in said action, urging the same cause of action and seeking relief against the same defendants as were said stockholders, but asking no relief against the plaintiff stockholders themselves or any of them. It is thus seen that the corporation in effect moved to supplant the plaintiffs and, if it did in fact do so, their appeal here must be dismissed. No affirmative relief was asked by the corporation in its cross-complaint against any of the stockholders thereof. The case in its legal essence became one by the corporation itself against the other defendants.

The later developments are that while this action was pending and undetermined, to wit, on August 28, 1931, in an action then pending in the United States District Court for the Southern District of California, styled Berryessa v. Sunset Pacific Oil Company, No. U-100-H, receivers were appointed for the Sunset Pacific Oil Company, a corporation, with explicit plenary and specific powers. Later one Rolapp became the sole receiver. Still later and on the 19th day of February, 1932, in a foreclosure action in the same court against said corporation, an order of consolidation was had of the two causes and said receiver was continued with enlarged powers specially conferred by order of the court.

It should also be here noted that theretofore and on September 23, 1931, the receiver was authorized and directed to apply to the above-mentioned superior court to be substituted in said action for said corporation as cross-complainant therein and was authorized, when so substituted, to take action in said cause, either to prosecute or to compromise it, subject in either instance to the approval of the federal court. He was specifically ordered to supplant the appellants here as plaintiffs in the action. On January 6, 1932, the substitution was duly made and the receiver thenceforth acted for the corporation in said action. Thereafter, and on July 8, 1932, the receiver was directed by the federal court to present to the superior court a petition seeking its order approving a proposed compromise and settlement of said action, subject to a later approval by the federal court. Thereafter and on July 13, 1932, the said receiver duly filed in said court such petition for an order approving said proposed compromise and settlement of said action.

An order to show cause was duly issued on said petition and notice given to the stockholders as well as all other interested persons. Hearing on the petition began July 25, 1932. At that time six of the eight persons who started the action applied to the court for a substitution of attorneys therein. The hearing was continued to July 27, 1932. This motion was on the latter date denied, but said stockholders were accorded the right to be heard in opposition to the said proposed settlement. At this juncture said stockholders applied to the District Court of Appeal, Second Appellate District, Division 2, for a writ of mandate to compel the superior court to permit said substitution of attorneys. The appellate court, on the hearing, denied the petition, giving as its reasons, in part, the following:

"The reasons for our conclusions may be very briefly stated, although many points were made at the argument. We think the petitioners, together with the two others joined with them as plaintiffs in the action, have become supernumerary parties in the trial of the question whether the compromise shall be approved by the court, this because the corporation filed cross-complaint and because the receiver was substituted for it as cross-complainant. We think this substitution was the equivalent of a substitution of the receiver as plaintiff in the place and stead of the eight persons who filed the complaint. There is therefore no room for a substitution of attorneys to represent either those eight or a majority of them." Fratessa v. Superior Court (Cal. App.) 13 P.(2d) 544. Thereafter and on September 27, 1932, this court approved the action of the District Court of Appeal.

[1, 2] As above noted, on August 9, 1932, the court made and entered its order approving said compromise and settlement and also fixing attorney's fees and made all the orders complained of by the notice of appeal herein, which said notice of appeal was not filed until October 24, 1932. But we need not pause to consider whether the appeals were taken within the time allowed by law, for from the above statement of facts, coupled with the above-cited holding of the appellate court, it is impossible to accord appellants the right of appeal. At most, their right to institute the suit depended upon the failure of the corporation itself to act. The cause of action, if any, was in favor of the corporation alone and not in favor of the stockholders in their capacity as such.

In the case of Whitten v. Dabney, 171 Cal. 621, 631, 154 P. 312, 316, the position of stockholders in an action of this kind is defined and it is there held that a stockholder is permitted to sue in such a matter simply in order to set in motion the judicial machinery of the court; that "his position in the litigation is in every legal sense the precise equivalent of that of the guardian ad litem" and in such case, of course, the infant and not the guardian is the real party. Therefore when the corporation, acting in good faith, by its cross-complaint declared upon the same cause of action set forth in the complaint of the stockholders, the stockholders from that moment on became supernumerary parties. We thus have a situation where if the corporation itself were the respondent, the stockholders would have no right of appeal. In re New England Oil-Refining Co. (C. C. A.) 9 F. (2d) 344. In addition, we have the fact that the receiver, with full power to act and with specific authority to compromise the very litigation, has supplanted the corporation itself. In Seaman v. McCulloch (C. C. A.) 8 F.(2d) 820, the power of a court of equity to empower a receiver to dismiss an action similar to the one here involved was recognized. Hence upon two grounds at least the stockholders are in no position to be heard. Moreover, the decision in the Fratessa Case, supra, is res judicata to the effect that appellants are not any longer necessary parties to the litigation and therefore they may not appeal. Reynolds v. Churchill Co., 187 Cal. 543, 202 P. 865; Price v. Sixth Dist., 201 Cal. 502, 258 P. 387.

The motion to dismiss is granted and, pursuant to stipulation of the parties, remittitur may issue forthwith.

We concur: WASTE, C. J.; SHENK, J.; LANGDON, J.; CURTIS, J.; SEAWELL, J.

217 Cal. 563

LEWITH v. REHMKE.

L. A. 13074.

Supreme Court of California.
March 24, 1933.

1. Exceptions, bill of 🔑40(1).

Statute authorizing extension of time for preparing and serving bill of exceptions does not authorize court to indefinitely extend such time but must be read with statute limiting time allowable without adverse party's consent (Code Civ. Proc. §§ 650, 1054).

2. Appeal and error 🔑956(2).
Exceptions, bill of 🔑43(1).

Motion for relief from default in preparing and serving bill of exceptions is addressed to trial court's discretion which will not be disturbed unless clearly abused (Code Civ. Proc. § 473).

3. Exceptions, bill of 🔑43(2).

Relief from default in preparing and serving bill of exceptions, occurring in good faith reliance on void orders purporting to extend time, *held* improperly denied (Code Civ. Proc. §§ 473, 650, 1054).

4. Common law 🔑9.

Law favors hearing of case on merits.

5. Appeal and error 🔑82(3).

Propriety and appealability of order denying motion to vacate judgment and reopen case, for further evidence *held* academic questions, and should await appeal from final judgment where newly discovered evidence was offered in support of motion for new trial, and might be considered on appeal from judgment (Code Civ. Proc. § 662).

6. Appeal and error 🔑870(6).

Order denying motion for new trial for newly discovered evidence is reviewable on appeal from judgment.

7. Appeal and error 🔑544(1).

Settled bill of exceptions is indispensable to proper determination of relevancy, competency, and materiality of newly discovered evidence urged as ground to vacate judgment and open case for further evidence (Code Civ. Proc. § 662).

In Bank.

Appeal from Superior Court, San Diego County; Arthur L. Mundo, Judge.

Action by Joseph L. Lewith against Mae Rehmke. From a judgment for defendant, and from an order denying motion for relief from default for failure to file bill of exceptions in time, plaintiff appeals.

Order reversed with directions.

See, also, 215 Cal. 241, 9 P.(2d) 297.

C. C. Pease, of San Diego, for appellant.

Gray, Cary, Ames & Driscoll and E. A. Walters, all of San Diego, for respondent.

WASTE, Chief Justice.

[1] Plaintiff instituted this action to cancel a deed to certain real property and to quiet his title thereto. The complaint alleges that defendant procured the deed from plaintiff by certain threats made at a time when plaintiff was in a weakened mental condition and while defendant was acting as the fiduciary agent of the plaintiff. The cause was tried by the court sitting without a jury. From the judgment entered for defendant the plaintiff prosecuted an appeal. However, the proposed bill of exceptions to be used on such appeal was not prepared or served within the time limited by law. Appellant's default was due to his reliance upon certain orders of the trial court purporting to extend the time therefor beyond the period fixed by sections 650 and 1054 of the Code of Civil Procedure. It is apparent upon an inspection of the record now before us that counsel for the appellant proceeded under the erroneous theory that the trial court's jurisdiction and power to grant extensions of time for the preparation and service of a proposed bill of exceptions was without statutory limitation. Section 1054 of the Code of Civil Procedure, however, expressly declares that the court below may not, without the consent of the adverse party, extend time for more than thirty days for the performance of certain acts. It has been repeatedly held by this court that the provision in section 650 of the Code of Civil Procedure providing that the draft of a bill may be prepared and served within ten days after notice of entry of an order denying a motion for new trial "or such further time as the court in which the action is pending or a judge thereof, may allow" does not authorize the court to grant an indefinite extension of time for the preparation and service of the draft, but is to be read in connection with the restriction contained in said section 1054 upon the amount of time which may be allowed by the court. Cameron v. Arcata & Mad R. R. Co., 129 Cal. 279, 61 P. 955.

Upon the discovery of his error, the appellant moved under section 473 of the Code of Civil Procedure to be relieved of his default. The court below denied the motion and plaintiff appealed therefrom. It is this latter appeal to which our attention is now directed, the disposition of which will, of course, have a material bearing upon the ultimate determination of the appeal from the judgment.

[2] Any discussion as to the propriety of the trial court's action refusing to relieve the appellant from default in the preparation of his record must necessarily be prefaced by a reference to the settled principle of law that motions for relief from default under the remedial provisions of section 473, supra, are

addressed to the sound discretion of the trial court, the exercise of which in the absence of a clear showing of abuse is not to be interfered with by an appellate tribunal. Waybright v. Anderson, 200 Cal. 374, 377, 253 P. 148. However, the existence of this salutary rule did not prevent this court from reversing an order refusing relief under circumstances substantially identical with those here involved. Cal. Nat. Bank v. El Dorado L. & M. Co., 200 Cal. 452, 455, 253 P. 704, 705. In the cited case it is declared: "While it was not within the power of the trial court to grant to the appellants herein, without the consent of the adverse party, an extension of time in excess of 30 days for the preparation and service of their proposed bill of exceptions (section 1054, Code Civ. Proc.), nevertheless, having exceeded its jurisdiction by extending the time therefor beyond the statutory limitation and the appellants having in good faith relied on such void orders extending time, the case would seem to fairly come within the remedial provisions of section 473 of the Code of Civil Procedure. The authorities indicate that a mistake of law may be availed of in support of a motion for relief under said Code section, for the provisions thereof are broad enough to include such mistakes within their scope. * * * In view of the appellants' reliance on the trial court's orders extending time for the preparation and service of the proposed bill, * * * we are of the opinion that a case is presented which would require the lower court, in the sound exercise of its discretion, to grant the relief prayed for. This being so, the appellants' motion to be relieved from default in the preparation and service of their proposed bill of exceptions was improperly denied by the court below."

[3, 4] While it is true, as urged by the respondent herein, that there appeared to be additional reasons suggesting the granting of relief to the appellants in the cited case, we were actuated in our reversal of the order in that case principally, if not solely, because of the appellants' reliance in good faith upon the void orders of the trial court purporting to extend the time for the preparation and service of the proposed bill of exceptions beyond the statutory period. The present case falls squarely within that rule and, in our opinion, warrants relief to the appellant. This will insure a hearing on the merits, which it is always the policy of the law to favor. Waybright v. Anderson, supra; O'Brien v. Leach, 139 Cal. 220, 72 P. 1004, 96 Am. St. Rep. 105.

In announcing our conclusion on this phase of the case we experience no difficulty with Ingrim v. Epperson, 137 Cal. 370, 372, 70 P. 165, relied on by the respondent. In that case the party in default did not rely on any orders of the trial court purporting to extend the time for the preparation and service of the proposed bill of exceptions. There the default was attributable solely to the appellant's failure to prepare the same within the statutory time.

We are next confronted with an appeal from an order denying plaintiff's motion, made under section 662 of the Code of Civil Procedure, to vacate and set aside the findings and judgment and to reopen the case for further evidence. This evidence, as appears from the affidavit in support of the motion, consisted of two letters written by the defendant shortly before the deed here sought to be canceled was obtained by defendant and wherein it appears that defendant, as alleged in the complaint, was relying upon certain threats to procure the deed. Discovery of these letters was made by the plaintiff subsequent to the trial.

[5-7] Preliminarily, respondent requests that we reconsider the question of the appealability of the order refusing to vacate the judgment and reopen the case, which question was heretofore decided adversely to her. Lewith v. Rehmke, 215 Cal. 241, 9 P.(2d) 297. We find it unnecessary at this time to pass upon either the appealability of such order or the propriety of the trial court's action in entering the same. At the conclusion of the trial of the cause the plaintiff duly moved for a new trial upon the ground, among others, of "newly discovered evidence, material to the plaintiff which he could not with reasonable diligence have discovered or produced at the trial." The motion for a new trial was denied. Inasmuch as the order denying the same is reviewable upon the appeal from the judgment, the trial court's action in refusing to reopen the case for the introduction of the asserted newly discovered evidence, which newly discovered evidence was also urged in support of the motion for new trial, may be considered and passed upon when the appeal from the judgment comes on for hearing on its merits. In fact, the matter can best be determined at that time for we will then have before us the duly settled bill of exceptions which is indispensable to a proper determination of the relevancy, competency, and materiality of such evidence. This being so, the matter is now purely academic and should properly await the disposition of the appeal from the judgment.

For the foregoing reasons, the order denying plaintiff's motion for relief from default in the preparation and service of his proposed bill of exceptions to be used on the appeal from the judgment is reversed with directions to the court below to settle the same in accordance with law, all other matters and questions to abide the consideration and disposition of the appeal from the judgment.

We concur: **PRESTON, J.; LANGDON, J.; CURTIS, J.; SHENK, J.; SEAWELL, J.; IRA F. THOMPSON, J.**

217 Cal. 721

GLOBE INDEMNITY CO. v. HANIFY et al.

LANNOM BROTHERS MFG. CO. et al. v. GLOBE INDEMNITY CO.

Sac. 4598.

Supreme Court of California.
April 3, 1933.

Rehearing Denied May 1, 1933.

1. Schools and school districts 🔑81(2).

School building contractor's surety, consenting to contractor's assignment of contract to bank, *held* estopped to resist payment to bank of amount, paid by it to laborers and materialmen, from balance due contractor.

> Assignment of contract authorized bank to collect moneys due contractor from school district and provided that it was made to secure payment of moneys due bank from, or thereafter advanced by it to, contractor; bank's attorney forwarded letter, notifying contractor's surety of assignment of contract to secure bank and require payment of all moneys thereto for payment of laborers and materialmen, and surety wrote in reply that it consented to such payments, subject to payment of all labor and material bills, and that assignment should not relieve principal or surety from liability under bond.

2. Schools and school districts 🔑81(2).

Surety was liable on school building contractor's bond to materialmen filing lien claims within 90 days after completion of building, even if notice thereof was invalid (Gen. Laws 1931, Act 6423; Code Civ. Proc. § 1187).

3. Statutes 🔑225.

Public Works Act and Mechanics' Lien Law must be construed together as dealing with same specific subject (Gen. Laws 1931, Act 6423; Code Civ. Proc. § 1183 et seq.).

4. Schools and school districts 🔑86(2).

Parties claiming liens for materials furnished school building contractor may enforce rights under Mechanics' Lien Law or sue on contractor's bond, notwithstanding provision, inserted therein by surety, to limit latter remedy (Gen. Laws 1931, Act 6423; Code Civ. Proc. § 1183 et seq.).

5. Trial 🔑388(2).

Consolidation of materialmen's lien claimants' actions for convenience did not deprive trial court of right or duty to make special findings (Code Civ. Proc. §§ 1184a, 1195).

In Bank.

Appeals from Superior Court, Yolo County; W. A. Anderson, Judge.

Action by the Globe Indemnity Company against Daniel R. Hanify, the Clarksburg High School District of Yolo County, and others, in which the Lannom Bros. Manufacturing Company and others filed cross-complaints against plaintiff. From the judgment rendered, plaintiff and defendant School District appeal.

Affirmed.

Rehearing denied; PRESTON, J., dissenting.

Hartley F. Peart, of San Francisco, and Huston, Huston & Huston, of Woodland (Russel Shearer, of San Francisco, of counsel), for Globe Indemnity Co., Inc.

Butler, Van Dyke, Desmond & Harris, of Sacramento, for Latourette-Fical Co. et al.

Elliott, Atkinson & Sitton, of Sacramento, for H. O. Adams et al.

Rowan Hardin, of Sonora, and Armfield & Eddy, of Woodland, for First Nat. Bank of Sonora et al.

Peter A. Breen, of San Francisco, for C. Jorgensen & Co.

Neal Chalmers, Dist. Atty., of Woodland, for Clarksburg High School Dist. et al.

Frank Hatch, of San Francisco, for James Michel and W. P. Pfeffer et al.

C. L. Colvin, of Oakland, for Noah Adams Lumber Co.

Earl D. White, of Oakland, for C. W. Lannom.

SEAWELL, Justice.

On July 6, 1928, the Clarksburg High School District of the County of Yolo entered into an agreement with Daniel R. Hanify as contractor to construct within a fixed period a certain gymnasium for the use of said high school district at the agreed cost of $56,324. Monthly payments of 75 per cent. of the value of the labor and materials were to be made to the contractor upon the certificate of the architect. The remaining 25 per cent. was to be retained by the high school district for a period of 35 days after final acceptance of the work. Appellant Globe Indemnity Company, a corporation, became surety for the contractor, Daniel R. Hanify, upon two bonds in the sum of $30,000 each, one in favor of laborers and materialmen and the other conditioned for the faithful performance of the contract.

Upon the completion of said building, there remained in the hands of said high school district, owner, the final payment in the sum of $14,524.50, which sum was due and unpaid under the terms of said builder's contract. The bank had advanced, with the consent of the surety, all of said sum of $14,524.50, but $1,133.75 in discharge of materialmen's claims. The cost of constructing and completing said building, as shown by the claims of materialmen subsequently filed against it, exceeded the contract price by the sum of $10,940.29. By its answer said school district admitted its liability, by reason of its contract, in said sum of $14,524.50, and pleaded its willingness and ability to pay said sum to whomsoever the court should direct or by its decree should determine was entitled to receive the same.

Notice of completion of said building was filed for record in the official records of the county of Yolo on January 8, 1929. Three of said materialmen filed stop notices within the 35-day period following the filing of the notice of completion, but the trial court found that none of them had given the 5 days' notice of proceedings to enforce payment, as prescribed by section 1184a, Code of Civil Procedure. The warrants issued by said high school district were in every instance drawn in favor of said bank. The last one, covering the final payment in controversy in the sum of $14,524.50, was so drawn on February 11, 1929, and was received by the bank on February 13, 1929. Payment was refused by reason of said stop notices.

As a result of trial, the court gave judgment in favor of all the material claimants and against Contractor Hanify, who defaulted, and against the surety company, and directed that the moneys in the possession of the Clarksburg High School District be paid to the clerk of the court, and that the bank be reimbursed out of said sum of $14,524.50, held as a final payment, to the extent of $13,390.75, moneys which it had paid to laborers and materialmen, and that the difference between the remaining $1,133.75 and the total amount found to be due the materialmen be entered as judgment against Hanify and his surety. A similar judgment was also entered in favor of the surety against Hanify. No question is raised that any claim for material was excessive or in any degree tainted with fraud.

The claimants being numerous, their several actions were joined, and the court, upon consent or stipulation of counsel, made orders of consolidation, as provided by sections 1184a and 1195, Code of Civil Procedure. Cases designated Sacramento No. 4605 and Sacramento No. 4598 are herewith presented on said consolidated record for the purposes of this appeal.

Some eighteen parties, including the Clarksburg High School district, owner of the building, Globe Indemnity Company, surety, First National Bank of Sonora, assignee, and all of the materialmen, appeared by direct proceedings or by cross-actions. The materialmen are not appealing from the judgments rendered by the trial court. Appellant Globe Indemnity Company and respondent bank are the parties really interested in the result of this appeal. Hanify, as was stated before, defaulted. The question which is decisive of the rights of said bank and surety company is whether the sum of $13,390.75 of said total final payment, to wit, $14,524.50, due from the owner upon completion of the building under the terms of its contract, should be paid to the bank in replacement of an exact amount which it advanced in payment of materialmen's claims in the course of construction, and which was so applied, or whether said final payment withheld by the owner subject to the order of court should be applied to the payment of claims of materialmen, some of which were incurred in excess of the contract price, notwithstanding certain agreements entered into between the surety company and the bank with respect to the subject-matter of the controversy. It may be here noted that the bank paid labor and materialmen's claims during the progress of construction of said building amounting to $55,190.25, leaving the sum of $1,133.75 in the hands of the owners in excess of the total sum paid by the bank. Said sum of $1,133.75 was awarded to said surety company by the judgment.

[1] The bank's action was in rem against the fund, and it did not seek nor was a judgment rendered in its favor against the surety company. The right to said fund as between the surety company and said bank by reason of the latter's participation in the matter as herein set forth is conceded by counsel to be the real issue presented by this appeal. If said bank is deprived of the moneys advanced by it to the materialmen in payment of materials which actually went into the building, it will in effect be substituted for the surety company. The solution of the question depends upon the intent and understanding with which the surety company and said bank entered into a certain transaction whereby said bank became the assignee of contractor Hanify for a definite purpose. It appears that Hanify, at the time or prior to the time he executed said assignment of contract as hereafter set forth was indebted to said bank in the sum of approximately $3,000, or possibly more. On July 18, 1928, twelve days after he had been awarded said contract, he executed an assignment of it to said bank for the special purposes therein set forth.

Said assignment restates the fact that the contract price of said building was fixed at *$56,324*. It is further provided therein that said assignment vests in the said bank the right to have, receive, and collect any and all moneys due for the performance of said contract from said high school district, and to receipt for the same, and that a copy of the assignment shall be filed with the board of trustees of said Clarksburg High School district. It also contains the following provision: "This assignment is made for the purpose of securing to the said First National Bank of Sonora the payment of all moneys past due, now due, or which may be hereafter *advanced* to the said Daniel R. Hanify."

(Italics supplied.) On July 23, 1928, the attorney of said bank forwarded a letter of notification to the Globe Indemnity Company calling attention to the fact that it was *financing* Mr. Hanify on his work of construction, and, further, "to give notice of the true conditions existing and that Mr. Hanify, in order to protect the bank, had assigned said contract to the First National Bank. The purpose of this assignment is to secure the bank and to require that all moneys be paid to the bank so that we can know that the moneys are expended solely for the purpose of paying for labor, materials and supplies. For your records I am enclosing a *copy of the assignment* made to the First National Bank, the original of which assignment will be filed with the Board of Trustees of the Clarksburg High School District." Some 30 days thereafter, to be exact, on August 23, 1928, said surety company replied to the bank's letter. In its reply letter it referred to the building contract, acknowledged its suretyship, and proceeded as follows: "The undersigned being the surety on that certain bond furnished the Clarksburg High School District * * * does hereby consent, authorize and direct that all moneys that may become due under said contract for work done or materials furnished, shall be paid to the First National Bank of Sonora, in accordance with the assignment of said contract by D. R. Hanify to the First National Bank of Sonora; it being understood and agreed that this assignment is subject to the payment of the premiums on said bond, the payment of premiums on compensation and public liability policies issued in connection with said contract, and *the payment of all labor and material bills incurred in said work;* that said assignment and the payments herein authorized to be paid to the said First National Bank of Sonora shall not release said principal or surety from liability under said bond." (Italics supplied.)

It is the contention of appellant surety company that the words "It being understood and agreed that this assignment is subject to * * * the payment of all labor and material bills incurred in said work," contained in said surety company's letter of consent, meant that the bank assumed an obligation greater than was imposed upon the owner under its contract, the terms of which no doubt were understood to prescribe the limit of the bank's obligation to the materialmen, which was that it would pay to materialmen all moneys it should receive from the owner in liquidation of said claims to the extent of the moneys received within the terms of said contract. The bank complied with its agreement, even to paying the premiums on compensation and public liability policies issued in connection with said building contract, a condition imposed upon the bank by the surety company as one of the conditions of its consent. If the surety company's construction of the agreement between the bank and the surety company be correct, it would lead to the anomalous situation of the owner being compellable to pay but once, while the bank, which merely obligated itself to see that the moneys received from the owner would in fact be properly applied, would be compelled to pay twice. It should be kept in mind that we are not here dealing with a question which affects the rights of laborers and materialmen to enforce liens as prescribed by statute, but solely with a transaction which is without the realm of the Mechanics' Lien Law so far as the real parties to this appeal are concerned.

We are of the view that the trial court's finding on this issue is sound. The last line of the surety company's letter is inconsistent with the construction which the surety company would place upon it. It is there plainly stated that said assignment and the payments therein authorized "shall not release said principal or surety from liability under said bond." The natural and logical inference to be drawn from the transaction itself as between the surety company and the bank —neither of which is entitled to the benefits which the statute confers upon laborers and materialmen—is that the surety company regarded the proffer of the bank as an assurance that all the moneys which were received by it from the high school district fund would be actually applied to the payment of materials furnished to and labor performed upon the building. The service agreed to be performed by the bank was a protection and benefit to the surety company, in that it provided that the fund which otherwise, under the building contract, would have passed into the hands of a contractor who was obviously in financial straits, should be handled by a responsible corporation. That the contractor was in embarrassing circumstances must have been known to the surety and its agents, not alone from the recitals of the assignment to which said surety company gave its assent, but also from the contents of the bank's letter to said surety company. The assignment—a copy of which was in the hands of the surety company—was of itself an admission by the contractor that he was not able to finance the project. The Hanify assignment, the bank's letter, and the surety company's consent letter show that the assignment was taken as security for moneys furnished and to be furnished to pay for the construction of the building, and without any thought or intent on the part of any one that the bank was assuming Hanify's obligation to complete the building. The surety company, having given its consent that the moneys be applied in the manner in which the bank applied them, placed the control of the fund, so far as the surety was concerned, entirely beyond its reach. It is in no position to complain. It is not reasonably conceivable, viewed in the light of the ordinary course of business transactions, that said surety company was prejudiced by the bank becoming the custodian or paymaster of the fund which came into its possession for distribution. It will not be presumed that the surety company consented to the assignment as a decoy to draw the bank into a position whereby its liability as surety might be shifted from its own shoulders to those of the bank. Doubtless, no thought of exceeding the contract price entered into the minds of any of the parties, the understanding being that, should the bank apply the moneys received by it to the payment of materialmen's claims, said surety company would regard its obligation discharged, and the bank's limited participation in the transaction would in no manner release or affect the surety company's liability on its bond. Such a contract was entirely within the purview of said parties, who were free, as between themselves, to contract in the premises. Their agreements between themselves could not affect rights conferred by statute upon the materialmen.

In the instant case the bank is not attempting to compel payment of an antecedent debt, for no such payment was made; nor is it attempting to recover from the sureties moneys loaned the contractor, under the guise of furnishing labor and material used in the construction of the work, as was the fact in Cadenasso v. Antonelle, 127 Cal. 382, 59 P. 765, the case upon which appellant surety company principally relies to sustain its point. The facts in the Cadenasso Case are in no material respect similar to the facts of this case. Turner and Vermeil were sureties on contractor Antonelle's bond for the construction of a tunnel, conditioned for the payment of labor and material performed or furnished in the construction of said tunnel. The court there held that the evidence to the point that plaintiffs furnished money to the contractor would not support the finding that they furnished material. The only point decided in that early case is that one who advances money as a loan, although it is expressly for the payment of materials and labor devoted to the erection of a building, can have no claim to the benefit of the Mechanics' Lien Law. Respondent bank herein is not attempting to enforce any lien claim, or attempting to obtain a money judgment against said surety. Its purpose is to reimburse itself out of a fund which its payments for materials, made with the consent of the surety, had created, and the application of the same to the purpose above stated is not opposed upon this appeal by any materialman or laborer. We are of the view that the impelling force of the consent agreement estops the surety company from resisting the payment of said fund to the bank. The equities of the case vastly preponderate in the bank's favor.

Sufficient has already appeared to justify an affirmance of the judgments awarding said final payment, consisting of $14,524.50, less said sum of $1,133.75, to the bank, solely upon the assent of said surety as set forth in said agreement made between the surety and the bank to the effect that the latter would be held harmless in making said payments on account of material furnished to the building.

[2] Appellant surety company admits that the liens of the materialmen are valid, but attacks the notice of completion of the building. The notice of completion strictly complies with the provisions of the Mechanics' Lien Law of this state, and started the time running for the filing of liens on the day it was recorded. If the notice was invalid, as claimed by the surety, for the reason that it did not strictly comply with the Public Works Act (St. 1919, p. 487, vol. 3 Gen. Laws of California [1931], Act 6423, p. 3680), a contention with which we do not agree, the time for filing claims of liens was extended 90 days after its completion by the provisions of section 1187, Code of Civil Procedure, and the liens of all the materialmen, having been filed within that period, were within time. This being so, the surety is bound by its bond to the materialmen. The validity or invalidity of the notice of completion could not affect the agreement made between the bank and surety as to the bank's right to possess said fund. The surety by its contract bound itself unto all materialmen for the payment of all claims for materials furnished and used in the construction of said building in case said claims were not paid by the contractor. By both the terms of the bond and the law governing the subject the materialmen had a direct action against the bond, and they were not required, as formerly, to exhaust any other fund or join any other parties with the surety in an action to recover on the bond.

[3, 4] The Public Works Act was first passed in 1919, and was designed as an aid to mechanics and materialmen in the enforcement of their lien rights. Its special effort was to make the General Mechanics' Lien Law more expansive and adaptable to actions in which the state, irrigation, and reclamation districts and other large public corporations were the builders. That it is a part of the Mechanics' Lien Law of the state is made evident by the numerous references it makes to said law, and by the adoption of its provisions by reference. Both laws deal with the same specific subject, and are to be construed together. The Legislature did not intend to defeat or embarrass the right of a lien claimant by the remedies prescribed, but meant to

broaden his remedy. Two remedies pointing to the same result being open to the claimant, he may pursue either as his interest will be best served. A provision inserted in the bond by the surety, as here, in an attempt to limit the remedy a mechanic or materialman may choose to elect, would be ineffectual as an invasion of his statutory rights to adopt the remedy provided by law in a proceeding in which liberality of construction is favored.

[5] The fact that the cases herein were consolidated for convenience did not deprive the trial court of its right or duty to make special findings if the justice of the case required it. The doctrines of subrogation and exoneration, urged in appellant's closing brief, have no relevancy to the issue upon which the cases herein are decided.

We have considered all the points made by appellant surety company, and are satisfied that it is not entitled to have any part of the fund which was awarded to the bank to be applied to the payment of lien claims.

The materialmen were evidently satisfied with the judgments entered in the trial court, as they have not appealed.

The judgments appealed from herein are each affirmed.

We concur: WASTE, C. J.; SHENK, J.; LANGDON, J.; CURTIS, J.

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217 Cal. 791

LATOURETTE-FICAL CO. (a Corporation) et al., Plaintiffs and Respondents, v. Daniel R. HANIFY, Defendant; Roy E. Cole, as County Treasurer of the County of Yolo, State of California, et al., Defendants and Appellants.

LATOURETTE-FICAL CO. (a Corporation) et al., Plaintiffs and Respondents, v. GLOBE INDEMNITY COMPANY (a Corporation), Defendant and Appellant.

LANNOM BROTHERS MFG. CO. (a Corporation), Plaintiff and Respondent, v. BOARD OF TRUSTEES OF THE CLARKSBURG HIGH SCHOOL DISTRICT OF YOLO COUNTY, State of California; Clarksburg High School District of Yolo County, State of California et al., Defendants and Respondents; Globe Indemnity Company, Defendant and Appellant.

Sac. 4605.

Supreme Court of California.

April 3, 1933.

Rehearing Denied May 1, 1933.

In Bank.

Appeals from Superior Court, Yolo County; W. A. Anderson, Judge.

Rehearing denied; PRESTON, J., dissenting.

Hartley F. Peart, of San Francisco, and Huston, Huston & Huston, of Woodland (Russel Shearer, of San Francisco, of counsel), for Globe Indemnity Co., Inc.

Butler, Van Dyke, Desmond & Harris, of Sacramento, for Latourette-Fical Co. et al.

Elliott, Atkinson & Sitton, of Sacramento, for H. O. Adams et al.

Rowan Hardin, of Sonora, and Armfield & Eddy, of Woodland, for First Nat. Bank of Sonora et al.

Peter A. Breen, of San Francisco, for C. Jorgensen & Co.

Neal Chalmers, Dist. Atty., of Woodland, for Clarksburg High School Dist. et al.

Frank Hatch, of San Francisco, for James Michel and W. P. Pfeffer et al.

C. L. Colvin, of Oakland, for Noah Adams Lumber Co.

Earl D. White, of Oakland, for C. W. Lannom.

PER CURIAM.

The above consolidated cases arise out of the same transactions set forth in consolidated cases No. 4598 [Globe Indemnity Co. v. Hanify (Cal. Sup.) 20 P.(2d) 689] this day decided, and therefore come within the rule announced therein. Each judgment appealed from herein is affirmed upon the grounds and for the reasons set out in said consolidated cases No. 4598.

It is so ordered.

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217 Cal. 731

BRADLEY v. BUTCHART et al.

BUTCHART v. BRADLEY et al.

AMES et ux. v. SAME.

L. A. 13067.

Supreme Court of California.

April 4, 1933.

1. **Appeal and error ⚿1011(1).**
In action to quiet title, findings based on conflicting evidence will not be disturbed.

2. **Fraudulent conveyances ⚿299(12).**
In action to quiet title, evidence *held* to sustain finding that property settlement between plaintiff's predecessor in title and her husband, entered into long before any controversy arose between husband and creditors, was bona fide transaction.

3. **Fraudulent conveyances ⚿95(2).**
Wife's execution, with husband and brother-in-law, of note to bank to finance hus-

band's purchase of realty in name of corporation, and wife's hypothecation of separate property to secure such note, *held* good and valuable consideration for corporation's note and trust deed to her.

4. Fraudulent conveyances ⇨95(5).

Wife's cancellation of note and failure to foreclose trust deed given her by corporation, the husband's alter ego, *held* good and valuable consideration for corporation's grant deed to her.

> Evidence disclosed that wife received such note and was made beneficiary of trust deed when wife, with husband and brother-in-law, joined in execution of note to bank to finance purchase of realty by husband in name of corporation, and when wife had at same time hypothecated separate property to secure note given to bank, that part of separate property hypothecated by wife had been sold by bank and remainder was still liable for debts remaining due to bank, and that at time of giving of grant deed there was still substantial sum due to bank.

5. Evidence ⇨18.

It is well known that often under forced sale real value of property cannot be obtained.

6. Fraudulent conveyances ⇨86.

Pre-existing debt is sufficient consideration for transfer of property.

7. Fraudulent conveyances ⇨121.

Transfer of property in consideration of pre-existing debt cannot be attacked by one creditor simply because debtor has given preference to another creditor, though debtor thereby rendered himself insolvent.

8. Corporations ⇨426(10).

Where corporation's deed is supported by valuable consideration, properly signed by officers and bearing corporation's seal, corporation is estopped to deny that conveyance was authorized by proper resolution, and, in absence of fraud, corporation's creditors are likewise estopped.

9. Fraudulent conveyances ⇨295(1).

In action to quiet title, evidence *held* to sustain finding that conveyance by plaintiff's predecessor to plaintiff, who, together with her brother, had obtained loan to save equity of plaintiff's predecessor in property, was bona fide transaction, without intent to defraud any person or creditor.

> It appeared that plaintiff's predecessor had conveyed the property to a bank as security for debt; that bank gave notice of default and advertised property for sale; that attorney of plaintiff's predecessor, such attorney being plaintiff's brother, put over $8,000 of his own and plaintiff's money into the deal and pledged his own credit to extent of $40,000 with another bank to secure loan to pay off first bank; and that plaintiff's predecessor conveyed property to plaintiff under agreement that, after payment of principal sum due, all taxes and assessments and costs expended in action to quiet title and any commissions and expenses of sale, net overplus should be divided equally between plaintiff and plaintiff's predecessor.

10. Estoppel ⇨68(4).

In action to quiet title, where defendants, creditors of one-man corporation controlled by person who controlled corporation in chain of title, asked court to disregard corporate entities and attacked conveyance by corporation in chain of title as fraudulent, defendants were not in position to attack conveyance as not authorized by proper resolution.

> Defendants could not take inconsistent position of claiming that corporate entity was to be disregarded in order to be considered as creditors of corporation in chain of title, and in same suit and at same time assert that corporate entity must be recognized and a duly authorized resolution of corporation's board of directors required to give validity to instrument executed by corporation through its officers.

11. Corporations ⇨1.

In proper case, to prevent fraud, court will disregard corporate entity, but will not in same action set it up again and require all formalities necessary for corporation to act to be properly complied with.

12. Pleading ⇨36(3).

In quiet title action, where defendants alleged that corporation's deed had been executed to injure, delay, and defraud creditors of individual who controlled corporation, thereby admitting execution of instrument, refusal to permit amendment, and evidence thereunder, that corporation's deed was not authorized by proper resolution, *held* not error.

13. Appeal and error ⇨761.

It is counsel's duty, by argument and citation of authorities, to show reasons why rulings complained of are erroneous.

14. Appeal and error ⇨1078(1).

Contentions supported neither by argument nor citation of authority are deemed unfounded and abandoned.

In Bank.

Appeal from Superior Court, Los Angeles County; R. M. Rankin, Judge.

Action by Ethel O. Bradley against J. H. Butchart, Ben Ames, and others, in which

J. H. Butchart and Ben Ames and wife filed cross-complaints against Ethel O. Bradley and others. From a judgment in favor of plaintiff, named defendants and cross-complainants appeal.

Affirmed.

Bernard Potter, Leonard Thomas, and H. B. Cornell, all of Los Angeles, for appellants.

Culbert L. Olson, of Los Angeles, for respondents Bradley and others.

Freston, Mulroney, Nilsson & Files and Freston & Files, all of Los Angeles, for respondent Merchants' National Trust & Savings Bank.

Scarborough & Bowen and M. J. Keane, all of Los Angeles, for Edward C. English and others.

CURTIS, Justice.

This is an action wherein the plaintiff, alleging that she is the owner and entitled to the possession of certain real property, to wit, lots 2, 3, and 4, Norwood terrace, Los Angeles, and that the defendants have no right, title, or interest in said property, sought a decree quieting her title to said property against any claim on the part of the defendants. Her claim of ownership is predicated upon a chain of title consisting of a conveyance in the form of a grant deed from Frank O. Dalton, Roy A. Dalton, and Alice Dalton to the English Realty Corporation under date of September 29, 1925, recorded on September 30, 1925; a conveyance from the English Realty Corporation in the form of a grant deed to Harriet W. English dated January 7, 1926, signed by Edward C. English, as president, and P. M. Jones, as secretary of the corporation, and under the seal of the corporation, recorded February 16, 1926, and a deed of conveyance from Harriet W. English to Ethel O. Bradley, under date of July 18, 1928, and recorded July 19, 1928. Defendants J. H. Butchart, Ben Ames, and Isobel K. Ames filed answers denying plaintiff's ownership. By way of a further and separate answer, defendants Ben Ames and Isobel K. Ames, setting up the fact that they were creditors of the English Apartment Company, alleged that the English Apartment Company and the English Realty Corporation were the alter ego of Edward C. English, and that Edward C. English caused said deed from the English Realty Corporation to his wife, Harriet W. English, dated January 7, 1926, and recorded February 16, 1926, to be executed by said corporation without any consideration and with the intent to hinder, delay, and defraud his creditors. Defendant J. H. Butchart, claiming as a creditor of the English Apartment Company, and Edward C. English personally, set up the same defense. These defendants also filed cross-complaints in which they set forth the above matters, and in addition alleged fraud on the part of each and every person or corporation in any manner connected with the financial transactions involving said property. There were named as cross-defendants by said cross-complaint the following parties: Edward C. English, Harriet W. English, E. E. Alexander, Ethel O. Bradley, and C. L. Olson, attorney for Ethel O. Bradley and who had acted as attorney for Harriet W. English in the transactions involving the property here in controversy. Upon the trial of the case, judgment was made and entered in favor of the plaintiff quieting her title to said lots, and from this judgment the defendants appeal.

The facts of the case, briefly stated, are as follows: On December 22, 1922, Edward C. English and Harriet W. English, his wife, entered into a contract settling their property rights, whereby certain community property became the sole and separate property of Mrs. English and certain other community property became the separate property of Mr. English. At the time of the agreement, Mrs. English had separated from her husband and had filed a suit asking for a separate property settlement. Under this agreement there was conveyed to Mrs. English by grant deed from Mr. English the residence property situated at 124 Fremont place, Los Angeles, of the approximate value of $65,000, the furniture and furnishings of the Fremont place house, 100 shares of the Western Electric Products, and 50 shares of Western State Bank. The suit by Mrs. English was thereupon dismissed, and the parties continued to live together until April, 1926, when Mrs. English separated from her husband. Mr. English was a prosperous contractor, and Mrs. English's share of the community property, which, by the carrying out of the terms of the agreement became her sole and separate property, was of the value of more than $100,000. All of the proof is to the effect that this was a bona fide settlement and division of the property rights and interests of the parties thereto, and it is to be noted that it was entered into at a time when it does not appear that Edward C. English had any creditors and at least two years prior to the time he became interested in the apartment house deal by which appellants claim to have become his creditors.

In 1925 Edward C. English became interested in a plan to build an "Own-your-own" apartment on the property in controversy, i. e., lots 2, 3, and 4, Norwood terrace, Los Angeles, and organized the English Apartment Company with the object of carrying this plan into effect. It seems that defendant Butchart and defendant Ben Ames had each previously entered into a contract with parties by the name of Zaiser & Killen, Butchart having paid $9,500 and Ames $11,500, under agreements to purchase from

Zaiser & Killen apartments in a proposed apartment building to be erected on the Ruth Roland property at the corner of Wilshire boulevard and Normandie street, being an entirely different piece of property from that involved herein. Dalton Bros., who owned the property here in controversy, had given an option on this said property to Zaiser & Killen. The latter assigned said option to Mr. English, and in some deal between the English Apartment Company, Zaiser & Killen, and the appellants Butchart and Ames, the English Apartment Company took over the contracts between appellants and Zaiser & Killen, and the amounts paid over by appellants to Zaiser & Killen were accepted as payment on apartments to be erected by English on lots 2, 3, and 4 of Norwood terrace. English found that he was unable to raise sufficient money to finance the purchase of these lots without assistance, and approached his wife with the idea that, if she would put up her separate property, in addition to certain property which he also would put up, the Citizens' National Trust & Savings Bank would loan him the sum of $170,000. Mrs. English at first refused, but, after being urged by her two sons and after consulting her attorney, Mr. C. L. Olson, she consented to said arrangement upon the understanding that she should receive a promissory note in the amount for which she would be liable to the bank, together with a trust deed upon the lots to be purchased as her security. She thereupon signed a ninety-day promissory note, together with her husband, Edward C. English, and his brother, Richard C. English, to the Citizens' National Trust & Savings Bank for $170,000, and to secure payment of this note hypothecated to the bank her sole and separate property consisting of the real property located at 124 Fremont place, Los Angeles, a chattel mortgage on its furniture and furnishings, 100 shares of Electric Products Corporation (formerly Western Electric Products) and 50 shares of Bank of America (formerly Western State Bank). At the same time Mr. English pledged with the bank, as security for this note, 100 shares of stock of Electric Products Corporation, 10 shares of stock of Citizens' Savings Bank of Champaign, Ill., and 39 bonds of Elks Building, Champaign, Ill. In the meantime, the English Realty Corporation had been organized by English for the purpose of holding title to the property. Nine thousand dollars, which had been paid by Zaiser & Killen for the option on the property, had been credited to English on the purchase price of these lots; he had previously paid an additional sum of $31,000; and $80,000 out of the money loaned by the Citizens' Bank was paid as the purchase price —making the total purchase price of the property $120,000. The property was thereupon conveyed to the English Realty Corporation by the Daltons. The sum of $81,542 of the amount borrowed from the Citizens' Bank was held intact by the English Realty Corporation in the said bank in connection with plans for the financing of the building on the lot.

At the same time a promissory note for $170,000 was executed and delivered to Mrs. English, and a deed of trust covering these said lots (subject to any mortgages or deeds of trust to secure a first mortgage bond issue of $650,000 and a general mortgage bond issue of $100,000, and the cost of any furniture to be placed on the premises not exceeding $180,000), in which she was named as beneficiary and C. L. Olson, her attorney, was named as trustee, was executed by the English Realty Corporation, signed by Edward C. English, as president, and P. M. Jones, as secretary, and bearing the seal of the corporation. At the request of Mr. English, this trust deed was withheld from recordation by reason of the fact that he was engaged in plans for the financing of the apartment building by means of a contemplated first mortgage bond issue of $650,000, and a general mortgage bond issue of $100,000, to be handled by Bailey Bros., and he did not wish the trust deed to be recorded until the other incumbrances had been placed of record.

Apparently the plans of the English Realty Corporation for financing the building by said bond issue did not materialize and the bank sold the 100 shares of stock of Electric Products Corporation pledged with it by Mrs. English for $20,141.68 and also the 100 shares of stock of Electric Products Corporation pledged with it by Mr. English for the same amount and applied the total amount received of $40,283.36 on the note for $170,000 held by it, leaving a balance due of $129,716.64. A renewal note was signed by Edward C. English, Harriet W. English, and Richard C. English. Later in March, 1926, the $81,542 which had been held intact was applied on the indebtedness, and a new note was made for the balance, being $48,174.64, bringing the interest up to date.

On January 5, 1926, a written agreement was entered into between English Realty Corporation, Edward C. English, and Harriet W. English. This agreement, after setting out the fact that the note to the Citizens' National Trust & Savings Bank had not been paid, that over $48,000 remained due upon said note, that said English Realty Corporation was unable to pay the same to obtain the release and return to Harriet W. English of the property conveyed and hypothecated by her with the bank to secure said note, and stating that a sale under foreclosure of the trust deed held by her would not furnish sufficient money, even after the application to said debt of the property of Edward

C. English still held by the bank, to pay said indebtedness to the bank and repay to Harriet W. English the value of her shares of stock of Electric Products Corporation sold by the bank, provided that the English Realty Corporation should convey to Harriet W. English by grant deed title to said property, lots 2, 3, and 4, Norwood terrace, and Harriet W. English agreed to cancel the note and trust deed held by her and also to save harmless the said English Realty Corporation, Edward C. English, and Richard C. English from any liability on said indebtedness to the bank. This agreement was signed by Edward C. English as president of the English Realty Corporation. Thereafter, the English Realty Corporation conveyed these lots to Harriet W. English by deed of conveyance dated January 7, 1926, signed by Edward C. English, as president, and P. M. Jones, as secretary, and bearing the seal of the English Realty Corporation, which deed was recorded on February 16, 1926. It will be noted that at the time of this conveyance in consideration of the cancellation of the note and trust deed held by her, Harriet W. English still had hypothecated with the bank as security for the indebtedness of the English Realty Corporation her residence property at 124 Fremont place, together with its furniture and furnishings, and her 50 shares of bank stock, and that she was entitled to credit of over $20,000 for the shares of stock of the Electric Products Corporation previously sold by the bank.

Thereafter Mrs. English conveyed these lots to the Citizens' Bank to secure the balance of the indebtedness due from her to the bank. In consideration of this conveyance the bank reconveyed to her the property pledged by her, being her residence property and her bank stock, and satisfied and discharged its chattel mortgage upon her furniture, and a supplemental declaration of trust was made by the bank substituting these lots as security for her indebtedness. The deed from Mrs. English to the Citizens' Bank was recorded February 16, 1926. Subsequently the other property pledged by Mr. English was sold by the bank and the proceeds of the sale applied on said indebtedness. Nothing further was paid, and on December 1, 1927, there was due $46,264.20. Mrs. English was unable to pay the amount due, and on February 27, 1928, a notice of default was served on her by the bank, and the property was advertised for sale by the bank. Mrs. English had been attempting to sell the property since 1926, but had not received an acceptable offer. It was apparent that she would lose her equity in the property unless she could forestall this sale by the bank. She thereupon called upon her attorney, C. L. Olson, to attempt to save something for her out of the property. Unless she was able to save something she would be entirely out for the value of her shares of stock of Electric Products Corporation, previously sold by the bank, of the value of over $20,000. Mr. Olson refinanced the loan by putting up $8,333 of money belonging to his sister, Ethel O. Bradley, plaintiff herein, and himself and securing a loan of $40,000 from the Merchants' National Trust & Savings Bank on his own personal note, putting up the property here involved as security for said loan. These amounts were paid to the Citizens' Bank in full satisfaction of the indebtedness due it, and said bank reconveyed to Mrs. English said lots 2, 3, and 4, Norwood terrace. In the meantime, Mrs. English had conveyed said property to Ethel O. Bradley under a written agreement that, after the payment of the principal sum due, the payment of all taxes and assessments on the property, the costs expended in any action to quiet title, and any commissions and expenses of a sale, the net overplus received by a sale of the property by Ethel O. Bradley should be divided equally between her and Harriet W. English; it being agreed that the property would not be sold for less than sufficient to pay Harriet W. English the sum of $20,000. Thereafter, and after the commencement of this action, by agreement of the parties to said agreement, the lots were sold on February 19, 1929, to Wm. M. Davey for $73,000 in cash and some equities in real property which were incumbered. Under this agreement the purchaser paid $13,000 in cash and assumed the payment of notes for $60,000, secured by a first trust deed on the property here involved, which notes were subsequently paid off by him. After payment of all expenses as provided for by the agreement between Ethel O. Bradley and Harriet W. English, there remained a surplus of $19,116.22 to be divided equally between them, Mrs. English having previously waived the provision that the sale must net her $20,000. It is apparent, therefore, at the termination of the transactions involving this property that Harriet W. English by the hypothecation of her sole and separate property with the Citizens' Bank for the loan of $170,000 for the purchase of the property in controversy, and having lost her shares of stock of Electric Products Corporation by the sale of said stock by the bank, which shares were sold for over $20,000, in fact sustained a loss of over $10,000.

There should also be included in a summary of the facts a statement that subsequent to the execution of the grant deed of January 7, 1926, by the English Realty Corporation to Harriet W. English, Mr. English continued to spend at least part of his time in the little real estate office located on the property. His presence there was explained by one of his sons as being to help his sons who were engaged in the contracting business also. It should also be stated that subsequent to the execution of said deed by the English Realty Corporation to Harriet W. English, Edward C. English in April, 1927, executed a trust deed to the Title Insurance & Trust Company as security for a loan of $110,000, and subsequently another deed of trust on lots 3 and 4 to the same company as trustee in favor of Richard C. English and Edward C. English, doing business as a copartnership, for the sum of $63,000. Before suit to quiet title was commenced, these deeds were released by the parties holding the same.

Upon the foregoing facts and the proof produced in support thereof, the trial court decided all of the issues in favor of the plaintiff and the cross-defendants, and gave judgment accordingly. Epitomized, the findings of the trial court are (1) that the plaintiff is the owner in possession of and entitled to the possession of the real property to quiet the title of which this suit was brought; (2) that defendants J. H. Butchart, Ben Ames, and Isobel Ames have not any title or interest in said real property; (3) that the English Realty Corporation, a corporation organized for profit, is a one-man corporation dominated and controlled by Edward C. English and the acts of said corporation are the acts of Edward C. English; (4) that the property settlement entered into on December 22, 1922, between Edward C. English and Harriet W. English was a bona fide agreement free from any fraud or fraudulent intent, whereby Harriet W. English, received as her sole and separate property certain property in lieu of her claim to any interest in certain other community property and in lieu of her claim for separate maintenance; (5) that the deed from the English Realty Corporation, whereby title to the property was conveyed to Harriet W. English, was not a voluntary conveyance but was made for good, valuable, and adequate consideration given and paid by Harriet W. English in the handling of her sole and separate property, and was made in good faith and without any intent to injure, hinder, delay, or defraud any creditors of Edward C. English, English Realty Corporation, or the English Apartment Company; (6) that the conveyance from Harriet W. English to Ethel O. Bradley was made in good faith and for a good, valuable, and adequate consideration and without any purpose or intent to injure or hinder or delay or defraud any creditor of Edward C. English, English Realty Corporation, or the English Apartment Company; (7) that the conveyance of said property by Harriet W. English to the Citizens' National Trust & Savings Bank in February, 1926, as security for the performance of an obligation due the bank, was made in good faith and for good and valuable consideration and without any purpose on the part of any one to injure, hinder, delay, or defraud any creditor or creditors of Edward C. English, English Realty Corporation or the English Apartment Company. The court further found that Edward C. English did execute certain deeds of trust to the Title Insurance & Trust Company and that said deeds of trust were recorded subsequent to the conveyance from the English Realty Corporation to Harriet W. English, but found that said execution and recording was done by Edward C. English in an attempt to secure funds to purchase said property back from Harriet W. English, which attempt failed and said trust deeds were a nullity, and that they were not executed in the exercise of any control of the legal or equitable title to said property, and were not executed or recorded with the knowledge or consent of said Harriet W. English and did not affect her title. The court likewise found that "the conclusions of law and judgment must be the same, in view of the findings herein, regardless of any finding as to whether 'the defendants J. H. Butchart, Ben Ames and Isobel K. Ames' were creditors of Edward C. English on January 7, 1926, the date on which the real property referred to in the complaint was conveyed to Harriet W. English by the English Realty Corporation," and that "the conclusions of law and judgment must be the same in view of the previous findings herein, regardless of any finding whether said Edward C. English was insolvent at the time of the conveyance by English Realty Corporation to Harriet W. English but it does not appear by any satisfactory evidence that Edward C. English was insolvent at that time. The evidence does show that after the conveyance of said property by the English Realty Corporation to Harriet W. English, the said Edward C. English still owned other property, the value of which was not established."

The two main contentions made by appellants are, (1) that the evidence is insufficient to support the findings and decision of the court, and (2) that the deed from the English Realty Corporation to Harriet W. English was not properly executed by the corporation; there being no regularly called meeting of the directors and no resolution formally passed authorizing the execution of said deed, and therefore the motion for a nonsuit, based upon the theory that there has been a failure to establish plaintiff's ownership to said property by a valid chain of title, should have been granted.

[1] Appellants recognize the rule that findings based on conflicting evidence will not be disturbed, but claim that in the instant case the testimony is so inherently improbable that no conflict in fact exists. We cannot agree with this view of the evidence, for we are of the opinion that a real and substantial showing was made by the plaintiff which amply warranted the trial court in arriving at the conclusion that plaintiff was entitled to a decree quieting her title to the property against any claims of the appellants. The

testimony of the various witnesses for the plaintiff with reference to the transactions involved in the handling of the property in controversy seems to us probable and worthy of credence, and we are satisfied with the conclusion reached by the trial court. It is true that evidence was produced by the appellants which casts some doubt upon the story of the transactions as pictured by the plaintiff's witnesses, and which tended to some slight degree to challenge the truth of some of the testimony of plaintiff's witnesses, but this is necessarily true of every case in which the issues are controverted, and, the trial court having weighed the evidence and resolved any contradictions and inconsistencies in favor of the plaintiff, its determination is final.

[2, 3] We think that there is no question but that the property settlement entered into between Edward C. English and Harriet W. English in 1922, long prior to the time any controversy arose between Edward C. English and his creditors, was a perfectly legitimate, bona fide transaction. The trial court expressly so found, and we think its conclusion is undoubtedly correct. As a result of said agreement, Harriet W. English became the owner, as her sole and separate property, of certain property over the value of $100,000 which she thereafter, upon solicitation by her husband, hypothecated with the Citizens' National Trust & Savings Bank to secure a loan to her husband of $170,000 to enable him to purchase lots 2, 3, and 4 of Norwood terrace for the purpose of erecting an own-your-own apartment house thereon. The deed to said property was taken in the name of the English Realty Corporation, and this hypothecation by her of her sole and separate property and her execution with her husband and his brother of the note to the Citizens' Bank were good and valuable considerations for the promissory note for $170,000 and for the trust deed executed in her favor by the English Realty Corporation. We are further of the opinion, in view of the testimony of P. M. Jones, secretary of the corporation, that the execution of said deed of trust was properly authorized by the corporation.

[4-7] The cancellation of this note and the failure of Mrs. English to foreclose under the deed of trust was a good and valuable consideration from Mrs. English for the grant deed by which the English Realty Corporation conveyed said property to Harriet W. English, which said grant deed was properly signed by Edward C. English, as president, and P. M. Jones, as secretary, and bore the seal of the corporation; thus being prima facie evidence of a conveyance of title. At the time of the giving of the grant deed to Mrs. English in lieu of the promissory note and trust deed, there was still over $48,000 due to the Citizens' Bank, and she had an interest of over $20,000 in the property by reason of the previous sale of her shares of stock of Electric Products Corporation by the bank, and her residence property worth $65,000, her furniture and furnishings valued at $15,000, and her shares of bank stock were all liable for the debt still remaining due to the bank. Although appellants attempted to prove at the trial that the grant deed was given not as an absolute conveyance but as security for the obligation to her, the trial court expressly found that the grant deed was made and executed as an absolute conveyance, and as we view the evidence this conclusion was a correct one. It is true that the original purchase price of the property was $120,000, and that the actual amount of money still due the bank, which Mrs. English assumed and for which her property stood pledged, amounted to $48,000, which, with the $20,000 from the sale of her shares of stock by the bank, made a total of $68,000, but there is testimony in the record that the value of the property had materially depreciated since the purchase of the property, and it is also a well-known fact that very often under forced sale the real value of the property cannot be obtained. The trial court also found that it did not appear by satisfactory evidence that Edward C. English was insolvent at the time of this transfer of the property to Mrs. English, and also that the evidence does show after this conveyance to Mrs. English that Edward C. English still owned other property. We find from a review of the record that this finding is correct. It is well settled that a pre-existing debt is sufficient consideration for a transfer of property, and such a transfer cannot be attacked by one creditor simply because the transferor has seen fit to give a preference to another creditor, even though the debtor thereby renders himself insolvent. Foster v. Foster, 123 Cal. App. 1, 10 P.(2d) 796. It should perhaps be here noted that the appellants, if creditors, were only general creditors and had no lien or interest in the particular property here in controversy. It was not until April, 1928, that the appellants Ben Ames and Isobel K. Ames obtained judgment against English Apartment Company and not until June, 1928, that appellant Butchart obtained judgment against the English Apartment Company and Edward C. English personally upon his guaranty of the obligation of the English Apartment Company, and subsequently made levies upon this particular property.

[8] In view of the fact that it is apparent that a valuable consideration existed for the conveyance by the English Realty Corporation to Harriet W. English of the property here involved, any evidence that the corporation did not by proper resolution authorize said conveyance would be immaterial for the reason that, regardless of whether there was proper authorization, such transfer, properly signed by the officers and bearing the seal of the corporation, would be valid by virtue of

the fact that the corporation itself would be estopped to deny the validity of the authorization, and it follows, of course, that, if the corporation is estopped, in the absence of fraud, the estoppel likewise applies against the creditors of the corporation. Wood Estate Co. v. Chanslor, 209 Cal. 241, 250, 286 P. 1001, is very similar in this respect to the instant case, and definitely settles the rule in this regard.

[9] We likewise fail to find the slightest taint of fraud in the transaction whereby Harriet W. English conveyed title to Ethel O. Bradley and the agreement whereby this was accomplished. The finding of the trial court that this was a bona fide transaction without any intent to defraud any person or creditor is, we think, amply sustained by the evidence. At the time Mr. Olson arranged for the refinancing of the loan, Mrs. English was in a situation where it was extremely probable that she would lose her entire equity in the property. The bank had already given her notice of default and had advertised the property for sale, and unless Mr. Olson, or some one else, came to her rescue, she would lose the whole thing. Mr. Olson, in that situation, put over $8,000 of his own and his sister's money into the deal and pledged his own credit to the extent of $40,000 with the Merchant's National Trust & Savings Bank to secure a loan to pay off the Citizens' Bank. We find nothing in the conduct of Mr. Olson as it is set forth in the record before us which would subject him to any criticism whatever. He acted for the best interest of his client and with the clear understanding that, if he advanced money and pledged his credit, he should share in the profits of the transaction.

In short, after a careful perusal of the record, we are satisfied that all of the material findings of the trial court to the effect that all of the financial transactions by which the plaintiff finally acquired title to the property in controversy were bona fide transactions, and that no intent was shown in any of them to injure, hinder, delay, or defraud any creditors of Edward C. English, English Apartment Company, or English Realty Corporation, are supported by substantial evidence, and that the findings in turn support the judgment.

[10, 11] We find no merit in the second contention that, no proof having been shown by the plaintiff that the English Realty Corporation was duly authorized to execute and deliver said grant deed, necessarily she has failed to establish her case and a nonsuit should have been granted. We have already pointed out that a valuable consideration to the corporation having been shown and the corporation having profited thereby, the corporation and its creditors would be estopped to set up any lack of authority on the part of the corporate officers to execute said conveyance. Wood Estate Co. v. Chanslor, supra. We are of the opinion that the appellants as creditors of the English Apartment Company and Edward C. English personally are in no position to set up any lack of authority on the part of the English Realty Corporation to execute the conveyance to Mrs. English. It is only if the corporate entity of the English Realty Corporation be entirely disregarded and wiped out that the appellants have any standing in the present action, for, if the corporate entity be not disregarded, they are not creditors of the English Realty Corporation, but are only creditors of the English Apartment Company and Edward C. English personally. Having asked the court to disregard the corporate entity of the English Realty Corporation and treat it as the alter ego of Edward C. English, which the trial court in fact did, the appellants may not in the same breath ask the court to consider that it is a corporation and can only act by means of a resolution duly and properly authorized by its board of directors. It is true that in a proper case to prevent fraud the court will disregard the corporate entity, but, having done so, it will not in the same action set it up again and require that all the formalities necessary for a corporation to act shall be properly complied with. If Edward C. English was the alter ego of the English Realty Corporation, then his acts as an individual were binding upon the corporation. In other words, appellants may not take the inconsistent position of claiming that the corporate entity is to be disregarded in order to be considered as creditors of the English Realty Corporation by reason of the obligation to them of Edward C. English personally or the English Apartment Company, and in the same suit and at the same time assert that its corporate identity must be recognized and a duly authorized resolution of its board of directors required to give validity to an instrument executed by it through its officers. The appellants may either ask us to disregard the corporate entity, or ask us to recognize the corporate entity, but they may not in the same breath ask us to both uphold the corporate entity and disregard it.

[12] In this regard, complaint is made by appellants that after the commencement of the trial they were not permitted to amend their pleadings so that they might set up and prove the lack of authorization of the officers of the English Realty Corporation to execute the conveyance of January 7, 1926, to Harriet W. English. Permission to amend was refused upon the ground that in their original pleadings they had set up the fact that the deed had been executed to hinder, delay, injure, and defraud creditors of Edward C. English, thereby admitting the execution of said instrument, and that they should not be allowed to take the inconsistent position after issues were joined of claiming that the deed

was not properly authorized and was therefore void. In other words, the court did not permit them to claim that the English Realty Corporation both was and was not a corporate entity.

It is apparent from the above discussion that the court was well within its right in refusing to permit the amendment and in refusing to permit the admission of evidence by the appellants which tended to contradict the admissions of their pleadings.

[13, 14] Finally, appellants claim that some fifty-eight errors were committed by the trial court. These errors are merely enumerated and given a number, and no attempt is made by the appellants to show wherein the action of the court was erroneous, aside from the mere statement that it was erroneous. "An appellate court cannot assume the task of discovering the error in a ruling and it is the duty of counsel by argument and the citation of authority to show the reasons why the rulings complained of are erroneous. Contentions supported neither by argument nor by citation of authority are deemed to be without foundation and to have been abandoned." 2 Cal. Jur. 732; People v. McLean, 135 Cal. 306, 67 P. 770; People v. Broyles, 113 Cal. App. 390, 298 P. 131.

The judgment is affirmed.

We concur: WASTE, C. J.; PRESTON, J.; LANGDON, J.; SHENK, J.; SEAWELL, J.; IRA F. THOMPSON, J.

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217 Cal. 662

YOUNG v. ENFIELD et al.

L. A. 12985.

Supreme Court of California.
April 3, 1933.

1. Appeal and error 🔑1011(1).

Supreme Court is bound by trial court's finding, based on conflicting evidence, that party excluded from corporate management because of alleged intoxication was not addicted to intoxicants.

2. Corporations 🔑190.
Judgment 🔑21.

Judgment and findings, in action between principal stockholders concerning ownership and management of laundry, *held* so inconsistent and uncertain as to require reversal.

The judgment upheld the issue of an unequal number of preferred shares, but decreed equal division of proceeds of business. Certain findings provided for equal control of business as in a partnership, yet one party was given more shares of voting stock than the other. Party ousted from control was found to be entitled to share control with party ousting him, but judgment contained no express provision restoring ousted party to joint control.

In Bank.

Appeal from Superior Court, Los Angeles County; J. Walter Hanby, Judge.

Action by James A. Young against Elmer Enfield and another. From judgment for plaintiff, defendants appeal.

Reversed.

John M. Hall and Alexander T. Sokolow, both of Los Angeles, for appellants.

J. R. Wilder, Arthur M. Gediman, and William J. McNichols, all of Los Angeles, for respondent.

SEAWELL, Justice.

Defendants Elmer Enfield and Southland Home Laundry Corporation appeal from the judgment entered in this action brought by plaintiff James A. Young to obtain an accounting of the business conducted by said corporation and a determination of his interest in the capital stock of said corporation and his right to participate in the management thereof. The terms and provisions of said judgment will be set forth in detail hereinafter.

The facts which gave rise to the action are as follows: Defendant Elmer Enfield desired to acquire an interest in a laundry business. Plaintiff wished to find a partner or to sell the laundry business operated by him in the city of Los Angeles under the name of Elysian Laundry. By his own admission, he was in debt, and it was difficult for him to get along without additional capital. Defendant represented that he could provide the needed capital. It was orally agreed that a corporation should be formed to conduct the business. No written agreement was ever entered into. Defendant employed the Nevada Agency & Trust Company to form the corporation. It was organized under the laws of Nevada as the Southland Home Laundry Corporation on November 17, 1927, by three incorporators, who were persons connected with said agency company, and who became the first directors. At the first directors' meeting, held in Reno, Nev., on November 17, 1927, a resolution was passed which ordered that stock be issued in accordance with the following table, and it was so issued:

	Preferred (Par-$25)	Class A Common (No par value)	Class B Common (No par value)
Elmer Enfield (defendant)	200	200	1,200
James A. Young (plaintiff)	280		280
F. W. Meckfessel	120		120

At the conclusion of this meeting the original incorporators and directors resigned and elected defendant, plaintiff, and one Lambert directors. This issue of stock left 400 shares of preferred stock and 400 shares of class B common stock undisposed of. Dividends at the rate of 8 per cent. per annum, to be cumulative, were required to be paid on preferred stock before any dividends should be declared on common stock. Only holders of class B common stock had the right to vote. The 200 shares of class A common stock are not here involved. A plan was to be arranged for distribution of this stock to employees as a bonus, and defendant admittedly holds it in trust for such purpose.

Plaintiff Young transferred all assets of the Elysian Laundry to the Southland Home Laundry Corporation. He did not own the real property on which the laundry was operated. The 280 shares of preferred stock issued to him had a par value of $25 a share, or a total par value of $7,000, which is the value placed by him in his complaint on the assets transferred, after allowing for liabilities. F. W. Meckfessel, father-in-law of defendant Enfield, paid $3,000 in cash for the 120 shares of preferred stock, par value $25 per share, issued to him. It had originally been intended that Enfield should purchase and transfer to the corporation a laundry route known as the Pope Laundry, but on March 25, 1928, the corporation by resolution voted to accept the demand note of Enfield for $5,000 in lieu of said route, and this note was subsequently paid in full. The 200 shares of preferred stock issued to Enfield had a par value of $5,000. Plaintiff Young and Meckfessel each received the same number of shares of class B common stock as of preferred stock, to wit, 280 and 120 shares, respectively; but to Enfield, who received 200 shares of preferred stock, 1,200 shares of class B common stock, the no par value voting stock, were issued. He subsequently sold 40 shares of class B stock to F. W. Meckfessel and 20 shares to W. R. Meckfessel, his brother-in-law, leaving him with 1,140 shares, or 1,138 after transfer of one share to plaintiff and one to another person, who became the third director of the corporation. Defendant Enfield claims that it was understood as a condition of his entering the business that he should have voting control, and that the 1,200 shares of voting stock, upon which no dividends could be paid until 8 per cent. cumulative dividends had been paid on preferred stock, were issued to him by express agreement and in consideration of the fact that he promised to and did obtain additional capital for the business. By the judgment appealed from the court ordered redistribution of the 1,138 shares held by defendant, so that plaintiff, who held 281 shares should thereafter own 709 shares and defendant 710.

[1] Defendant Enfield became president and treasurer of the corporation, and plaintiff Young, vice president. Defendant borrowed over $20,000 on behalf of the corporation from his own relatives, which was invested in new and additional equipment. The total value of the plant at the time defendant became associated with the business in November, 1927, was approximately $11,000. On April 26, 1930, it was over $60,000. The total volume of laundry business for the first week defendant was interested in the business was $220; the week preceding the trial it was $3,600. Nevertheless, the disbursements for the period November 17, 1927, to May 6, 1930, exceeded the receipts by $227.72, no doubt due to the fact that such large sums had been invested in additional equipment. No dividends were ever paid, but plaintiff and defendant each drew a salary of $35 a week. On March 29, 1930, plaintiff claims, and the court found, that defendant without right excluded him from the laundry business and the management thereof. Defendant claims that he was driven to this course because plaintiff so often came to work intoxicated that he was unable to participate in the management of the laundry, and this was his sole reason for excluding him. On this point there was a conflict in the evidence, and we are bound by the trial court's finding that plaintiff was not given to intoxication.

On June 5, 1930, plaintiff filed his complaint herein, the theory of which is not entirely clear. Although he alleges a scheme on the part of defendant to cheat and defraud him of a prosperous business, and his wrongful exclusion from said business, he does not seek to rescind the transaction and recover the laundry as his individual property. Nor does he pray for a dissolution and liquidation, as in the case of a partnership, on the ground that he and defendant are no longer able jointly to manage the business in harmony. Rather, the relief prayed for is based on a continuance of the corporation. Plaintiff prays for an accounting and for restoration to office. The redistribution of class B common stock awarded by the judgment was not mentioned in the prayer for relief.

The court made lengthy findings, many of which follow word for word the language of the complaint, and thereby incorporate in the findings the confusion and uncertainty inherent in certain allegations of the complaint. Several of the findings, including the finding of an original fraudulent scheme to cheat and defraud plaintiff of his business, are not sustained by the evidence viewed in the light most favorable to plaintiff. Due no doubt to the state of plaintiff's pleading and the manner of presentation, the trial court expressed difficulty in disposing of the case, and plaintiff and respondent has not aided our consideration on appeal by filing a brief.

The entire testimony of plaintiff as to the terms of the agreement was that a corporation was to be formed, and that everything was to be divided equally. He claims to have had an entire lack of knowledge as to the details of corporate affairs and the issuance of stock, which matters he left to the exclusive discretion of defendant. He alleged in his complaint, and the court found, that it was agreed that "this plaintiff and said defendant would at all future times share and share alike and equally in said business," and that they would "share and share alike in all assets of the corporation, and in the proceeds from the business carried on by the same." The agreement is not described with any greater certainty or particularity in the pleadings or in the testimony of plaintiff. It is this finding of equality, made in the language of the complaint, which is the basis of the judgment. On analysis of the judgment we find:

First, that the court orders redistribution of the total number of shares of class B common stock issued in the name of plaintiff and defendant at the commencement of the action (plaintiff 281, defendant 1,138) to give plaintiff 709 shares and defendant 710. It would seem that if plaintiff from the first was entitled to share equally with defendant in said stock, the court should have based the division on the 1,200 shares originally issued to defendant, rather than on the number of shares, to wit, 1,138, remaining after transfer of approximately 60 to the Meckfessels. The judgment perpetually enjoins defendant from ever owning more than one share in excess of the number owned by plaintiff.

Secondly, the court adjudges that plaintiff and defendant have shared equally in the business and proceeds of the corporation as of November 17, 1927. The evidence showed that no dividends had been paid, and that plaintiff and defendant had received equal salaries of $35 a week. Although the date stated, November 17, 1927, is the date of commencement of the corporate business, we construe this provision as adjudging that the parties had shared equally for the period from November, 1927, to April, 1930, covered by the accounting rendered by the accountants appointed by the court. The effect of this provision of the judgment, considered together with certain findings, is to decree equal division of future profits and proceeds.

Although the court by its findings sustains the right of plaintiff to share jointly and equally with defendant in the management and control of the business, the judgment proper contains no express provision restoring him to joint control.

[2] Furthermore, although the court on the basis of its finding of equality in all things, ordered approximately equal division of the class B common stock, and equal division of profits and proceeds, it did not redistribute the preferred stock. Plaintiff owns 280 shares of this stock, and defendant originally owned 200 shares, and now owns 140, having transferred 60 shares to the Meckfessels. All preferred stock was issued for value received equivalent to the par value of the stock, as previously noted, and the trial court has sustained said issue of stock, and on the record before us we find it to be just and proper. By the articles of incorporation 8 per cent. cumulative dividends are required to be paid on preferred stock before any dividends are paid on common stock. It would follow that the profits and proceeds remaining after payment of expenses, instead of being divided equally between plaintiff and defendant, should be paid to them as dividends on preferred stock in proportion to the number of shares owned by each. There is an inconsistency, contradiction, and uncertainty in the judgment before us which upholds the issue of an unequal number of shares of dividend paying stock, but nevertheless seems to decree equal division of all proceeds of the business.

Furthermore, certain provisions of the findings very plainly sustain the right of plaintiff to resume equal control with defendant in the active management of the business, as in a partnership. Yet defendant is given 710 shares of voting stock, and plaintiff 709, which would seem to uphold defendant's contention that he was to have voting control. Here, again, there is uncertainty in the judgment.

The exclusion of plaintiff from joint control, according to his testimony, was the main grievance which led him to bring action. Although, as noted above, the judgment proper does not expressly decree that he be restored, nevertheless when considered with reference to the findings it would seem to have that effect. If plaintiff and defendant were to exercise joint and equal control as in a partnership, the proper procedure would be for the court to decree dissolution and liquidation—as in the case of a partnership—rather than to decree continuance of an impossible relationship by court order.

We conclude that the judgment and findings as they stand are uncertain and contradictory and fail to define in an effective manner the interests of the respective parties in the corporation, its stock, the proceeds of its business, and its management. The effect would seem to be to superimpose a partnership on a corporation while maintaining inconsistent features of each type of business organization. We have hesitated because of the additional cost that will be involved to send the case back for retrial, but in the state of the record we cannot undertake to revise the findings and judgment. It may be that the business entanglements of the parties will be settled by themselves without further expense.

The judgment is reversed.

We concur: WASTE, C. J.; CURTIS, J.; LANGDON, J.; PRESTON, J.; THOMPSON, J.

131 Cal.App. 6

Emily A. CARSON, Plaintiff and Appellant, v. Clare WOOLWINE, Leonard M. Comegys, Wm. W. Reid and C. B. Christie, Defendants and Respondents.

Civ. 7696.

District Court of Appeal, Second District, Division 2, California.

April 4, 1933.

Appeal from Superior Court, Los Angeles County; William Hazlett, Judge.

Kelly, Stuart & Hendrick, of Los Angeles, for appellant.

James Hosick and Dana R. Weller, both of Los Angeles, for respondents.

STEPHENS, Justice.

Upon an action for stockholders' liability, judgment went for defendants, and this appeal is upon the sole point that a judgment against defendants should have been ordered upon the court's findings. But the findings do not connect either of the defendants with the case.

Judgment affirmed.

We concur: WORKS, P. J.; ARCHBALD, Justice pro tem.

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131 Cal.App. 12

PEOPLE v. LINDE.

Cr. 79.

District Court of Appeal, Fourth District. California.

April 4, 1933.

Rehearing Denied April 18, 1933.

Hearing Denied by Supreme Court May 4, 1933.

1. Criminal law 🔑507(1).

Burglar admitting guilt and implicating defendant *held*, as to defendant, "accomplice" within statute requiring corroboration (Pen. Code, § 1111).

[Ed. Note.—For other definitions of "Accomplice," see Words and Phrases.]

2. Criminal law 🔑511(1).

Evidence corroborating accomplice need not be strongly corroborative or establish precise facts testified to by accomplice (Pen. Code, § 1111).

3. Criminal law 🔑511(2).

Evidence corroborating accomplice, though slight and entirely circumstantial, is sufficient if connecting accused with commission of offense (Pen. Code, § 1111).

4. Criminal law 🔑511(1).

Evidence corroborating accomplice is insufficient if merely raising suspicion or showing opportunity for commission of offense (Pen. Code, § 1111).

5. Criminal law 🔑511(2).

In second-degree burglary prosecution, evidence in corroboration of alleged accomplice's testimony *held* insufficient to connect defendant with commission of offense (Pen. Code, § 1111).

Evidence relied on for corroboration showed that defendant, between one and two hours before burglary, commission of which was admitted by alleged accomplice, visited accomplice's home; that about one hour before burglary accomplice stated to defendant and third person that he intended to commit burglary that evening; that defendant in accomplice's presence had said that one could probably take some property from garage which was subsequently entered; that accomplice instructed defendant to obtain accomplice's address from accomplice's brother and that two days after burglary defendant asked accomplice's brother for such address; and that defendant in presence of accomplice's brother remarked when automobile passed that he wondered whether that was sheriff looking for him (defendant).

6. Criminal law 🔑427(5).

Evidence in second-degree burglary prosecution *held* insufficient to establish conspiracy by raising more than mere suspicion thereof as prerequisite to admissibility of alleged accomplice's letter as being declaration of coconspirator.

7. Criminal law 🔑427(4).

Coconspirator's declaration, being hearsay, cannot be used to prove existence of conspiracy.

8. Criminal law 🔑424(1).

Conspirator's declaration is inadmissible against coconspirator unless in furtherance of common purpose or design and made when conspiracy was pending, and when its object was not consummated.

9. Criminal law 🔑417(16).

Except on theory of declaration of coconspirator, letter written shortly before writer's arrest for burglary, commission of which was admitted by writer, who implicated defendant, *held* inadmissible, where letter was addressed to but never received by defendant.

Evidence showed that writer of letter in question, which was addressed to defendant, unsuccessfully attempted to procure envelope in which to mail letter to defendant, and that after writer's arrest he handed letter to third person with instruction to keep it, and that letter did not reach defendant.

Appeal from Superior Court, Inyo County; William D. Dehy, Judge.

Lawson Linde was convicted of burglary of the second degree, and he appeals.

Reversed.

Jess G. Sutliff, of Independence, Fred W. Heath, of Los Angeles, and Glenn E. Tinder, of Bishop, for appellant.

U. S. Webb, Atty. Gen., John L. Flynn, Deputy Atty. Gen., and Harvey W. Guthrie, Dist. Atty. Inyo County, of Independence, for the People.

JENNINGS, Justice.

This is an appeal by the defendant from a judgment convicting him of the crime of burglary of the second degree. The following facts are pertinent to the appeal: On July 18, 1932, at some time between 7 and 8 o'clock p. m., a garage building owned by the Sierra Talc Company in the town of Keeler, Inyo county, was entered and a number of tires and tubes, together with a small sum of money, were taken from the premises. One Steve Gago was arrested at San Fernando, Cal., three days after the burglary was committed and most of the stolen property with the exception of the money was found in his possession. He was charged with the crime of burglary, pleaded guilty, and was sentenced by the court.

After Gago's arrest and after he had confessed his guilt, he implicated the defendant, Lawson Linde, as a participant in the burglary. An information was thereupon filed charging Linde with the crime of burglary. He was arraigned, pleaded not guilty, was tried before a jury, and convicted. Judgment was rendered. A motion for a new trial was made by the defendant and denied. This appeal is from the judgment and from the order denying defendant's motion for a new trial.

[1] During the trial of defendant, Steve Gago testified as a witness for the prosecution. He admitted that he had committed the burglary and testified that appellant had assisted in its commission. It is therefore not open to question and it is conceded by respondent that, as to appellant, the witness Gago was an accomplice as this phrase is defined in section 1111 of the Penal Code.

Appellant's principal contention on this appeal is that the testimony of the admitted accomplice was not corroborated by such other evidence as tended to connect him with the commission of the offense as required by section 1111 of the Penal Code. Respondent, on the other hand, contends that sufficient corroborative evidence to fulfill the requirements of the above-mentioned statute was placed before the jury.

The evidence which, it is maintained, furnished sufficient corroboration of the testimony of the accomplice consists of the following: First, the admitted fact that appellant visited the home of the accomplice between the hours of 5:30 and 6 o'clock p. m. of the evening of July 18, 1932; second, the testimony of the defense witness, Morris Horn, that he was at a swimming pool in Keeler during the evening of July 18, 1932, and that appellant and accomplice appeared at the pool about 6:30 p. m. of the above-mentioned date and during a conversation that ensued between the three the statement was made by the accomplice that he "was going to knock over a place that evening and both of us (Lawson Linde) and myself both said we did not want anything to do with it"; third, the testimony of the witness Wilson Plummer to the following effect: "Well, it came up, Gago was about to lose his car and he hated to lose it, and he was out of a job and he would like to work but there was nothing to do and Linde made the statement, I took it to be in a joking way, he said 'one could probably get some tires out of the Talc' and that was all that was said"; fourth, the testimony of the accomplice that he gave appellant instructions to obtain his address from his brother, Claude Gago; fifth, the testimony of Claude Gago that on July 20, 1932, appellant asked him for Steve Gago's address; sixth, the testimony of Claude Gago to the effect that on July 20, 1932, while the witness was at appellant's home, an automobile passed and appellant remarked, "I wonder if that is the sheriff Hutchison looking for me."

The contention of noncorroboration is a most common contention in cases where convictions have been obtained principally by reason of the testimony of accomplices. From this it has resulted that decisions are numerous wherein the evidence presented to the trial court has been examined for the purpose of discovering whether or not it measures up to the standard established by the statute requiring corroboration of the testimony of accomplices. From these decisions certain unquestioned principles with respect to the highly controversial subject of corroboration of accomplices have developed.

[2, 3] In the first place, it has become thoroughly settled that the corroborative evidence need not establish the precise facts testified to by the accomplice; that it need not be strongly corroborative; and that even though it be slight and entirely circumstantial it is sufficient if it can be said to connect the accused with the commission of the offense. People v. Negra, 208 Cal. 64, 280 P. 354; People v. Martin, 19 Cal. App. 295, 125 P. 919.

[4] On the other hand, it is equally well established that the corroborative evidence is not sufficient if it does no more than show an opportunity for the commission of the offense or raise a suspicion, however strong, that the offense was committed by the accused. People v. Robbins, 171 Cal. 466, 154 P. 317; People v. Kempley, 205 Cal. 441, 271 P. 478; People v. Davis, 210 Cal. 540, 293 P. 32. The evidence relied upon as corroborative of the testimony of an accomplice must, in the language of the statute, "tend to connect the defendant with the commission of the offense." The difficulty of properly solving the problem is enhanced by reason of the fact that a reviewing court must, in the final analysis, place itself in the position of the triers of fact and weigh the evidence for the purpose of discovering whether it complies with the requirements of the statute.

Bearing in mind the above-mentioned principles applicable to the question here presented, we approach a consideration of the evidence which, it is claimed, sufficiently corroborated the testimony of the accomplice for the purpose of discovering whether in any part, or taken collectively, it may be said that it tended to connect appellant with the commission of the offense with which he was charged.

[5] The evidence relied upon by respondent as being sufficiently corroborative of the accomplice's testimony may be summarized as follows: Appellant was at accomplice's home between 5:30 and 6 o'clock p. m. of the day on which the burglary was committed and at 6:30 p. m. of the same day was present with the accomplice at the swimming pool in the town of Keeler, at which time and place the accomplice stated "he was going to knock over a place that evening." At some time in response to a suggestion by the accomplice that he was about to lose his car appellant remarked "One could probably get some tires out of the Talc." On the second day after the burglary was committed appellant asked the accomplice's brother to furnish him the address of the accomplice and on this same occasion appellant remarked, upon observing a passing automobile, "I wonder if that is the sheriff Hutchison looking for me."

It may be conceded that the evidence as to the presence of appellant at the home of the accomplice and shortly thereafter at the swimming pool directly corroborated the testimony of the accomplice to these two facts. However, unless we can say that being in the company of the individual who admitted that he committed the burglary at a time two hours prior to the time it was committed, tended to connect appellant with its commission, this evidence of itself has no corroborative value. It is obvious that, standing alone, it did not connect appellant with the commission of the crime.

It may also be conceded that the evidence respecting the statement attributed to appellant, viz., "One could probably get some tires out of the Talc" directly corroborated the testimony of the accomplice to this fact. Nevertheless, it is at least difficult to arrive at the conclusion that this isolated statement tended in any way to connect appellant with the commission of the offense. Furthermore, there is a time element important to be considered with reference to this statement. The accomplice testified positively that the appellant said something to him in the presence of the witness, Wilson Plummer, about burglarizing the garage and that the statement was made about 4 or 4:30 o'clock of July 18, 1932. The accomplice did not testify what the statement was, but stated that it was repeated when he and appellant went home for supper and that the two of them talked it over and planned about going out later in the evening. The witness Plummer, however, testified that appellant remarked to the accomplice in his presence that "One could probably get some tires out of the Talc," but that the remark was made about a week prior to the date on which the burglary was committed. The statement loses much of whatever corroborative efficacy it possesses if made a week prior to the date of the burglary as testified by the witness Plummer.

The statement attributed to the accomplice to the effect that "he was going to knock over a place that evening," which the witness Morris Horn and appellant both testified was made at the swimming pool about 6:30 p. m. of July 18, 1932, can hardly be said to connect appellant with the commission of the burglary, particularly in view of the additional testimony of both of the above-mentioned witnesses that they then and there remarked that they did not want anything to do with the proposed burglary.

It is equally difficult to discover how it can be argued, with any hope of success, that the evidence that appellant asked the accomplice's brother for the address of accomplice on July 20, 1932, materially corroborated the testimony of the accomplice. It is true that the accomplice testified that he informed appellant that appellant could procure his address from accomplice's brother and the inquiry as to the address directed to the brother by appellant may well have been considered by the jury as a circumstance corroborating the accomplice's testimony to the effect above stated. But, conceding that it was corroborative to the extent suggested, it can hardly be maintained that it tended in any way to connect appellant with the commission of the offense. The evidence produced at the trial showed that appellant and accomplice were well acquainted and were often together and that appellant knew that the accomplice intended to go to Los Angeles on the evening of July 18, 1932. The inquiry regarding the address of the accomplice made on July 20, 1932, was, therefore, under the circumstances, a natural and possibly an innocent inquiry. Whatever corroborative value it had was too slight to meet the requirements of the statute.

The statement attributed to appellant by the witness Claude Gago to the effect "I wonder if that is the sheriff Hutchison looking for me" is not directly corroborative of any particular part of the accomplice's testimony. It may, however, be argued that it is a circumstance corroborative of the highly material portion of the accomplice's testimony that appellant was present and assisted in the commission of the burglary and strongly indicative of a sense of guilt on the part of appellant. Nevertheless, bearing in mind the admission of appellant that he was in the company of the accomplice during the late afternoon and early evening of the day on which the burglary was committed, the statement takes on an entirely different aspect and displays a very natural concern on appellant's part that the sheriff might be looking for him for the purpose of interrogating him as to what he knew of the accomplice's movements on the night of the burglary.

We also entertain the opinion that the aforementioned evidence, taken collectively, does not afford the corroboration of the accomplice's testimony contemplated by the provisions of section 1111 of the Penal Code. The most that can be said of it is that it raises a suspicion that appellant may have been implicated in the commission of the burglary. This, however, as heretofore pointed out, is not enough. The evidence relied upon as corroborative of an accomplice's testimony must of itself tend to connect the accused with the commission of the offense.

Our conclusion that the testimony of the accomplice incriminating appellant was not sufficiently corroborated to justify appellant's conviction renders unnecessary a discussion of other points relied upon by him as additional reasons for reversal of the judgment. One such contention deserves consideration not so much because of its importance as a contention on behalf of appellant on this appeal as because there is bound up in it a question with respect to the admission of certain evidence which respondent contends was erroneously resolved in appellant's favor by the trial court.

During the trial of the action a certain letter written by the accomplice on the third day following the commission of the burglary and addressed to appellant was offered in evidence by the prosecution. The evidence relating to the writing of the letter showed that it was composed by the accomplice in his home shortly prior to his arrest; that he attempted to procure an envelope in which to mail the letter to appellant, but was unable to do so; that after his arrest he handed the letter to his sister with the instruction that she should keep it; that the letter did not reach appellant. Under these circumstances the court sustained appellant's objection to the admission of the letter and it was rejected. During the argument of the case before the jury the district attorney made certain remarks respecting the writing of this letter by the accomplice. These remarks were assigned as misconduct by appellant's counsel and it is contended that the alleged misconduct of the prosecution in this regard of itself warrants a reversal of the judgment. No useful purpose would be subserved by prolonged consideration of this contention under our view that a reversal is justified because of the lack of sufficient corroboration of the accomplice's testimony. Some consideration may, however, properly be given to respondent's contention that the trial court erred in refusing to admit the letter in evidence.

[6-8] This contention is based upon the reasoning that the letter offered in evidence was admissible as the declaration of a coconspirator under the familiar rule that the acts and declarations of one conspirator during the pendency of a conspiracy are competent evidence against his coconspirator. The difficulty which arises in attempting to apply the rule to the proffered evidence is that in order to make such evidence admissible there must be proof of the existence of the conspiracy. Manifestly, the declaration of a coconspirator may not be used to establish the fact of the existence of the conspiracy for the declaration or statement is pure hearsay unsanctified by the solemnity of an oath and incapable of being subjected to the test of cross-examination. People v. Doble, 203 Cal. 510, 265 P. 184; People v. Zimmerman, 3 Cal. App. 84, 84 P. 446. The obvious danger of permitting evidence of this character to be received is that the jury might accept it as proof of the existence of the conspiracy and then use the same evidence to establish a defendant's guilt. People v. Irwin, 77 Cal. 494, 20 P. 56. If the record herein had shown that aside from the proffered evidence and from the testimony of the accomplice there was evidence which tended to prove that a conspiracy to commit the crime had been entered into between appellant and the accomplice, there would be greater force to respondent's contention. But, when the record is searched it is clear that the same difficulty is encountered as is presented by the endeavor to discover whether the testimony of the accomplice is sufficiently corroborated. Conceding that conspiracy is by reason of its very character difficult of proof and that the rule is well established that it may be shown by evidence entirely circumstantial and consisting of independent facts bearing more or less closely or remotely upon the essential fact of a common unlawful design, nevertheless such evidence must at least produce more than a suspicion that a conspiracy existed. When, therefore,

the evidence independent of the accomplice's testimony is examined for the purpose of discovering whether it may fairly be said that it tended to show the existence of the claimed conspiracy it is apparent that the only evidence which in the slightest degree pointed to the formation and existence of a common unlawful design consists of the proof that appellant was in the company of the accomplice during the afternoon and evening of the day on which the burglary was committed and that two days after the commission of the offense appellant requested the accomplice's brother to furnish him with the accomplice's address. To hold that these slight circumstances furnished sufficient proof of the existence of a conspiracy to make the proffered evidence admissible is, we think, not justified and we therefore entertain the opinion that the court committed no error in rejecting the evidence. This conclusion has been reached without regard to the established rule that the declaration of one conspirator is admissible in evidence against his coconspirator only when it appears that the conspiracy was pending and its object not consummated when the declaration was made and also that the declaration must be in aid or furtherance of the common purpose or design of the conspiracy.

[9] Aside from the theory of respondent that the letter was admissible as the declaration of a coconspirator it was clearly not admissible under any other theory. People v. Colburn, 105 Cal. 648, 38 P. 1105; People v. Lee Dick Lung, 129 Cal. 491, 62 P. 71; Sorenson v. United States (C. C. A.) 168 F. 785.

For the reasons herein stated the judgment is reversed.

We concur: BARNARD, P. J.; MARKS, J.

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130 Cal.App. 615

PEOPLE v. DURBOROW.

Cr. 241.

District Court of Appeal, Fourth District, California.

March 28, 1933.

Rehearing Denied April 11, 1933.

Hearing Denied by Supreme Court April 27, 1933.

1. Criminal law 🔑517(4).

Corpus delicti is sufficiently established to render admissible accused's extrajudicial statements where prima facie evidence establishes that deceased met death through another's unlawful act, though such act is not traced to accused.

2. Homicide 🔑236(1).

Evidence *held* sufficient to sustain conviction for murder by causing deceased's inhalation of illuminating gas.

3. Homicide 🔑234(10).

In murder prosecution, jury was entitled to consider accused's extrajudicial statements, many of which were proved false and others unworthy of belief.

4. Homicide 🔑234(9).

In prosecution for murdering husband from whom accused had separated, at a time when accused was living with another man, jury was entitled to consider relations of three parties involved and motive.

5. Criminal law 🔑517(4).

Objection that court erred in overruling objections to introduction of accused's extrajudicial statements admitted before corpus delicti was proved, went to order of proof, which is committed to trial judge's discretion.

6. Criminal law 🔑1169(12).

Admitting accused's extrajudicial statements in murder case before proof of corpus delicti *held* not prejudicial error.

7. Criminal law 🔑729, 730(10).

Any error in district attorney's argument allegedly having effect of commenting on accused's failure to testify in homicide case was cured by district attorney's promptly disavowing such intention and trial judge's admonition.

Appeal from Superior Court, San Diego County; Arthur L. Mundo, Judge.

Ann Elizabeth Basham Durborow was convicted of murder in the first degree, and she appeals.

Affirmed.

Edgar G. Langford, of Hollywood, for appellant.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, of San Francisco, for the People.

MARKS, Justice.

Appellant was convicted of murdering James Basham and was sentenced to imprisonment for life. She has appealed from the judgment and from the order denying her motion for new trial. She urges the following grounds for a reversal of the judgment: (1) That the trial court erred in admitting evidence of defendant's extrajudicial statements in the absence of proof of a corpus delicti; (2) that the evidence is insufficient to sustain the judgment; (3) that the trial court erred in its ruling upon certain objections to the admission of evidence at the trial; (4) that the district attorney was guilty of prejudicial misconduct during the course of the trial.

Appellant and James Basham were husband and wife on January 9, 1932, the date of his death. They had separated prior to that date and appellant was living in a small dwelling with William Gallagher Durborow and was known to some as Mrs. Gallagher. At about 1:30 o'clock in the morning of January 9, 1932, Basham and a friend went to this house, where they found appellant and Durborow. The three men consumed a quantity of alcoholic liquor, each drinking about the same amount and from the same containers. Interspersed with their drinking, Basham and Durborow engaged in a series of fist fights which resulted in Basham receiving bruises on his face and head and a fractured cartilage in his nose. None of these injuries were serious enough to cause his death. When Basham was found dead at about 4 o'clock in the afternoon of January 9th, there was clotted blood of a normal color in his nostrils.

Durborow took Basham's friend in his automobile and drove away from the premises at about 6:30 o'clock in the morning, leaving appellant and Basham in the house. Appellant, clothed in a nightgown, was in the one bed in the house. Though a quantity of liquor had been consumed by the three men, and they were all intoxicated, they were all able to walk and to talk. The house was in confusion and disarray, as a result of the fighting, with furniture overturned and broken, cigarettes, ashes, and matches scattered over the floor.

The dwelling contained but one bedroom. The bed stood with its head against the east wall of the room, the southeast corner of the bed flush against the frame of a door opening into a bathroom, and the northeast corner about ten inches from a gas jet which protruded out of the east wall. A gas stove, when in use, was connected with the jet by means of a hose which was of sufficient length to reach from the jet across the north half of the bed. There was one window in the south wall of the bedroom and another in the south wall of the bathroom which opened from the southeast corner of the bedroom.

At about 4 o'clock in the afternoon appellant called a neighbor, telling her Basham was dead. He was lying partly on his left side on the north side of the bed which was close to the gas jet and heater. The hose was disconnected from the jet and so loosely connected onto the heater that it fell off when touched by a police officer. The door into the bathroom was open as were the two windows already mentioned. The house was clean and in order and appellant was neatly dressed with her hair combed. She was calm and collected. The flesh around one of her eyes was blackened. There was a depressed imprint on the pillow and south half of the bed and the bedclothes were thrown back from this portion of the bed. Basham was fully clothed except for his shoes which had been removed. His legs were covered with the bedclothes. No gas jet was open and no gas was escaping in the house when others arrived.

An autopsy was performed on the body of Basham and an analysis made of his blood, the contents of his stomach, and some of his vital organs. As a result, the autopsy surgeon was of the opinion that death had occurred between 6 and 8 o'clock in the morning as a result of carbon monoxide poisoning from the inhalation of illuminating gas.

[1, 2] Appellant's contention that her extrajudicial statements should not have been admitted because the corpus delicti had not been proven, cannot be supported. In a homicide case the corpus delicti is sufficiently established to permit the introduction of such statements where it is made to appear, by prima facie evidence only, that the deceased met his death by means of the unlawful act of another. It is not necessary in establishing the corpus delicti that the unlawful act be traced to the defendant. People v. Selby, 198 Cal. 426, 245 P. 426; People v. Moreno, 111 Cal. App. 52, 295 P. 50; People v. Murillo, 119 Cal. App. 59, 5 P.(2d) 897. It is highly improbable that Basham, after having inhaled a lethal quantity of illuminating gas, could arise from his bed, close the jet and then lay himself down to die. It is equally improbable that appellant, if the weight of her body had formed the depression in the bed and pillow, could lie beside her husband and inhale the same fumes that killed him and show no ill effects from the poison. There were but two people in the house. One or the other of them must have turned off the gas after Basham had inhaled a sufficient quantity to have caused his death.

[3, 4] If what we have already said does not sufficiently dispose of the contention that that the evidence is insufficient to sustain the judgment, it should suffice to add that when the police officer first took hold of the hose it gave off the distinct odor of illuminating gas which was also distinguishable in the clothes and from the lungs of Basham at the time of the inquest. It is apparent that the gas was turned on in the bedroom, then turned off after Basham had inhaled a sufficient quantity to produce death. The jury was entitled to consider the extrajudicial statements of appellant, many of which were proved to be false, and others unworthy of belief. It was entitled to consider the relations of the three parties involved, and consider a motive for the killing. Appellant had separated from her husband and was living with the man whom she married shortly after the homicide. Appellant benefited financially to some extent, the amount being undisclosed, from the death of her husband. She received one payment from the United States government and another from an insurance company. After Basham's death, and before she was charged with murder, she told one of her friends: "I never killed any

one * * *. If the * * * was here I would kill him," referring to her dead husband. There is sufficient evidence to support the verdict and judgment.

[5, 6] Under appellant's third specification of error she maintains that the trial court erred in overruling her objections to the introduction of her extrajudicial statements. Technically speaking, her contention is correct as some of these statements were admitted before the corpus delicti was proven. As the corpus delicti was afterwards proven, the objection goes to the order of proof, which in this state is committed to the discretion of the trial judge. People v. Watters, 202 Cal. 154, 259 P. 442. We find no sufficient abuse of discretion in admitting the evidence out of order to constitute prejudicial error.

[7] Appellant asserts misconduct on the part of the district attorney in making statements during his argument and maintains they were in effect comments on her failure to testify. The district attorney promptly disavowed any such intention and the trial judge instructed the jury to disregard the statements. The error, if any, was thereby cured.

The judgment and the order appealed from are affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

BOCK et al. v. HAMILTON SQUARE BAPTIST CHURCH.

Civ. 8450.

District Court of Appeal, First District, Division 2, California.

March 29, 1933.

Rehearing Denied April 28, 1933.

Hearing Granted by Supreme Court May 25, 1933.

1. Landlord and tenant ⚿164(2).

Landlord is liable to tenant injured through landlord's negligent failure to keep in repair portion of premises reserved for use in common by landlord and tenants.

2. Landlord and tenant ⚿169(6).

Evidence *held* to show landlord reserved rear stairway and platform for common use of tenants, both as means of ingress and egress and as means of access to clotheslines surrounding platform.

3. Landlord and tenant ⚿169(6).

Evidence that landlord's agent had actual knowledge of defective condition of rear stairway, but did not repair it, sustained finding of negligence in action by tenants against landlord.

4. Landlord and tenant ⚿169(6).

Evidence *held* sufficient to show that landlord's negligent failure to repair defective rear stairway was proximate cause of injuries to tenant, precipitated to ground when she leaned against railing.

5. Abatement and revival ⚿69.

Death of plaintiff in personal injury case pending appeal does not abate right of action.

6. Appeal and error ⚿877(6).

Landlord is not entitled, as of right, to segregation of damages in action by married tenants for injuries to wife, and cannot complain where amount awarded to tenants is sustained by evidence.

7. Damages ⚿132(3).

$11,000 *held* not excessive for internal and other injuries sustained by wife who fell 18 feet from back stairway.

> Wife was 41 years of age and in good health. The injuries sustained included a concussion of the brain followed by a state of disorientation which might be permanent, fracture of left foot, including the second and third metatarsal bones, a broken nose, multiple contusions and abrasions of the body and legs, lacerations of face and hands, together with internal injuries and a severe shock to her nervous system. She was in bed for five or six months, and at time of trial, approximately two years after the accident, she still had swelling, discoloration, and cyanosis of both legs, still used a cane, and was unable to perform her household duties.

Appeal from Superior Court, City and County of San Francisco; James G. Conlan, Judge.

Action by Georgia Bock and L. A. Bock against the Hamilton Square Baptist Church. From judgment for plaintiffs, defendant appeals.

Affirmed.

Robert B. Gaylord and Gaylord & Lovell, all of San Francisco, for appellant.

Raymond D. Williamson, of San Francisco, for respondents.

SPENCE, Acting Presiding Justice.

Upon a trial by the court sitting without a jury, plaintiffs recovered judgment in the sum of $11,000 as damages resulting from personal injuries sustained by plaintiff Georgia Bock. From this judgment defendant appeals.

The plaintiffs were husband and wife. The defendant corporation was the owner of a three-story apartment house located on the southeast corner on Post and Steiner streets in San Francisco. Plaintiffs rented from

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the defendant through Mrs. Hungate, defendant's manager, the rear apartment on the second floor. This apartment could be entered through the main hallways from the front entrance of the building on Post street or by means of a stairway in the rear of the building. Said rear stairway was not leased to any tenant, but was retained by defendant for the common use of the tenants in the three rear apartments. The record on appeal does not contain a detailed description of said stairway, and the photographs which were introduced in evidence are not before us. It appears, however, that there was a railing at the sides of the steps and also at the sides of a platform which was located about opposite the rear door of plaintiffs' apartment. This railing was about 3½ feet high, and consisted of perpendicular boards surmounted by a grooved railing, the top of the boards fitting into the groove in the railing.

When plaintiffs rented the apartment there were clotheslines paralleling the railing on three sides of the platform. These lines were about a foot and one-half or two feet above the railings, and were attached to the posts at the corners of the platform. They were old and dirty, and the plaintiff L. A. Bock replaced them. These clotheslines were actually used by both plaintiffs and Mrs. Hungate, the defendant's manager, who resided in the rear apartment on the first floor, but it does not appear that other tenants made use of them. There was also located on this platform a garbage can furnished by the owner.

The accident happened on June 24, 1928. The plaintiff Georgia Bock went out onto the rear stairway from plaintiffs' apartment, went up a few steps to the platform, and was in the act of hanging a tea towel on one of the clotheslines when she fell approximately 18 feet to the ground below. There was no other witness to the accident, and the injured woman could not tell what had happened from the time she was hanging out the towel until the time she regained consciousness. Her husband was attracted by the loud crash and found his wife unconscious on the ground. He also found there the garbage can and its contents, together with portions of the boards and railing. The railing and boards were introduced as exhibits in the trial court. Plaintiffs state that these exhibits establish the fact that, due to decay and corrosion, the boards and nails were in an unsafe condition. Defendant replies that the portion of the transcript relating to the introduction of the exhibits does not so state. These exhibits are not before us, but we do not believe that defendant seriously questions the unsafe condition which existed. It appears that long before the accident Mrs. Hungate, defendant's manager, knew that certain portions of the stairway were in bad condition, as the carpenter who had been engaged to do some repairing thereon had told her that "the whole back stairway should be reconditioned because it was in poor condition."

[1-3] On this appeal numerous authorities are cited, but few of which are at all analogous in their facts. The general rule applicable in cases like the present one is that, "where a portion of the premises is reserved by the landlord for use in common by himself and tenants, or by different tenants, a duty is imposed upon him to use ordinary care to keep those particular portions of the premises in a safe condition; and if he is negligent in this regard, and a personal injury results to a tenant by reason thereof, he is liable therefor. * * *" Hassell v. Denning, 84 Cal. App. 479, 482, 258 P. 426, 427. See, also, Spore v. Washington, 96 Cal. App. 345, 274 P. 407. Appellant does not apparently question this general rule, but argues that the situation here is similar to the one presented in Walsh v. Frey, 116 App. Div. 527, 101 N. Y. S. 774, and falls within the exceptions to the general rule discussed in De Motte v. Arkell, 77 Cal. App. 610, at pages 623 to 625, 247 P. 254. As stated in the last-mentioned opinion, at page 623 of 77 Cal. App., 247 P. 254, 259, the authorities referred to are "cases having to do with the misuse of platforms and guard rails in cases where the landlord actually retains control." We cannot say that there was any misuse of the platform or guard rail in the present case, and we believe that the trial court was justified in impliedly finding that the stairway and platform was reserved by appellant for the common use of the tenants, not only as a means of ingress and egress, but also as a means of drying linen on the clotheslines surrounding the platform. While it may be true, as contended by appellant, that there were clotheslines in the basement for the common use of the tenants, it is likewise true that there were clotheslines on said platform apparently for such common use when respondents rented their apartment. We are therefore of the opinion that the facts in the present case bring it within the general rule above stated rather than the exceptions relied upon by appellant; and, as appellant's manager had actual notice of the defective condition of the entire stairway and, as nothing was done to remedy the condition, there was ample evidence to sustain the finding of negligence.

[4] Appellant further contends that "the burden is upon plaintiffs to establish defendant's negligence as the proximate cause of the accident; the plaintiffs have failed to establish the cause of the accident." Under this heading appellant discusses the doctrine of res ipsa loquitur, and claims that it was not applicable. Respondents do not discuss this doctrine, and we know of no reason for their doing so, as we do not believe they were compelled to rely upon it in support of the

findings and judgment. Appellant's contention embraces the further claim that, even assuming negligence on the part of appellant, respondents failed to establish that such negligence was the proximate cause of the injury. It must be conceded that the precise cause was not established by direct evidence, but in our opinion there was sufficient evidence from which it might be inferred that the negligence of appellant was the proximate cause. From the evidence before the court it could be properly inferred that the injured woman leaned against the defective railing while in the act of hanging out the towel and that said railing gave way, thereby precipitating her to the ground below.

Appellant further contends that, even assuming that a defective railing caused the accident, still respondents cannot recover. In this connection appellant argues that, if the defects were patent, respondents are chargeable with contributory negligence; while, if the defects were latent, there is no proof of lack of care on the part of appellant. The trial court found generally against appellant's claim of contributory negligence and further found that the defective condition of the railing was not known to or apparent to the injured woman and was "entirely concealed from her view." We believe these findings as well as the findings relating to negligence on the part of appellant are sustained by the evidence.

[5, 6] The next contention is that appellant was entitled to a segregation of general damage as between the two respondents. Appellant requested such segregation before the findings were filed, but the trial court made its findings covering the general damage found to have been sustained by both respondents collectively. In support of its contention appellant cites Bloomberg v. Laventhal, 179 Cal. 616, 178 P. 496; Murphy v. Stelling, 8 Cal. App. 702, 97 P. 672, and Phelps v. Arnold, 112 Cal. App. 518, 297 P. 31, but a reading of these cases shows that none is in point. Appellant then states that there are two reasons why such segregation should have been made in the present case. The first reason advanced is that, if respondent Georgia Bock should die pending this appeal, her right of action would abate. This alleged reason is based upon an erroneous conception of the law. Fowden v. Pacific Coast Steamship Company, 149 Cal. 151, 86 P. 178; Blackwell v. American Film Company, 48 Cal. App. 681, 192 P. 189; 1 Cal. Jur. 76. The second reason advanced is that, by failure to separately fix the amount of damage suffered by the husband and wife respectively, it is impossible to determine the propriety of the award so far as it concerns either. In our opinion, appellant is not entitled as a matter of right to such segregation, and may not complain if the amount awarded to cover the general damage sustained by both respondents finds support in the evidence.

[7] It is finally urged by appellant that the damages awarded were excessive. We find no merit in this contention. The special damages found by the court amounted to $869.40, leaving a balance of $10,130.60 as general damages. Briefly stated, the evidence shows that at the time of the accident respondent Georgia Bock was an active woman, 41 years of age, and in good health; that she sustained serious injuries in her fall, including a concussion of the brain, followed by a state of disorientation which may be permanent; fracture of the left foot, including the second and third metatarsal bones; a broken nose, multiple contusions, and abrasions of the body and limbs; lacerations of the face and hands, together with internal injuries and a severe shock to her nervous system; that she was in bed for five or six months following the accident; that at the time of the trial, which was approximately two years after the accident, she still had swelling, discoloration and cyanosis of both legs, being marked on the left leg, and was still using a cane; and that she was still unable to perform her household duties or engage in other activities in the way she had prior to the accident. On the trial the condition of the injured woman's left leg was exhibited to the court. Considering all of the evidence covering the nature of the injuries, the long confinement, the pain and suffering, and the probable permanency of the effects of said injuries, we cannot say that the amount awarded to cover the general damages to both respondents was excessive.

The judgment is affirmed.

We concur: **GOODELL, Justice pro tem.; STURTEVANT, J.**

130 Cal.App. 717

PEOPLE v. JONES.

Cr. 1253.

District Court of Appeal, Third District, California.

March 30, 1933.

1. Homicide 🔑250.

Evidence *held* to support conviction of manslaughter.

2. Criminal law 🔑829(1).

Refusal of instructions, proper legal principles in which are adequately covered by instructions given, is not error.

3. Homicide 🔑203(1).

Dying declaration is admissible only on preliminary proof that it was made under belief that death was impending.

4. Homicide 🔑216.

In ascertaining whether deceased considered himself in extremis at time of dying declaration, oral evidence of surrounding circumstances, including his verbal declarations, is admissible.

5. Homicide 🔑203(3).

Evidence of deceased's belief that death was impending at time of dying declaration *held* sufficient to authorize admission thereof.

6. Criminal law 🔑730(9).

District attorney's declaration in argument to jury that he believed defendant guilty of murder *held* not prejudicial misconduct, in view of instructions and other parts of argument.

> Court instructed jury that counsel's remarks during argument are not evidence, and that jury could convict only on competent testimony showing defendant's guilt beyond all reasonable doubt, while district attorney stated, in beginning argument, that burden of determining defendant's guilt rested on jury and, in closing, that he asked only that jury discuss matter deliberately, without passion, and arrive at verdict thought just, but was of opinion and asked that defendant be found guilty of murder.

Appeal from Superior Court, Nevada County; Raglan Tuttle, Judge.

H. B. Jones was convicted of manslaughter, and he appeals.

Affirmed.

Harry M. McKee, of Nevada City, and S. Luke Howe and O. F. Meldon, both of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for respondent.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

The defendant was charged with the murder of his wife. He was convicted of manslaughter. On appeal he contends that he shot his wife in an effort to protect her chastity by shooting at her inebriated companion while they were fleeing from his presence after a drunken debauch in which all three individuals participated.

It is asserted the evidence fails to support the judgment; that the court erred in refusing to give certain instructions to the jury which were offered by the defense; that a dying declaration of the deceased was received in evidence without preliminary proof that it was made in extremis; and that the district attorney was guilty of prejudicial misconduct in stating to the jury in his closing argument that he believed the defendant was guilty of murder.

The defendant and his wife were living in the Mariposa school building near Grass Valley in Nevada county. In the afternoon of Sunday, the 22d day of August, 1932, an associate by the name of Edward Ryan appeared and spent the afternoon and part of the night drinking liquor with them. They were well acquainted, having previously picked fruit together. Ryan brought a bottle of whisky with him. Several times the defendant and Ryan drove to Grass Valley and purchased more whisky. Ryan says they drove to town for liquor two or three times. The defendant admits they went for whisky once. He claims that he drank very little liquor. Both Ryan and deceased became intoxicated. The defendant and his wife had previously lived in harmony. Ryan's story of the shooting is very vague. He was evidently quite drunk. The defendant claims that his wife had been drinking with Ryan periodically throughout the entire time they spent together on this occasion, and that she was very drunk. There is no evidence that he protested against her drinking. About 2 o'clock in the morning he claims to have reclined on a couch pretending to sleep; that Ryan was making love to his wife in a maudlin fashion; that after talking together in a low tone of voice and concluding that he had gone to sleep, they slipped out the back door. The defendant arose and listening at the door he heard them talking near by. He suddenly opened the door and saw his wife in the embrace of Ryan. They were leaning against an upright post supporting the roof of the porch. He claims to have cursed Ryan and to have rushed out, striking at him. The couple started to run across an open space near the house. Ryan held Mrs. Jones by the hand. She was wobbling as they ran. The defendant entered the house, and, grasping a loaded shotgun, he returned to the open doorway, claiming that he intended to "sprinkle his back with shot." It was moonlight, and the defendant could see the fleeing couple fairly well. They had reached a point about thirty or forty steps from the house when the defendant fired. Mrs. Jones received the charge of shot in her right side, face, breast and abdomen. Sixty shot took effect in her body. She fell screaming to the ground. Ryan received only two or three shot in the neck and face. They lodged just beneath the skin. He easily picked them out himself. He was not seriously injured. From this fact, it appears evident that he must have been some distance beyond Mrs. Jones at the time the gun was fired. He ran to his automobile and tried to start it, but failed. He then fled from the scene.

The defendant immediately threw his gun down and went to the assistance of his wife. He evidently regretted his act and grieved over her injuries and subsequent death. He was unable to carry her to the house, although she weighed but a hundred and twenty pounds. He brought a quilt from the house and placed her upon it. He then hastened to the home of a neighbor, and arousing two young men he sent them to town for a doctor. He did not tell the boys how the shooting occurred. A doctor soon arrived. In the morning Mrs. Jones was removed to the hospital at Grass Valley. She died five days later. Prior to her death Mrs. Jones made a dying declaration in which she asserted that her husband declared, "I will shoot you,—He run in the house and got the shotgun—and he shot me."

[1, 2] The verdict and judgment finding the defendant guilty of manslaughter are adequately supported by the evidence. No error was committed in refusing to give the challenged instructions which were offered by the defendant. They apply to the lawful right of a husband to use necessary force to protect his wife against physical violence or an assault. The proper legal principles which are contained in these instructions were adequately covered by other instructions which were given by the court to the jury.

[3-5] The preliminary proof was sufficient to show that the dying declaration of the deceased was made by her in extremis when she believed that death was imminent, and it was properly admitted in evidence. A dying declaration is admissible in evidence only upon preliminary proof that it was made by the deceased under the belief that death is impending. In ascertaining that the deceased considers himself to be in extremis at the time the statement is made, oral evidence of the surrounding circumstances may be received including his verbal declarations regarding his condition and the nature and seriousness of his injuries. 13 Cal. Jur. 719, §§ 90, 91. In the present case the declaration was taken in the hospital under the direction of the district attorney three or four days before the death of Mrs. Jones. It was reduced to writing and signed by her. It contains the following dialogue concerning her expectation of immediate death:

"Q. At this time do you believe you are going to die? A. Yes sir.

"Q. You are willing to make a dying statement as to how this shooting occurred? A. Yes.

"Q. And to sign the statement after it is made? A. Yes. * * *

"Q. What did he do, your husband? A. He said, 'I will shoot you, * * *' He ran in the house and got his shot gun, and I started to run.

"Q. You started to run? A. Yes sir, and he shot me."

Regarding the belief of the deceased that she was about to die, the defendant testified to the following conversation which he had with her: "I was telling her * * * I didn't intend to shoot her. She said 'I know.' I said 'I don't think it is bad.' She said 'Yes, it is bad. * * * I am afraid I am going to die, goodbye, sweetheart, goodbye.'" She did in fact die three or four days later. The evidence of belief that death was impending is adequate to authorize the admission of the dying declaration in evidence.

[6] The appellant contends the district attorney was guilty of prejudicial misconduct in declaring in his argument to the jury that he believed the defendant was guilty of murder. We are of the opinion the record may not be reasonably so construed. Just before the arguments of counsel were commenced, at the request of counsel for the defendant, the court instructed the jury as follows: "The jury understands that remarks of counsel made during the course of argument or otherwise are not evidence at all. They are simply statements made with which you have nothing to do in considering the case after you retire." In beginning his argument the district attorney said: "There is nothing personal in the matter. I represent you and upon you rests the burden of determining whether this man has committed the crime under the facts shown or not." The court also fully instructed the jury they could convict the defendant only upon competent testimony of his guilt beyond all reasonable doubt. In closing his argument to the jury the district attorney made the following statement which is challenged by the appellant as prejudicial. He said: "All I ask of you is that when you go into the jury room that you discuss this matter deliberately and without passion and without sentiment and arrive at a verdict which you think is just to the state and just to this defendant, but as we stated in the beginning we are of the opinion and ask that in the verdict rendered that this defendant be found guilty of the crime of murder of which he is charged." This sentence evidently refers to the opening statement above quoted, in which the district attorney told the jury, "Upon you rests the burden of determining whether this man has committed the crime under the facts shown or not." The challenged statement may reasonably be construed to mean, "As we stated in the beginning we are of the opinion the evidence proves the guilt of the defendant and ask that in the verdict rendered that this defendant be found guilty of the crime of murder of which he is charged." This construction of the foregoing statement to which the defendant objected must have been in accord with the view of the trial judge when he said that he did not understand that it constituted misconduct. The record contains no evidence of undue zeal on the part of the district attorney in the prosecution of the case. We are satisfied his argument was not prejudicial. The defendant appears to have had a fair and impartial trial. Under the facts of the case the defendant may be deemed to be fortunate that the jury found him to be guilty of manslaughter only. The record contains no reversible error.

The order and the judgment are affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

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131 Cal.App. 1

PEOPLE of State of California, Plaintiff and Respondent, v. Calvin P. RUFF, Defendant and Appellant.

Cr. 1717.

District Court of Appeal, First District, Division 1, California.

April 4, 1933.

Appeal by defendant from a judgment of the Superior Court, City and County of San Francisco, James G. Conlan, Judge, of conviction of forgery, and from an order denying motion for new trial.

Raine Ewell, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, of San Francisco, for the People.

PER CURIAM.

Defendant was charged by an information filed in the superior court, in and for the city and county of San Francisco, with the crime of forgery. He was convicted and has appealed from the judgment and the denial of his motion for a new trial. No brief was filed by him or on his behalf, and the appeal was ordered submitted on the record.

We have examined the record in order to determine whether the verdict was sustained and if any errors prejudicial to the defendant were committed. No error appears therefrom, and the evidence was amply sufficient to support the verdict.

The judgment and order are accordingly affirmed.

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130 Cal.App. 612

260 SEAMAN AVE. CORPORATION v. ARMSTRONG.

Civ. 4760.

District Court of Appeal, Third District, California.

March 28, 1933.

1. Landlord and tenant 🔑**231(8).**

In action for rent due under lease, evidence *held* to support finding that apartment was leased for 13 months.

2. Landlord and tenant 🔑**112½.**

In action for rent due under lease of apartment, evidence *held* insufficient to establish that lease was canceled and terminated.

3. Landlord and tenant 🔑**199½.**

Lessee could remain in apartment or out of it without affecting liability for rent under lease.

4. Principal and agent 🔑**100(2).**

Person engaged by owner of apartment house to show apartments and negotiate terms and receive rents, but without power to execute leases, *held* not vested with implied power to cancel and terminate lease.

Appeal from Superior Court, Sutter County; K. S. Mahon, Judge.

Action by the 260 Seaman Avenue Corporation against George M. Armstrong. Judgment for the plaintiff, and the defendant appeals.

Affirmed.

Rich, Weis, Coats & Carlin, of Marysville, and Arthur Coats, of Yuba City, for appellant.

Fred M. Harter, of Marysville, for respondent.

PARKER, Justice pro tem., delivered the opinion of the court.

Plaintiff alleged a lease in writing of an apartment in the city of New York, for a period of thirteen months beginning September

1, 1929, and terminating September 30, 1930, at the rental of $1,170, payable $90 per month, and sues for a balance due thereon of $720.

Defendant denies the existence of such a lease. Defendant admits the signing of a lease, but alleges on information and belief that the same was not executed by the plaintiff or any officer or agent of the plaintiff having authority to execute leases. Defendant then alleges that the lease was canceled and terminated by mutual consent.

The case was tried by the court, without a jury, and judgment went for plaintiff as prayed. Defendant appealed.

[1] The first ground urged by appellant is that the finding that the apartment was leased for a stated time of thirteen months is not supported by the evidence. Strangely enough the lease itself was not offered in evidence at the trial. The record discloses that the lease was offered in evidence at the taking of the deposition of plaintiff's witness, though the return is silent as to the action taken on the offer. However, all the testimony thereafter in the deposition was concerning the lease.

The direct testimony was that the lease was executed and that five months' rent was paid and eight months' rent remained unpaid. The testimony of defendant was that the lease was executed in duplicate, defendant retaining one and plaintiff one. No evidence was offered by defendant as to the term of the lease nor was any question raised in the court below on the point.

A fair reading of the transcript discloses that it was taken for granted that the lease was, as alleged, for thirteen months. The main claim of defendant was that the lease was terminated. Obviously a lease that never existed would require no proof of termination. We think the evidence sufficiently supports the finding attacked.

[2] The next claim of appellant is that the lease was canceled and terminated. We do not find evidence to sustain this contention. The claim is based upon certain conversations with a person whose relation to the corporation plaintiff is not clearly revealed. This was a party referred to as a Mrs. Allen. We will not detail all of the facts and circumstances of defendant's dealing with this lady. The fact is that defendant knew she had no power to execute the lease and did not execute the same. Should we concede her authority to terminate the lease, we would still lack proof that she did terminate it.

There is testimony of the defendant to the effect that when he vacated the apartments he notified Mrs. Allen of his intention, and she replied that she was sorry to have him go and she said: "I don't know what I can do." This surely would not support a claim of termination even if Mrs. Allen did have authority in the premises.

The finding of the trial court was that when defendant vacated the premises he notified the woman in charge, but failed to notify plaintiff or any of its authorized agents.

The strongest inference that can be drawn from defendant's testimony is that Mrs. Allen was a servant of plaintiff corporation, authorized to receive rentals from the tenants and to look after the premises in a supervisorial capacity, but with no power to contract. Her connection with the corporation is but vaguely suggested. When asked by the court whether she was an officer, or manager of the corporation, defendant replied that he did not know. For aught the record discloses she may have been the maid or janitress.

Lastly, appellant complains of the trial court's rulings on the admission and rejection of testimony. The error urged is but argumentatively specified with no citation of authority and no showing as to the facts expected to be proved. The general nature of the argument is that by the evidence excluded it would have been shown that Mrs. Allen was held out by the corporation plaintiff as clothed with full authority to act and authorized to cancel and terminate the lease in question.

We have examined the transcript and fail to find any substantial basis for the contention. If all the evidence offered or suggested had been received, no proof of agency or authority would have resulted. And, to repeat, even if such authority had been shown, there was still no compelling evidence that she had terminated the lease or agreed to a cancellation thereof.

[3] The defendant, as lessee, could remain in the apartment or out of it without affecting his liability under the lease. A lessor has no right or power to prevent a lessee from vacating the demised premises, though he may have certain power of holding whatever security the lease or the law may give.

When defendant vacated the apartment the statement of Mrs. Allen that she did not know what she could do about it fell far short of an agreement to terminate or cancel the lease even if she had authority, of which authority there is no evidence.

[4] The entire appeal is based upon the proposition that one engaged by the owner of an apartment house to show apartments and negotiate terms with prospective tenants and receive rents, but with no power to execute leases, is vested with an implied power to cancel and terminate leases executed by the owner.

Thus grounded the appeal has no merit.

Judgment affirmed.

We concur: PLUMMER, Acting P. J.; R. L. THOMPSON, J.

JOHN PHILLIPS CO. v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY.

Civ. 8777.

District Court of Appeal, Second District, Division 2, California.

March 28, 1933.

Hearing Granted by Supreme Court May 25, 1933.

Corporations ⚿668(15).

Statute requiring foreign corporation to be doing business in state when summons is served *held* not affected by statute providing that cessation of business does not revoke appointment of agent on whom process may be served (Code Civ. Proc. § 411; Civ. Code, § 411).

Petition by the John Phillips Company for a writ of mandate to compel the Superior Court in and for Los Angeles County to vacate orders quashing service of summons and to assume jurisdiction and proceed with the trial of an action brought by plaintiff in respondent court against two foreign corporations and others.

Alternative writ of mandate vacated, and peremptory writ denied.

McCutchen, Olney, Mannon & Greene, of Los Angeles, for petitioner.

Everett W. Mattoon, Co. Counsel, S. V. O. Prichard, Deputy Co. Counsel, and Salisbury & Robinson, all of Los Angeles, for respondent.

WORKS, Presiding Justice.

Petitioner is plaintiff in an action in respondent court in which two corporations organized and existing under the laws of Mexico, among others, were defendants. Copies of summons and of the complaint were delivered to the president of one of the corporations and to the secretary of the other. Each of these natural persons was at the time of the delivery of the papers a resident of California, and the delivery was made within the state. Motion to quash service of summons was made in respondent court by both corporations and the motion was granted as to each. Petitioner came to this court asking for the writ of mandate to compel respondent to vacate the orders, to assume jurisdiction of the action as to the corporations defendant, and to proceed with the trial of it. An alternative writ issued.

It is contended by petitioner that at the time the obligation was incurred upon which the action is founded the two corporations were doing business in California and that the attempted service of summons upon their respective officers was for that reason effective. The contention that they were at the time mentioned so doing business is warmly contested by respondent. This question we shall not determine, but shall go at once to another which cries for decision, as it reveals an unfortunate condition affecting the status of foreign corporations under the laws of the state—a condition which should immediately be called to the attention of the Legislature.

It is conceded by the parties that the two corporations were not doing business in the state at the time service of process upon them was attempted, and respondent insists that for that reason it was right in making its order to quash. Section 411 of the Code of Civil Procedure as it stood in 1929—and it is the section in that form which controls the question presented—was to the effect that in a suit against a foreign corporation "doing business and having a managing or business agent, cashier or secretary within this state," service of summons should be made upon "such agent, cashier or secretary." Except for a minor amendment not material here the section had been so phrased for forty years. The phrase "doing business," as employed in the section, has been the subject of frequent consideration by the courts. It was said, during a lengthy discussion, in Jameson v. Simonds Saw Co., 2 Cal. App. 582, 84 P. 289: "For the purpose of enabling * * * courts to acquire jurisdiction over foreign corporations statutory provisions for the service of process upon them are enacted, and must be strictly followed in order to give validity to their judgments. * * * Under the provisions of this section [411 C. C. P.], in order that the court may get jurisdiction over a foreign corporation it is requisite that such corporation shall be 'doing business' within the state at the time the summons is served. * * *" This case has been followed in Dickinson v. Zubiate Mining Company, 11 Cal. App. 656, 106 P. 123; R. H. Herron Company v. Westside Electric Company, 18 Cal. App. 778, 124 P. 455; Carpenter v. Bradford, 23 Cal. App. 560, 138 P. 946; Lumas Film Corporation v. Superior Court, 89 Cal. App. 384, 264 P. 792, although there the point was not necessary to a decision of the action; and in Davenport v. Superior Court, 183 Cal. 506, 191 P. 911. In the latter case the Supreme Court said: "In order to justify a finding that a foreign corporation is so far engaged in business in this state that a valid service of summons upon it in an action in this state, under section 411 of the Code of Civil Procedure, may be made upon its agent within this state, 'the corporation must transact within the state some substantial part of its ordinary business by its officers or agents appointed and selected for that purpose.' 'Legal service of process upon a corporation, which will give a court jurisdiction over it, can be made only in the state where it resides by the law of its creation, or in a state in which it is actually doing business at the time of service, in the manner prescribed by the statutes of that state or of the United States.' Doe v. Springfield, etc., Co., 104 F. 687, 44 C. C. A.. 128; Jameson v. Simonds Saw Co., 2 Cal. App. 585, 84 P. 289. It follows, therefore, that the attempted service upon the two corporations by service upon Barnes as president and secretary, respectively, of said corporations, was ineffectual for any purpose."

In partial answer to the effect of section 411 of the Code of Civil Procedure petitioner turns to a section of the same number in the Civil Code, enacted in 1929 (St. 1929, p. 1290), which reads: "A foreign corporation which has qualified to transact business in this state may withdraw and surrender its right to engage in business within this state, by filing in the office of the secretary of state, a certificate executed and acknowledged by its president or vice president, and secretary or treasurer, setting forth: 1. That it surrenders its authority to transact intrastate business in this state. 2. That it consents that process against it in an action upon any liability or obligation incurred within this state prior to the filing of the certificate of withdrawal may be served upon the secretary of state. 3. A post-office address to which the secretary of state may mail a copy of any process against such corporation that may be served upon him. The revocation of authority to transact business shall not affect any action pending at the time. The mere retirement from transacting business within this state without filing a certificate of withdrawal shall not revoke the appointment of any agent upon whom process may be served within this state." The last subdivision of this section cannot affect the meaning of the section in the Code of Civil Procedure. That section relates directly to the service of process upon foreign corporations, while the last subdivision of the section of the Civil Code relates only to the continued maintenance, after a cessation of business, of an "agent upon whom process may be served." The matter of service of summons is one which pertains to the Code of Civil Procedure and not to the Civil Code. The title of the act which created section 411 of the latter code is entitled, so far as that section is concerned, only as one "relating to foreign corporations" (St. 1929, p. 1287). Section 411 of the Code of Civil Procedure, which contains several subdivisions, commences: "The summons must be served by delivering a copy thereof as follows."

As a matter of possible interest to the Legislature it is to be remarked that, while section 411 in each code was amended in 1931, (St. 1931, pp. 1834, 1836), neither amendment appears to affect the question here presented.

If the two Mexican corporations ever did business in California, it is conceded that they never complied with the laws of the state concerning the right of foreign corporations to do business within its boundaries nor relating to the manner in which they must indicate a desire to cease the conduct of such business, as, for instance, as provided in section 411 of the Civil Code. Petitioner cites authorities from other jurisdictions to the effect that foreign corporations which do business within a state without complying with its laws are estopped to take advantage of such noncompliance. This rule has never been applied in California, and it would be futile, and therefore but obiter, to announce it in the present case. The reason seems plain. Section 411 of the Code of Civil Procedure certainly applies to foreign corporations which have complied with our laws. A corporation estopped to take advantage of its noncompliance therewith would by the operation of the estoppel be placed in the same position with organizations which had rendered a strict compliance. Therefore the section would apply to the estopped corporation.

The alternative writ of mandate is vacated and a peremptory writ is denied.

We concur: CRAIG, J.; STEPHENS, J.

130 Cal.App. 739

NATIONAL AUTOMOBILE INS. CO. v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al.

Civ. 8828.

District Court of Appeal, Second District, Division 2, California.

March 31, 1933.

Rehearing Denied April 25, 1933.

1. Insurance ⟾670.

In compensation proceeding, finding that employer's insurance carrier was certain company *held* insufficient to constitute finding whether policy had been delivered, which was disputed (St. 1917, p. 850, § 20 (a).

> It appeared that following understanding between employer and alleged insurer's agent that policy in controversy would be issued and delivered upon receipt of payment of premium, policy was issued and forwarded to agent, but premium was not paid nor policy requested by employer delivered to him or ever in his possession, and policy was subsequently returned to insurer, and upon evidence to this effect, findings were requested as to whether there had been delivery of policy to employer or to his broker to be held for him and as to whether policy had ever been in effect.

2. Insurance ⚷670.

Where delivery of compensation policy was disputed and findings thereon requested, omission of fact finding in such respect *held* error (St. 1917, p. 850, § 20 (a).

Certiorari to Industrial Accident Commission.

Proceeding under the Workmen's Compensation, Insurance and Safety Act by F. L. Robertson, claimant, opposed by the employer and the National Automobile Insurance Company, alleged insurer. To annul an award by the Industrial Accident Commission in favor of employee, alleged insurer brings certiorari.

Award annulled.

J. L. Kearney, of Los Angeles, for petitioner.

A. I. Townsend, of San Francisco, for respondents.

CRAIG, Justice.

Upon application of an employee for compensation under the Workmen's Compensation, Insurance and Safety Act, alleging that he had been injured in the course of his employment and that his employer was insured against such casualties by the petitioner, an award was made accordingly. The insurance company insisted that the evidence was insufficient to warrant such award, and that no finding in support thereof was made by the respondent commission.

[1, 2] Following an understanding between the employer and the insurer's agent that the policy in controversy would be issued and delivered upon receipt of payment of the premium, the same was issued by the company and forwarded to said agent. The premium was not paid, nor was the policy requested by the employer delivered to him, or ever in his possession. The same was subsequently returned to the insurance company. Upon the evidence to this effect findings were requested as to whether or not there had been a delivery of the policy to the employer, or to his broker to be held for him, and as to whether or not the policy had at any time been in effect. A finding was made that "said employer's insurance carrier was defendant National Automobile Insurance Company." Section 20 (a) of the Compensation Act (St. 1917, p. 850) provides for findings by the commission "upon all facts involved in the controversy." We think it clear that in this instance the finding above quoted is insufficient. The question of the delivery of the policy was material in determining whether or not the National Automobile Insurance Company was an insurance carrier for Robertson. It was error to omit a finding of fact upon a material issue. General Accident, Fire & Life Assurance Corp. v. Industrial Accident Com., 196 Cal. 179, 237 P. 33.

The award is annulled.

We concur: WORKS, P. J.; ARCHBALD, Justice pro tem.

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130 Cal.App. 715

ALLIED FINANCE CO., Limited, v. ADAMS.

Civ. 8576.

District Court of Appeal, Second District, Division 1, California.

March 30, 1933.

Appeal and error ⚷1126.

Where appellant's brief failed to state substance of pleadings with proper references, and showed that decisions relied on were inapplicable, judgment will be affirmed on motion (Code Civ. Proc. § 953a et seq.; District Court of Appeals rule 8, § 3).

Appeal from Superior Court, Ventura County; Edward Henderson, Judge.

Action by the Allied Finance Company, Limited, against J. T. Adams. From judgment for plaintiff, defendant appeals. On respondent's motion to dismiss appeal or affirm judgment.

Judgment affirmed.

James C. Hollingsworth, of Ventura, for appellant.

Mark H. Edwards, of Santa Paula, for respondent.

CONREY, Presiding Justice.

The defendant appealed from the judgment entered against him in this action. The clerk's and reporter's transcripts and the appellant's opening brief have been filed. Proceeding under rule V, section 3, respondent moves for dismissal of the appeal or affirmance of the judgment. Rule VIII, section 3, of the rules of this court provides: "Where the parts of the typewritten record relied upon on appeal are required to be printed in the briefs (Code Civ. Proc. § 953a et seq.), it shall be sufficient to state therein the substance of such record, parenthetically referring to the line and page of the typewritten transcript for verification, * * * The pleadings need not be printed in such briefs, but the nature of the action and the substance of the pleadings must be stated in general terms. * * *"

In passing upon a similar motion in Birk-

⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

land v. Ratterree Land Co., 14 P.(2d) 133, this court said: "There is not in the brief any statement of the pleadings whereby the issues presented to the trial court by those pleadings can be defined or understood. * * * But in the absence of any statement of the contents of the pleadings, or of the substance thereof, the brief does not present any record by which the merit of appellant's contentions can be tested." The appeal was dismissed. In Haines v. Commercial Mortgage Co., 205 Cal. 71, 269 P. 921, the Supreme Court said: "The appellants' opening brief, consisting of but six pages, makes no attempt to set forth any part of the record. It contains but an outline of the appellants' several contentions upon appeal, from which it is difficult to even ascertain the facts giving rise to the litigation." The judgment was affirmed. In Dahlberg v. Dahlberg, 202 Cal. 295, 260 P. 290, the judgment was affirmed as a consequence of appellant's failure to set forth enough of the record to properly present merits of the appeal. In the case at bar the brief of appellant is likewise defective. There is indeed a statement (without reference to the record) that the action was brought by the original vendor on a conditional sales contract to recover from the vendee a balance due on the purchase price. But this does not give the substance of the complaint, or any statement of the answer or of the issues tendered by the answer.

Moreover, if we should ignore the insufficiency of the brief in its presentation of the record, nevertheless we would find in paragraph 12 of the contract (the only paragraph thereof contained in the brief) terms of agreement which probably are sufficient to make inapplicable to the case the decisions upon which appellant relies for reversal of the judgment.

The judgment is affirmed.

We concur: HOUSER, J.; YORK, J.

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131 Cal.App. 8

PEOPLE v. RUBAL.

Cr. 2222.

District Court of Appeal, Second District, Division 2, California.

April 4, 1933.

1. Burglary ⟹41(6).

Evidence, including testimony showing flight, sustained burglary conviction, although containing no direct identification of accused as one of men seen participating in burglary (Pen. Code, § 1127c).

2. Criminal law ⟹1159(2).

Reviewing court cannot set aside verdict for insufficiency of evidence, unless clearly unsupported on any hypothesis by sufficient substantial evidence.

Appeal from Superior Court, Los Angeles County; Fletcher Bowron, Judge.

Alphonso Rubal was convicted of burglary, and he appeals.

Affirmed.

Frederick H. Vercoe, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, of San Francisco, for the People.

ARCHBALD, Justice pro tem.

Defendant was tried before the court, a jury having been waived, and convicted of the crime of burglary. From the judgment of conviction and from the order denying his motion for a new trial he has appealed.

[1, 2] The sole contention made by appellant for a reversal relates to the alleged insufficiency of the evidence to sustain the judgment and order.

The evidence shows without question that on the night of September 8, 1931, a cleaning and dyeing establishment located at 5006 Avalon boulevard, Los Angeles, was burglarized. A. L. Irwin, a motor coach driver for the Los Angeles Railway Company, testified that he passed such establishment at about 4:55 a. m. of September 9th and saw a Hudson coach parked on 50th street, facing Avalon, back of the alley which ran through the block behind the dye works, and that he saw a young man crossing the vacant lot between 50th street and the dye works, coming from toward the front entrance of the place and proceeding in the direction of the Hudson coach; that the latter stepped into the street on the way toward the Hudson but before he reached it some one at the front of the dye works "hollered," and that the young man and this other party conversed together but that the witness did not understand what they said; that the young man got into the Hudson, started the motor and drove out into Avalon boulevard toward 51st street and, turning around about the center of the block, drove back and parked in front of the dye works, where he turned his lights on for the first time; that he, the witness, went on to 49th street to catch a car; that he missed his car and that while he was waiting a man named Rumford drove along and picked him up; that they turned east on 49th street to McKinley avenue and then south on McKinley, and that just before they reached 50th street the Hudson coach "pulled off on Mc-

Kinley, and turned up the street, going south in front of us"; that he copied the license number of the Hudson and that it was either "1N-4908" or "1N-4989"; that he was not sure whether the next to the last number was an "0" or an "8"; that there were two persons in the car; that the Hudson was a black or dark-colored machine. The witness Rumford testified that he was driving west on 50th street and made the boulevard stop at Avalon; that he saw two men, one taller than the other, crossing the lot by the side of the dye works; that the shorter one had his arms full of clothes; that the man with the clothes went to the Hudson car, but apparently saw Rumford and went on by it, while the other one got in; that the witness turned right on Avalon and proceeded to 49th street, where he picked up Irwin and then turned to the right into 49th street to McKinley, turned to the right south on McKinley, "and I went—it must have been half way of the block, and this Hudson car turned right to the right, going in the same direction I was, ahead of me"; that the same two men were in it; and that while he could not identify the defendant, he was about the size of the man with the clothes.

W. L. Owen testified that on or about July 30, 1931, he sold defendant a dark blue and black Hudson coach, with state license No. 1N-4909; that on or about September 14th of that year defendant made a payment on the car and drove it onto "the lot." Police Officer Stanger testified that he and Officer Beard stepped onto the lot and went toward the Hudson coach that same day, while defendant was observing a mechanic working on it; that as they entered the lot defendant started toward the rear of the premises and walked around behind the office, between it and a fence that was approximately five feet to the rear of it; that the witness walked around the office in the other direction and headed him off; that he asked defendant where he was going, to which the latter replied, "To the toilet." Officer Beard came in behind defendant and asked him his name, to which he replied, "Alphonso Rubal," and in response to their query he stated that the Hudson coach was his. Stanger showed defendant his badge and told him he was under arrest. Defendant was then asked if he was out at the dye works the night of the burglary, to which he said, "No." The officers then took him back to the Hudson coach and Officer Beard left to get their car. While talking to the mechanic working on defendant's car, according to Stanger's testimony, Rubal suddenly "jumped and ran through this small space between the front end of the other car and the wall and headed east toward Seventh street." Stanger said, "Stop," but defendant kept running, whereupon the former drew his gun and fired one shot, missing defendant; the latter crossed Seventh street and went west to San Pedro street, crossed that thoroughfare through the traffic, proceeded across a vacant lot, and into the next street. The last the witness Stanger saw of him he was going over a shed roof and up around the corner of a brick building, at which time Stanger fired another shot at him as he disappeared around the corner. The testimony of the officer as to the flight is corroborated by his companion, Beard, as well as by the mechanic and Owen. It also appears that when the Hudson coach was driven on the lot by defendant the front license plate was No. 1N-4909 and the one on the rear was "St6896," and that the license plate corresponding with that on the front was found inside the car.

There is no direct identification of appellant as one of the men participating in the burglary. The evidence does show that one of the men seen carrying clothes from the dye works was of the approximate build and height of appellant, and the identity of appellant's car with the one used would seem to be satisfactorily established. Furthermore, appellant's actions when told that he was under arrest, the questioning having indicated that it was because of participation in the burglary in question, would seem to indicate guilt. The effect of this evidence and the weight to be given it was a matter for the determination of the trial judge (section 1127c, Pen. Code), and in conjunction with other circumstances connecting appellant with the crime charged, it makes a chain of evidence so strong that we cannot say it is "made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below" (People v. Tom Woo, 181 Cal. 315, 326, 184 P. 389, 393), which seems to be the test to be applied before a verdict is set aside. In this case the court considered the evidence once more, upon the motion for new trial, and having observed the witnesses personally we think his determination should not be disturbed, as there would seem to be sufficient facts before the court to justify the inference of guilt. People v. Hennessey, 201 Cal. 568, 258 P. 49.

Judgment and order affirmed.

We concur: CRAIG, Acting P. J.; STEPHENS, J.

131 Cal.App. 30

In re McNAMEE et al.

HURST v. ALLISON et al.

Civ. 1004.

District Court of Appeal, Fourth District, California.

April 4, 1933.

Hearing Denied by Supreme Court June 1, 1933.

1. Reference ⚷88.

Referee in land registration proceedings has no power to make findings except on evidence regularly admitted at hearing (Land Title Law, § 18 [St. 1915, p. 1937]; Code Civ. Proc. §§ 638, 639).

2. Appeal and error ⚷934(2).

Trial court is presumed to have rested judgment on findings which afford sufficient basis therefor, and other insufficient findings will be disregarded.

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Proceedings by John McNamee and others to register land under the Land Title Law. The petition of Allie E. Hurst for land registration was opposed by Herman Allison and others. A report of the referee in favor of petitioner Hurst was approved by the trial court, and objectors appeal.

Affirmed.

John B. Haas and John D. Home, both of Los Angeles, and R. B. Bidwell, of Glendora, for appellants.

Jas. W. Bell, of Los Angeles, for respondent.

VAN ZANTE, Justice pro tem.

On the 15th day of May, 1929, respondent, as petitioner, filed an application to register, under the Land Title Law (St. 1915, p. 1932), his land described as "Lot 'A' of Tract No. 10573, in the County of Los Angeles, State of California, as per map recorded in book 159, page 10 of maps, in the office of the recorder of said county, constituting one parcel of land." The petition contains the usual averments in actions of this character. The appellants are named therein as adjoining property owners. And likewise the separate answers of these appellants contain the usual denials and averments in actions of this character. There is no question of title involved. This is strictly a boundary line case.

This case was submitted to a referee for hearing. The referee filed his report finding for respondent. The appellants filed their exceptions to this report. The trial court, after hearing arguments of respective counsel, approved the report as filed and rendered judgment in favor of respondent.

[1] Appellants contend that there is no evidence in the record to support the following finding: "The contestants Allison in 1917 procured a decree of this court registering the land which he now owns. The county surveyor has approved the description in this petition and I find that the west line of tract No. 10573 coincides with the east line of the property of Allison as registered in L. R. 149, application 70."

Respondent virtually concedes this but contends that "the matter was referred to the Referee to investigate all the facts and to report, as provided under section 18 of the Land Registration Act; and it has been held by this court that such proceeding is proper even under sections 638 and 639 of the Code of Civil Procedure." In re Application of Reed, 204 Cal. 119, 266 P. 948. We find nothing in this act, or section of the Code of Civil Procedure referred to, vesting a referee with power to make findings not based on evidence regularly admitted at the hearing. It certainly cannot be maintained that a referee can be clothed with power not possessed by the court appointing him. "We have repeatedly held, that a trial before a referee should be conducted in the same manner as though it was had before a Court." Goodrich & Myers v. Mayor and Common Council of Marysville, 5 Cal. 430, 431. See, also, Phelps v. Peabody, 7 Cal. 50. In re Reed, supra, is not in point. In that case the judgments were offered and were admitted in evidence both upon the hearing and before the trial court upon the report of the referee. We think appellants' contention must be sustained as to this finding by the referee.

[2] However, we find the following stipulation and statements of counsel in the record, "It was thereupon stipulated that the land described by metes and bounds in the deed from Mr. Needham to Hurst in 1909 was the same as that designated as lot A, Tract No. 10573." "Mr. Bidwell: I don't think, as far as the survey is concerned, we can show any change. We have had it surveyed." "Mr. Bidwell: * * * If the record title is in Mr. Hurst, then of course, our only other title would be to establish an agreed boundary line."

We think the above stipulation and statements of counsel together with the other evidence in the case sufficient to sustain the findings and that the judgment of the trial court should be affirmed. "Or, in other words, however unsupported, however lame, however inconclusive, any number of the findings may be, if in any case there be one clear, sustained, and sufficient finding upon which the judgment may rest, every presumption being in favor of the judgment, it will be here concluded that the court did rest its judgment upon that finding, or those findings, and the others may and will be disregarded. Thayer

v. Tyler [169 Cal. 671], 147 P. 979." American National Bank v. Donnellan, 170 Cal. 9, 15, 148 P. 188, 190, Ann. Cas. 1917C, 744.

We have examined the record and find no reversible error committed by the referee in admitting or striking out evidence.

Judgment affirmed.

We concur: BARNARD, P. J.; MARKS, J.

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131 Cal.App. 7

LASSITER et al. v. CALIFORNIA TRUST CO.

Civ. 7733.

District Court of Appeal, Second District, Division 2, California.

April 4, 1933.

Hearing Denied by Supreme Court June 1, 1933.

1. Vendor and purchaser 🔑39.

Agreement to purchase lots before recording of plat containing such property *held* void.

2. Vendor and purchaser 🔑334(1).

Consideration paid under agreement to purchase lots, void because plat was not recorded, could not be recovered, where it was applied to subsequent purchase agreements for same lots after plat was recorded.

Appeal from Superior Court, Los Angeles County; Douglas L. Edmonds, Judge.

Action by E. T. Lassiter and others against the California Trust Company. From a judgment for defendant, plaintiffs appeal.

Affirmed.

H. M. Mayes, of North Hollywood, for appellants.

Jennings & Belcher, of Los Angeles, for respondent.

STEPHENS, Justice.

[1, 2] Complainants ask a money judgment. The essential facts are as follows: Before the recording of a plat of ground containing such property plaintiffs entered into an agreement to purchase two lots, and paid a consideration thereon. After the recording of the plat two separate agreements were entered into between the parties; one for the purchase of one of the lots, the other for the purchase of the other. The consideration paid under the first agreement was applied upon the subsequent agreements. The complaint is for the return of the consideration paid under the first agreement. Defendant's general demurrer was sustained without leave to amend, and judgment for defendant followed.

The first agreement was void, and the parties themselves adjusted the matter. If authority is needed, Letteau v. Dumas, 99 Cal. App. 230, 278 P. 459, supplies it.

Judgment affirmed.

We concur: WORKS, P. J.; ARCHBALD, Justice pro tem.

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130 Cal.App. 780

SCHLUTER v. SCHLUTER et al.

Civ. 848.

District Court of Appeal, Fourth District, California.

April 3, 1933.

1. Divorce 🔑331.

Interlocutory divorce decree, if attempting to fix title to land outside state, exceeds court's jurisdiction.

2. Divorce 🔑287.

That portions of findings and interlocutory divorce decree attempt to fix title to property outside court's jurisdiction does not require reversal, but such portions may be stricken out on appeal.

3. Divorce 🔑296.

Considering child's welfare, divorce decree awarding custody to mother *held* not abuse of discretion, in view of father's neglect of child.

4. Divorce 🔑312.

Award of child's custody in divorce action will not be disturbed on appeal, except for manifest abuse of discretion.

5. Divorce 🔑221.

In divorce action, attorneys' fees cannot be awarded for past services.

6. Appeal and error 🔑934(1).

Unless record contains something to contrary, appellate court, to support judgment, must assume that all steps necessary to its legality were taken before its rendition.

7. Divorce 🔑286.

To support award of costs and attorneys' fees in divorce action, appellate court could assume, record being silent, that portion of judgment awarding costs and fees was in effect decision on show-cause order following reservation of decision thereon.

In view of silence of record, appellate court might assume in support of award of costs and attorneys' fees that order to show cause was issued and served, that order was heard, and that at hearing and on stipulation of both parties trial court reserved its decision until trial and rendition of judgment; and that portion of judgment awarding costs and attorneys' fees was, in effect, decision on order to show cause made on such stipulation and reservation of such ruling.

8. Divorce ⚷238.

Interlocutory decree granting husband divorce for extreme cruelty is erroneous if awarding support money to wife.

Appeal from Superior Court, Kern County; Erwin W. Owen, Judge.

Divorce action by Fred A. Schluter against Dorothy McDonald Schluter, naming Cal Chandler as co-respondent, with a cross-complaint by the defendant wife. From portions of an interlocutory decree granting a divorce, plaintiff appeals.

Modified and affirmed in part, and reversed in part.

W. I. Gilbert, of Los Angeles, for appellant.

M. G. Brittan, of Bakersfield, for respondent Schluter.

Clement L. Shinn and Mack Meader, both of Los Angeles, for respondent Chandler.

MARKS, Justice.

In this opinion Fred A. Schluter, the plaintiff, cross-defendant, and appellant, will be referred to as the appellant, and Dorothy McDonald Schluter will be referred to as the respondent. Where it is necessary to refer to Cal Chandler, he will be designated as the co-respondent.

Appellant instituted this action for divorce and custody of his minor child. His complaint states three separate causes of action. He alleges extreme cruelty and two acts of adultery. Respondent answered, denying the material allegations of the complaint, and filed a cross-complaint seeking a divorce on the grounds of extreme cruelty, and custody of the minor child of the marriage. The co-respondent answered, denying the adultery.

The trial court found in favor of appellant on his allegations of extreme cruelty and against his allegations of adultery; against respondent on her allegations of extreme cruelty; that appellant was not a fit and proper person to have the care, custody, and control of the minor child, and that the respondent was; that respondent owned as her separate property a described parcel of land in the city of Dallas, Tex., and that appellant owned as his separate property another described parcel of land in the same city; that each of such parties owned a one-half interest in a home in that city; that the appellant had a net income of $10,000 a year; that the custody of the minor child be awarded to respondent; that $200 per month was a reasonable and necessary sum to be paid by appellant to respondent for the support of the minor child and herself, together with $200 costs, and $2,000 attorneys' fees; that appellant was able to pay each of said amounts. The conclusions of law omitted all reference to the Texas property, but otherwise followed the findings, except as to the amount of the monthly payments for support, which was there fixed at the sum of $250. The interlocutory decree of divorce followed the findings in all particulars except in the amount of the monthly payments for support, which was fixed at $250. Appellant was given the right to visit the minor at the mother's home at all reasonable times.

Appellant has appealed from the following portions of the interlocutory decree: (1) That respondent owned as her separate property a described tract of land in Dallas, Tex.; (2) that appellant and respondent jointly owned a home in Dallas, Tex., each owning an undivided one-half interest in it; (3) that the care, custody, and control of the minor child of the parties be awarded to respondent; (4) that appellant pay to respondent for her support and that of the minor child $250 per month, $200 costs, and $2,000 attorneys' fees. The other portions of the interlocutory decree are not brought here for review.

[1] If the lower court attempted to fix title to the property in Texas in the interlocutory decree of divorce, it went beyond its jurisdiction, and these portions of the decree complained of are of no binding force and effect. This is clearly made to appear in Taylor v. Taylor, 192 Cal. 71, 218 P. 756, 758, 51 A. L. R. 1074, where it is said:

"Appellant's first contention is unquestionably correct. That the courts of one state cannot make a decree which will operate to change or directly affect the title to real property beyond the territorial limits of its jurisdiction must be conceded. The doctrine that a court, not having jurisdiction of the res, cannot affect it by its decree is firmly established. Title Ins. Co. v. California Dev. Co., 171 Cal. 173, 197, 152 P. 542; Fall v. Eastin, 215 U. S. 1, 11, 17 Ann. Cas. 853, 23 L. R. A. (N. S.) 924, 54 L. Ed. 65, 30 S. Ct. 3 [also Rose's U. S. notes]; Fall v. Fall, affirming 75 Neb. 104, 121 Am. St. Rep. 767, 106 N. W. 412, 113 N. W. 175; Sharp v. Sharp, 65 Okl. 76, L. R. A. 1917F, 562, 166 P. 175; Rodgers v. Rodgers, 56 Kan. 483, 43 P. 779; 19 Cor. Jur. 367. By means of its power over the person of the parties before it, a court of equity may in proper cases compel them to act in relation to property not within the jurisdiction, but its decrees do not operate directly upon the property nor affect the title. They are only made effectual through the coercion of the parties, by directing some action on their part, such as the execution of conveyances or the cancellation of instruments. Fall v. Eastin, supra. The reason for the rule is that jurisdiction to affect the title to real estate by a judgment in rem, or directly against the thing itself, exists only in the courts of the state wherein the land is situated. 'No principle is more fundamental or thoroughly settled than that the local sovereignty, by itself or its judicial agencies, can alone adjudicate upon and determine the status of lands and immovable property within its borders, including their title and its incidents and the mode in which they may be charged or conveyed. Neither the laws of another sovereignty, nor the judicial proceedings, decrees, and judgments of its courts, can in the least degree affect such lands and immovable property.' Bullock v. Bullock, 52 N. J. Eq. 561, 565 (46 Am. St. Rep. 528, 27 L. R. A. 213), 30 A. 676, 677; Proctor v. Proctor, 215 Ill. 275, 277, 106 Am. St. Rep. 168, 69 L. R. A. 673, 74 N. E. 145 [2 Ann. Cas. 819]; Tiedemann v. Tiedemann, 172 App. Div. 819, 158 N. Y. S. 851, affirmed in 225 N. Y. 709, 122 N. E. 892."

[2] The presence of these portions of the findings and judgment concerning the Texas property in the record does not, of itself, require a reversal of the judgment. We may strike them out.

[3, 4] We have studied the record and cannot conclude that the award of the custody of the minor to respondent was an abuse of discretion on the part of the trial court. The rule governing this question on appeal is clearly set forth in Bancroft v. Bancroft, 178 Cal. 352, 173 P. 582, 584, as follows: "It is conceded that in respect to the children of a marriage which is being dissolved at the suit of either or both of the parties to it the court becomes invested with jurisdiction to determine to which of the spouses the custory of the children shall be assigned, and that it retains such jurisdiction during the pendency of the case before it, and that the welfare of the children is the paramount interest before the court in determining who shall be their custodian, and that in the exercise of this jurisdiction the trial court is invested with a very large measure of power, which will not be interfered with upon appeal except in the clearest instance of its manifest abuse."

It would serve no good purpose to review the mass of evidence in the record concerning the delinquencies of both parents. It reflects little credit on either of them. However, the mother did show affection for her child and cared for him during the seven years of his life. The father continually neglected him. The only parental duty that he seemed to recognize was that of financial support. From the point of view of the welfare of the child, the mother was entitled to the custody rather than the father. It is evident from the record that the trial judge is going to exercise a supervision over the future environments of the child that may have a salutary effect on the habits of the mother.

There is ample evidence in the record supporting the award of costs, attorneys' fees, and support money. However, it is necessary for us to consider the items separately.

[5-7] Attorneys' fees cannot be awarded for past services in a divorce action. We are required to assume in support of a judgment that all steps necessary to its legality were taken prior to its rendition when there is nothing in the record to the contrary. The record being silent on this question, we may assume in support of the award of attorneys' fees that an order to show cause was issued and served on appellant, requiring him to show cause why he should not be required to pay a reasonable fee to respondent's attorneys; that this order was set for hearing and heard; that at such hearing and on stipulation of both parties the trial court reserved its decision on the question of attorneys' fees until the trial of the cause and the rendition of judgment; that the portion of the judgment awarding attorneys' fees was, in effect, a decision upon the order to show cause made upon such stipulation and the reservation of such ruling. Wood v. Wood (Cal. App.) 14 P.(2d) 584. A similar assumption supports the judgment for costs.

We will disregard the variance of $50 in the amount of the monthly support money set forth in the findings and in the conclusions of law and the judgment. It will be observed that in all instances the court directed the money to be paid for the support of the minor child and his mother, the respondent. We have no way of determining the portion of the award the trial court intended for the support of the child and the part it intended for the support of the mother.

[8] It is well settled in California that where a divorce is granted to a husband against his wife on the ground of extreme cruelty, the court cannot award support money to the wife in the interlocutory decree of divorce. Johnson v. Johnson, 104 Cal. App. 283, 285 P. 902; Johnson v. Superior Court (Cal. App.) 17 P.(2d) 1055. In view of this award of support money to respondent, we deem it necessary to send the case back for retrial on the sole question of the amount to be awarded for the support and maintenance of the minor child of the parties.

It is ordered:

(1) That the following be stricken from the findings of fact:

"That the defendant and cross-complainant owns as her separate estate, being property given her as a gift by her husband during their married life, the following described real property situate in the city of Dallas, state of Texas, to-wit:

"A part of block No. 107, according to the official map of said city, beginning at a point in the north line of Main street 2 inches N. 76 east of the Pollock wall, said point being also 273-9/10 ft. S., 76 W. from the West line of Harwood street; thence N. 14 W. parallel with Pollock's said wall and 2 inches therefrom 100 feet; thence N. 76 E. and parallel with the N. line of Main St. 50 feet; thence S. 14 E. and parallel with Pollock's said wall 100 ft. to the north line of Main St., thence S. 76 W. with the north line of Main St., 50 ft. to the place of beginning.

"And that in addition thereto the plaintiff and defendant jointly own a home in the city of Dallas, state of Texas, each of the parties thereto owning an undivided one-half interest."

(2) That the following be stricken from the interlocutory decree of divorce:

"That the defendant owns as her own separate estate the following described real property situate in the city of Dallas, state of Texas, to-wit:

"A part of block 107, according to the official map of said city, beginning at a point in the north line of Main St. 2 inches N. 76 east of the Pollock wall, said point being also 273-9/10 ft. S., 76 W. from the west line of Harwood street; thence N. 14 W. parallel with Pollock's said wall and 2 inches therefrom 100 ft.; thence 76 E. and parallel with the N. line of Main St. 50 feet; thence S. 14 E. and parallel with Pollock's said wall 100 ft. to the north line of Main St. 50 ft. to the place of beginning.

"That the plaintiff and defendant own a home in the city of Dallas, State of Texas, jointly, each of the parties owning an undivided one-half interest therein."

(3) That portion of the judgment only providing: "That the plaintiff pay to the defendant the sum of $250.00 per month, the term of payment to commence as of the 15th day of May, 1930, and become and be payable on the 15th day of each and every month thereafter during the minority of said child, for the support, maintenance, care and control of said minor child, Charles Carroll Schluter, and the defendant herein," is reversed, with directions to retry the question of the amount to be paid by appellant for the support, care and maintenance of the minor child of the parties, and make appropriate findings and enter judgment thereon.

(4) In all other respects the interlocutory decree is affirmed.

Each party will pay his own costs on this appeal.

We concur: BARNARD, P. J.; JENNINGS, J.

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130 Cal.App. 746

DOZIER v. BOARD OF SUP'RS OF SHASTA COUNTY et al.

Civ. 4765.

District Court of Appeal, Third District, California.

March 31, 1933.

Rehearing Denied April 29, 1933.

Hearing Denied by Supreme Court May 29, 1933.

1. Mandamus ⚿78.

Changing boundaries of supervisorial districts *held* discretionary with county supervisors under statute providing that supervisors "may" change boundaries, precluding mandamus (Pol. Code, § 4029).

Pol. Code, § 4029, provides that by two-thirds vote board of supervisors may change boundaries of supervisor districts of county and that such districts shall be as nearly equal in population as may be.

[Ed. Note.—For other definitions of "May," see Words and Phrases.]

2. Counties ⚿18.

Court would not invalidate former ordinances dating back to 1904 establishing supervisorial districts of county, on ground that ordinances created inequality of population contrary to statute (Pol. Code, § 4029).

3. Counties ⚿18.

If county supervisors omit to change boundaries of supervisorial districts, thereby equalizing population, redistricting may be effected by initiative (Pol. Code, § 4029).

Appeal from Superior Court, Shasta County; R. M. Rankin, Judge.

Proceeding by Earnest Dozier for a writ of mandate against the Board of Supervisors of the County of Shasta and others, as members of the Board, to compel defendants to redistrict the county into new supervisorial districts in order to avoid gross inequality in population of the districts. The writ was denied, and plaintiff appeals.

Affirmed.

Fred C. Pugh, of Red Bluff, for appellant.

Albert F. Ross, Dist. Atty., of Redding, for respondents.

PARKER, Justice pro tem., delivered the opinion of the court.

This is a mandamus proceeding to compel

the board of supervisors of the county of Shasta to redistrict said county into supervisorial districts because of gross inequality of said districts in population. The court below denied the writ, and petitioner appeals.

It is conceded that in 1921 the board of supervisors passed an ordinance, dividing the county into supervisorial districts, which ordinance is still in effect. Further is it conceded that the districts by said ordinance established are not as nearly equal in population as may be.

Section 4029 of the Political Code reads as follows: "The board of supervisors may, by a two-thirds vote of the members of said board, change the boundaries of any or all of the supervisor districts of a county. Said districts shall be as nearly equal in population as may be. The boundaries of no supervisor district shall at any time be changed in such manner as to affect the term of office of any supervisor who has been elected, and whose term of office has not expired. No change in the boundaries of any supervisor district shall be made within ninety days next preceding a general election."

[1] The real question here presented is concerning the power of the court to compel by mandate a redistricting of the county of Shasta into supervisorial districts equal in population. A complete answer is to be found in the case of Peterson v. Board of Supervisors, 93 Cal. App. 490, 269 P. 743. We need not quote from the language of the case, but adopt the opinion in its entirety. Suffice to say here that the court there held that mandamus does not lie.

The plaintiff-petitioner seeks to have declared void the former ordinances of the supervisors dating back to 1904, by which ordinances supervisorial districts were established. It is contended that in all and each of these said ordinances section 4029, Political Code, was disregarded and inequality of population within the respective districts was created.

[2, 3] In Harnett v. County of Sacramento, 195 Cal. 676, 235 P. 445, it was held that a redistricting ordinance such as prohibited by the terms of section 4029, Political Code, was void. However, in that case the relief sought and obtained affected a present condition. Here, we are asked to go back through the years to 1904 and declare a then-existing ordinance void. Thus, we create uncertainty and vexation and bring into dispute the political life of a county and its people for more than a quarter of a century past. Not such relief does the time require. As outlined in the Harnett Case, supra, a redistricting may be effected by initiative should the supervisors fail to act, or the supervisors might be persuaded to see the error of their ways and redistrict at once.

The Peterson Case holds flatly that the supervisors may or may not change the districts as in the discretion of the board may seem best. The Code section reads: "Said districts shall be as nearly equal in population as may be."

Notwithstanding certain language in the Harnett Case, the question of equality of representation is not one entirely of population. The United States senate and, indeed, the state senate of California, is organized upon the plan of geographical representation as well as numerical representation. In a county where there is but one large city wherein two-thirds, or possibly three-fourths of the population of the county reside, a redistricting by population alone might be difficult and more likely unwise. Without exhaustive discussion it is obvious that there are many factors entering into a reasonable exercise of the discretion vested in the board of supervisors.

It is our opinion that the court properly denied the writ of mandate sought.

Judgment and order affirmed.

We concur: PLUMMER, Acting P. J.; THOMPSON, J.

130 Cal.App. 678

MERRALLS v. SLAWSKI.

Civ. 4721.

District Court of Appeal, Third District, California.

March 29, 1933.

1. Deeds 🔑211(1, 4).

Evidence, in action to quiet title, sustained finding that grantor suffering from arteriosclerosis was mentally competent, and that deed was not obtained by undue influence.

The evidence disclosed that the grantor for many years transacted all her own business affairs and had considerable property, and that the execution of the deed was in strict accordance with specific provisions of contract for conveyance, made four years previous thereto, and that the grantee in consideration had built a house on the land and cleared land, and no acquaintance other than one expert witness testified to circumstances indicating incompetency.

2. Deeds 🔑196(1, 3).

Conveyance made for adequate consideration between parties dealing at arm's length is presumed valid, and one challenging it has burden to prove undue influence or grantor's incompetency.

3. Deeds ⊂⇒68(1½).

That grantor is weak-minded or easily influenced will not alone warrant cancelling deed.

Appeal from Superior Court, Los Angeles County; K. S. Mahon, Judge.

Action by Charles M. Merralls, as administrator of the estate of Temperance Laura Merralls, against Stephen F. Slawski, in which defendant filed a cross-complaint. Judgment was entered for defendant on the cross-complaint, and plaintiff appeals.

Affirmed.

Euler & Subith and Paul A. Tschirgi, all of Los Angeles, for appellant.

Henry O. Wackerbarth, of Los Angeles, for respondent.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

The cross-complainant, Slawski, recovered judgment quieting title in him to one acre of a tract of land in Los Angeles county to which the appellant sought to establish title. From this judgment the cross-defendant has appealed.

It is contended the deed of conveyance to the cross-complainant's one acre of land is invalid and void for the reason that the grantor was mentally incompetent to execute the instrument; that a confidential relationship existed between the grantor and grantee; that the deed was procured by undue influence; and that the findings and judgment are not supported by the evidence.

The evidence is conflicting. Temperance Laura Merralls, a widow who was sixty years of age, owned twelve acres of land in lot 23 in Lankershim Ranch & Water Company's subdivision of the city of Los Angeles. She had two children, for whom she entertained some enmity. The respondent was a mere acquaintance whom she had known for a brief period of time. August 6, 1925, she made a written agreement to convey one and a half acres of that tract of land to him in consideration of his services in constructing for her on the premises a "garage house," clearing six acres of the land, and assisting in "surveying this property for subdivision." This agreement was not recorded until March 1, 1928. The respondent fulfilled his part of this agreement, with the exception of helping to survey the land for subdivision. He built the house at a cost to him of $400. He cleared the land, including the removal of 100 tons of rock, at an expense to him of $150. He waived his right to a conveyance of one-half an acre of the property on account of his failure to help survey the land. He testified that the one acre of land which was subsequently conveyed to him was then valued at five or six hundred dollars. The consideration for the deed may therefore not be deemed to be inadequate. It does not appear just when the services in fulfillment of the contract to convey the real property were performed by the respondent. Some time after the execution of the contract Mrs. Merralls obtained a loan of $2,000, which she secured by a mortgage on the entire tract of land. The respondent explained that he did not promptly demand a deed to his one acre of land because he expected to secure the conveyance thereof free of incumbrance. The inference is that he expected the grantor to satisfy the mortgage and give him clear title to his one acre of land. In February, 1929, Mrs. Merralls fell and broke her hip bone. She was confined to a hospital for some time while she was recovering from this injury. Learning of this fact, the respondent procured the execution of a deed to the one-acre tract of land pursuant to the former contract, in which instrument the performance of the services and the expenditure of money by him were recited as consideration for the conveyance of the land. The deed was presented February 19, 1929, to the grantor at the hospital by the respondent and a notary public by the name of Roberts, before whom it was duly executed. It was then delivered to the grantee and recorded. Upon petition subsequently filed, and without opposition thereto, the probate court adjudged Temperance Laura Merralls to be incompetent, and on March 27, 1929, appointed the Security-First National Bank of Los Angeles guardian of her estate. This suit was subsequently commenced to quiet title to the entire tract of land above referred to. The respondent was the sole party defendant in that suit. He admitted the allegations of the complaint with respect to the entire tract of land, except the one acre thereof to which he claimed title by deed as above recited. In a cross-complaint he set out the circumstances incident to the securing of his conveyance of this one acre of land, and asked the court to quiet title thereto in him. Findings were adopted in accordance with the allegations of the cross-complaint. The court determined that a relationship of confidence did not exist between the grantee and the grantor at the time of the execution of the deed; that the conveyance was not procured by undue influence; that the consideration therefor was fair and adequate; that the grantor was not incompetent to execute the conveyance; and that the deed to the respondent is valid and binding. Judgment was rendered accordingly.

[1] There is a conflict of evidence respecting the competency of the grantor. The evidence is entirely satisfactory and convincing

in support of the finding that a relationship of confidence did not exist between the grantor and the grantee. It is equally apparent that the deed was not procured by the undue influence of the grantee. There is also substantial evidence to support the finding that the grantor "was in full possession of her mental faculties and knew and understood what she was doing and the effect of her actions in regard thereto." In other words, the record contains substantial evidence that she was mentally competent to execute the deed.

Dr. Bowers, who attended Mrs. Merralls while she was confined in the hospital for treatment for the fractured hip, testified that in September, 1929, she was suffering from arteriosclerotic dementia, which had progressed to a degree, according to his opinion, which rendered her incompetent. He said this affliction was progressive in its character and usually slow in its progress, consisting of a hardening of the arteries ultimately resulting in failure to nourish the brain by means of adequate blood supply, and that mental deterioration gradually follows. Arteriosclerosis is usually recognized as an affliction of old age. It may be aggravated by disease or dissipation. It may be evidenced by general debility, atrophied muscles, poor circulation, low temperature, loss of appetite, impaired memory, rambling conversation, and mental and physical exhaustion. It is said that the true arteriosclerosis frequently causes neuralgia of the heart or angina pectoris, which is a common cause of death. It is apparent that the mere existence of arteriosclerosis does not render a person mentally incompetent. The effect of this disease upon the faculties of the mind depends upon its flagrancy and the degree to which it has progressed. Probably most old people suffer to some extent from hardening of the arteries. Many who suffer from angina pectoris or arteriosclerosis retain their mental faculties to the end of life. The question for solution in the present case is not whether the grantor was afflicted with arteriosclerosis, but rather, had that disease progressed to an extent that her mind had become so deteriorated she was incompetent to execute the deed of conveyance which is involved herein?

Doctor Bowers is the only expert witness who testified regarding her mental incompetency. Upon the contrary, Jessie Guilloz, who had been her intimate friend for twenty years, testified that Mrs. Merralls was competent to transact business. Mr. Dunkley, an agent for Marsh & Co., which firm loaned the money which was secured by a mortgage on the premises, visited her at the hospital in March after the execution of the deed, and conversed with her regarding the transaction in which his firm was interested. He said she was then "perfectly rational."

In view of the fact that Mrs. Merralls was a widow of considerable wealth and possessed of various properties; that for many years she had transacted all of her own business affairs; that a prominent financial institution had made loans of money to her upon real estate security without questioning her competency; that with the exception of Charles Merralls, the grantor's son, who said that he thought his mother was incompetent because "she was easily influenced in the transactions of real estate affairs," no acquaintance or individual, other than Doctor Bowers, testified to circumstances or conditions intimating that she was incompetent; that the execution of the deed was in strict accordance with the specific provisions of her former contract for conveyance, which was made by her four years previous thereto, and that the consideration for the property was apparently fair and adequate, we are unable to say there is not an abundance of evidence to support the findings and judgment to the effect that the grantor was competent and that the deed is valid and binding.

[2, 3] The burden of proving that a deed was procured by fraud, mistake, or undue influence ordinarily rests upon the party who challenges the validity of the instrument. 9 Cal. Jur. 231, § 108. When, in the absence of confidential relationship, a conveyance of property is made for a fair and adequate consideration between parties who deal at arm's length, every presumption is in favor of the validity of the transaction, and the burden is upon him who challenges the competency of the grantor to prove the invalidity of the instrument by a preponderance of the evidence. One may be weak-minded or easily influenced, but these conditions alone are insufficient to warrant the canceling of a deed for incompetency or undue influence. If the consideration for the conveyance is adequate, and the transaction is fair and equitable, and the grantor has sufficient intelligence to understand the nature of the deal, the purpose and effect thereof, and the power to exercise her own free will with relation thereto, the validity of the deed should be upheld. 9 Cal. Jur. 224, § 103; Carleton v. Bonham, 60 Cal. App. 725, 739, 214 P. 503.

The judgment is affirmed.

We concur: **PULLEN, P. J.; PLUMMER, J.**

130 Cal.App. 704

POHLE v. BOLINAS BEACH REALTY CO. et al.

Civ. 8516.

District Court of Appeal, First District, Division 1, California.

March 30, 1933.

1. Appeal and error ⚿901, 933(1).

All presumptions are in favor of order granting or denying new trial, and appellant has burden of making it affirmatively appear by record that order is erroneous.

2. Appeal and error ⚿706(1).

Order granting new trial was affirmed where facts relied on for reversal did not appear in record.

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Action by Josephine Pohle against the Bolinas Beach Realty Company, Day's U-Drive Autos, Limited, and others. Judgment in favor of plaintiff against the first named defendant. From an order granting plaintiff's motion for a new trial as to the second named defendant, it appeals.

Affirmed.

See, also, 14 P.(2d) 858.

Henry Heidelberg and Robert G. Partridge, both of San Francisco (John R. Golden, of San Francisco, of counsel), for appellant.

Daniel A. Ryan and Thomas C. Ryan, both of San Francisco (George F. Snyder and James W. Harvey, both of San Francisco, of counsel), for respondent.

PER CURIAM.

This is an action for damages for personal injuries sustained in an automobile accident. The jury rendered two verdicts, one in favor of the defendant Day's U-Drive Autos, Limited, and the other against its codefendant Bolinas Beach Realty Company for the sum of $17,500. Judgment was entered accordingly, and subsequently the trial court granted plaintiff's motion for a new trial as to the defendant Day's U-Drive Autos, Limited. From the order made in that behalf the latter has appealed.

The action was instituted against Bolinas Beach Realty Company, appellant, Edward J. Goldstein, and certain fictitious parties. The complaint alleged that appellant was engaged in the business of renting automobiles, and was the owner of the automobile involved in the accident, in which plaintiff was riding as a passenger for hire; "that on said 26th day of July, 1931, the *defendants* were operating said automobile on the Bolinas road and at a point about one-half way between Stinson Beach and Sausalito in the county of Marin * * *; that at said time and place the *defendants* carelessly and negligently drove and operated said automobile over a cliff and thereby inflicted upon the plaintiff" certain personal injuries which are specifically described. (Italics ours.) Appellant and the realty company filed separate answers. In its answer appellant admitted that it was engaged in the business of renting automobiles, and that it was the owner of the automobile involved in the accident; also that plaintiff was riding therein as a passenger for hire. The remaining allegations of the complaint were denied. The realty company's answer denied all of the allegations of said complaint, except the allegation that appellant was in the business of renting automobiles, which was admitted. On January 15, 1932, the action came on for trial. At that time Goldstein's time for answering the complaint had not yet expired and consequently as to him the cause was not at issue. Nevertheless the parties proceeded with the trial, and, as stated, it resulted in the rendition of the two verdicts above mentioned. On the same date, January 15, 1932, judgment was entered accordingly. Eight days thereafter, and on January 23, 1932, Goldstein filed his answer wherein he denied the allegations of the complaint which are hereinabove quoted. On January 28, 1932, plaintiff served and filed its notice of motion for new trial, and on February 26, 1932, the motion was granted. Among the grounds urged for a new trial were irregularity in the proceedings of the court and on the part of appellant which prevented plaintiff from having a fair trial as to appellant; insufficiency of the evidence; that the verdict in favor of appellant was against law; and errors in law occurring during the trial. The trial court's order granting the motion stated merely that "* * * it was by the court ordered that the motion for a new trial be granted as to defendant U-Drive Autos, etc."

[1] Under well-established rules all presumptions are in favor of an order granting or denying a new trial, and the burden is upon appellant to make it affirmatively appear by a proper record that the order complained of is erroneous. See 2 Cal. Jur. 887, and cases cited under note 14. In the present case, at the outset, respondent raises the point that the trial court's order granting the new trial must be affirmed for the reason that the asserted facts upon which appellant relies in support of its claim that the court erred in granting the new trial do not appear in the record on appeal. We are of the opinion that respondent's point is well taken.

The theory upon which appellant seeks a reversal is, in the main, as follows: It is contended that its liability in the matter, if any, is for the imputed negligence of the operator of the automobile, as provided in section 1714¼ of the Civil Code, which in part reads as follows: "Every owner of a motor vehicle shall be liable and responsible for the death of or injury to person or property resulting from negligence in the operation of such motor vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, express or implied, of such owner provided that the liability of an owner for imputed negligence imposed by this section and not arising through the relationship of principal and agent or master and servant shall be limited" to certain amounts therein stated; "and provided that in any action against an owner on account of imputed negligence as imposed by this section the operator of said vehicle whose negligence is imputed to the owner shall be made a party defendant provided personal service of process can be had upon said operator within this state, and upon recovery of judgment, recourse shall first be had against the property of said operator so served. * * *" And in this connection it is asserted in appellant's briefs that it did not rent the automobile to the realty company, but rented it to a man named Reder, who, acting for the realty company, authorized Goldstein to drive the same; that Goldstein was driving the car at the time of the accident, not as agent or servant of appellant, but as the employee of the realty company; and that, inasmuch as the cause was not at issue as to Goldstein, the driver of the automobile at the time the cause was tried against appellant as owner, appellant, under said section 1714¼ could not be held liable. It is further asserted that in view of such facts the trial court, on appellant's motion, instructed the jury to find for appellant, and that such a verdict was returned. Basing its legal contention on the foregoing asserted facts appellant argues that in the state of the evidence and of the record as the same existed at the time the instruction was given, the instruction was proper, and that merely because Goldstein afterwards filed his answer and put the cause at issue as to him, did not serve as legal grounds for granting a new trial as to appellant.

[2] However, appellant took the appeal and has chosen to present it on a clerk's transcript alone; consequently none of the foregoing facts and circumstances upon which it relies in support of its contention that the court erred in granting a new trial, appear in the record before us. Respondent in her brief evidently concedes some of the facts asserted by appellant, including the assertion that Goldstein was the driver of the automobile at the time of the accident and that as such driver he was in the employ of the realty company; but, contrary to appellant's assertion, respondent claims that appellant rented the automobile to the realty company; that consequently the realty company was the "operator" of the car at the time of the accident, within the meaning of said section 1714¼, and that therefore a cause of action was established against appellant, as owner, under the provisions of said section, regardless of the fact that the cause was not at issue as to the driver of the car. If that be so, then it follows that the court erred in giving the instruction to the jury to find for appellant, because, as held in Sutton v. Tanger, 115 Cal. App. 267, 1 P.(2d) 521, 523, said section 1714¼ makes the owner of the automobile liable for the negligence of any person using or operating the automobile with his implied or express consent, and the word "operate," as used in said section, is sufficient to hold the owner liable for the negligence of a person to whom his permittee has temporarily entrusted the automobile. In so holding, the court, in quoting from another case, said: "If the owner chooses to intrust his car to another person, he invests such person, so long as he uses the car, with the same authority in regard to the management of the car which the owner has. That authority includes the right to select the operator. The statute so provides in unmistakable language."

Summarizing, therefore, the record upon which the appeal is taken, shows no error and even assuming as appellant claims that the trial court's order granting a new trial was based upon the conclusion that the instruction above mentioned was erroneous, we are not in a position to say that such instruction was not erroneous, because, in the absence of the evidence, there is nothing in the record before us to show that the automobile was not rented to the realty company.

That the record on appeal was doubtless insufficient was clearly indicated in an opinion heretofore rendered in ruling upon respondent's motion to dismiss the appeal or affirm the judgment. Pohle v. Bolinas Beach Realty Co. (Cal. App.) 14 P.(2d) 858. The order granting the new trial is affirmed.

131 Cal.App. 41

Ex parte MEYER.

Cr. 84.

District Court of Appeal, Fourth District, California.

April 5, 1933.

1. **Divorce** 🔑**269(8).**

Mailing copy of alimony order to husband *held* insufficient basis for contempt proceeding; personal service being necessary (Code Civ. Proc. § 1016).

2. **Habeas corpus** 🔑**76.**

Court in habeas corpus by one adjudged guilty of contempt must look to findings and contempt order in absence of record of testimony.

3. **Divorce** 🔑**269(12).**

Order adjudging husband in contempt for failure to pay accrued alimony *held* unauthorized where findings failed, except by way of conclusion, to show ability to pay (Code Civ. Proc. §§ 1218, 1219).

> The court found that the husband was making a salary of $185 per month, and in addition $2 per day for traveling and automobile expenses as salesman, and further found that he had the ability to comply with the court order for payment of alimony. This order had been mailed to the husband, but personal service thereof was delayed, and at time of personal service the sum of $450 had accrued under it, and there was no showing that during the 17-day period between the service of the order and the adjudication in contempt the husband could have paid that sum or portion thereof.

Application by John F. Meyer, for writ of habeas corpus, opposed by the Sheriff of San Bernardino County.

Writ granted, and petitioner discharged.

Meserve, Mumper, Hughes & Robertson, of Los Angeles (by Leo E. Anderson, of Los Angeles), for petitioner.

Lester G. King, of San Bernardino, for respondent.

CAMPBELL, Justice pro tem.

Petitioner is in the custody of the sheriff of San Bernardino county under a judgment finding him guilty of contempt of court in failing to comply with an order directing the payment of alimony. On October 6, 1932, the trial court made its order as follows:

"Now, therefore, it is hereby ordered, adjudged and decreed, that the plaintiff, John F. Meyer, shall pay the Defendant the sum of Fifty dollars ($50.00) per month as and for her support pendente lite, said sum to be paid in bi-monthly installments as follows: Twenty-five dollars ($25.00) forthwith and twenty-five dollars ($25.00) on the 5th and 20th day of each and every month, from and after the date hereof, commencing with the 20th day of October, 1932, until a further order of the Court in the premises.

"And it is further ordered, adjudged, and decreed, that said Plaintiff shall pay the Defendant, as and for her attorney's fees herein the sum of One Hundred twenty-five dollars ($125.00) forthwith and an additional sum of One Hundred twenty-five dollars ($125.00) within sixty days from the date hereof, without prejudice to a further order of the court in the premises."

Petitioner was not present in court when the order was made. He was represented by counsel, however. Petitioner was personally served with a copy of the said order on February 10, 1933, concurrently with an order to show cause issued on the same day, directing him to appear on the 27th day of February, 1933, then and there to show cause why he should not be punished for contempt of court for violating the said order. Petitioner appeared on the appointed day and after a hearing the court adjudged him guilty of contempt of court and remanded him to the custody of the sheriff of San Bernardino county, state of California, for a period of three days, and to and until such time as petitioner shall have paid all sums due pursuant to the order of the court made on October 6, 1932.

[1] Respondent contends that mailing a copy of the order of October 6, 1933, to petitioner in Los Angeles, Cal., and a copy to petitioner's attorney is sufficient service of the original order upon which to base a contempt of court. Chapter 5 of the Code of Civil Procedure, which contains all of the provisions relating to the filing and service of papers, provides in sections 1011, 1012, and 1013, for the service of various papers upon parties or attorneys, and the same chapter in section 1016 provides as follows: "The foregoing provisions of this chapter do not apply to the service of a summons or other process, or of any paper to bring a party into contempt." The Code therefore specifically provides that before petitioner can be found in contempt of court he must be served personally. This section has been modified by the case of Shibley v. Superior Court, 202 Cal. 738, 262 P. 332, where it is provided that, if a showing is made that the party is out of the state or concealing himself to avoid service of process, the trial court may then make an order for the service of the papers upon defendant's attorney of record. Such an order was not made in this case.

In the case of Johnson v. Superior Court, 63 Cal. 578, 580, the court says: "But there are other difficulties in the way of sustaining the action of the respondent herein. It does not appear that there was any service of the order which the petitioner failed to comply with, unless the delivery of a copy of it to him in the State of Missouri constituted a service. The six sections of the Code which immediately precede section 1016 provide several modes in which notices and papers may be served, but those provisions do not apply to the service 'of any paper to bring a party into contempt.' And where a party has an attorney in an action, service of papers to bring such party into contempt cannot be made upon such attorney. (Code Civ. Proc. § 1015). Before a party can be brought into contempt for not complying with an order of court, such order must be served upon him, and the mere delivery to a person in Missouri of a certified copy of an order made by a court in this State, would not be a service upon him within the meaning of the law."

To place any other construction on section 1016 of the Code of Civil Procedure would be a plain violation of the spirit of the law. It appears to us that in this case petitioner could not have been found in contempt of court until after the service of the copy of the order upon him on February 10, 1933.

[2, 3] The court found that petitioner was making a salary of $185 per month, and in addition, $2 a day for traveling and automobile expenses; also that he had an automobile which he used in his business as a salesman. The court further found that petitioner had paid sums under the order of October 6, 1932, totaling $50, between the dates of February 23, 1933, and February 27, 1933, inclusive. The court further found that petitioner has had and now has the ability to comply with said order of the court made October 6, 1932. This statement is more of a conclusion than a finding.

At the time petitioner was served with the order of October 6, 1932, there had accrued under the order the sum of $450. The order of commitment was made February 27, 1933, 17 days after the service of the order. In order that the trial court should have jurisdiction to make an order finding petitioner in contempt on February 27th, and committing him to the county jail, the court must have been able to find that petitioner had the ability between February 10th and 27th to pay the sum of $450, or a portion thereof, and the commitment should have been based on such a finding. The findings are silent as to petitioner's ability to pay after service of notice.

There is no record of the testimony taken at the contempt hearing before us, and it therefore becomes necessary for us to look to the findings and to the face of the order for the necessary support of the judgment. Merritt v. Superior Court, 93 Cal. App. 177, 269 P. 547. From the findings it does not appear affirmatively that petitioner did have the ability, at the time of the hearing of the order to show cause on the contempt proceedings, to comply with the order, and the lack of such affirmative finding of ability to pay deprives the trial court of jurisdiction to find petitioner in contempt or to commit him in punishment thereof. The court found that petitioner was earning $185 per month as a salesman, with automobile and traveling expense of $2 per day. There is no finding as to the net income. The courts have uniformly recognized necessary expenses as legitimate in order to arrive at the net income as a basis for determining one's ability to comply with the order. The conclusion that petitioner had ability to pay falls of its own weight, for it is not supported by any finding. The order cannot be sustained under section 1218 of the Code of Civil Procedure because a criminal contempt is punishable by imprisonment not exceeding 5 days, whereas petitioner faces life imprisonment in the county jail, for under the finding petitioner will never, if committed, be able to comply with the order, nor can the order be sustained under section 1219 of the Code of Civil Procedure, because it is only when the contempt consists of the omission to perform an act which is yet in the power of the person to perform that he may be imprisoned until he shall have performed it. Here the finding of the court shows affirmatively that petitioner cannot comply with the order.

Writ granted. Petitioner discharged.

We concur: BARNARD, P. J.; MARKS, J.

130 Cal.App. 620

DEWEES v. KUNTZ.

Civ. 731.

District Court of Appeal, Fourth District, California.

March 28, 1933.

Rehearing Denied April 19, 1933.

Hearing Denied by Supreme Court May 25, 1933.

1. Appeal and error ⚿1097(3).

Decision on former appeal does not become law of case on second appeal where there is substantial difference in evidence offered at second trial.

2. Automobiles ⚿244(2).

To establish prima facie case, plaintiff must prove facts showing automobile collision resulted from defendant's act or omission and that defendant should have foreseen that collision would result.

3. Automobiles ⚿146.

Whether defendant motorist should have foreseen and averted collision must be determined from attending facts and circumstances.

4. Automobiles ⚿147.

Statute requires exercise of that care in driving automobile over highway which circumstances exact, having in view character of highway and its use (St. 1923, p. 553, § 113, as amended by St. 1927, p. 1436, § 30).

5. Automobiles ⚿244(20).

Evidence sustained finding that motorist who, on meeting approaching automobile passing parked automobile, turned out on mountain grade, causing automobile to turn over, injuring guest, was negligent.

6. Appeal and error ⚿1011(1).

Trial court's finding that defendant's negligence proximately caused accident, supported by evidence, became final on appeal, though evidence was conflicting.

7. Automobiles ⚿201(8).

That other motorists were negligent would not relieve defendant of result of her own negligence if it proximately caused injury to guest.

8. Negligence ⚿61(1).

Defendant's negligence need not be sole cause of injury to render defendant liable, it being sufficient if negligence is proximate cause of injury.

9. Appeal and error ⚿1149.

Where trial court found damages in the sum of $1,570 and judgment was for $1,750, transposition of figures would be corrected on appeal.

Appeal from Superior Court, Fresno County; S. L. Strother, Judge.

Action by Nora Dewees against Dorothy Kuntz, also known as Dorothy Nell Dewees. From the judgment, defendant appeals.

Judgment reduced, and as reduced affirmed.

Lasher B. Gallagher, of Los Angeles, for appellant.

M. F. McCormick, of Fresno (Fred Baruch, Jr., of Fresno, of counsel), for respondent.

MARKS, Acting Presiding Justice.

Since this action was instituted appellant has married and her name is now Dorothy Mullineaux. This is the second appeal in this case. The first judgment was reversed on the ground that the evidence did not show any negligence on the part of appellant. The facts appearing on the first trial are stated in the earlier opinion, Dewees v. Kuntz, 106 Cal. App. 665, 289 P. 912, and we will not repeat here those which are common to both records. We will confine ourselves to a discussion of evidence omitted from the second record, but which appears in the first, and new facts developed in the second trial.

There is no evidence before us that at the place of the accident there was any "soft dirt on the top" of the small rocks and boulders on the extreme right of the traveled portion of the roadway from the direction in which appellant was traveling. The curve in the road, at the place of the accident mentioned in the former opinion, is now described as slight.

Appellant testified that the accident happened while she was traveling downgrade and immediately after she had crossed a culvert in the form of a pipe under the road and that she remembered crossing but one culvert before the accident. An officer of the county of Fresno, who had charge of this particular road, testified there were two culverts on the downgrade west of Squaw Valley. The upper, or one nearest Squaw Valley, was an iron pipe under the road which discharged into a depression at the roadside. The second, or lower culvert, was a much larger pipe with its ends set in rock abutments. He testified that while standing in the road immediately below the lower culvert he could see the road for two hundred yards towards Squaw Valley, and from immediately below the upper culvert he could see the road for one hundred yards in the same direction. We think the evidence justifies the conclusion that the accident happened immediately after appellant drove her car across the smaller or upper culvert. None of this evidence appears in the transcript of the first trial.

[1] On a second appeal the decision on questions of law on the first appeal becomes the law of the case and is binding where there is identity of facts. Where there is a substantial difference in the evidence offered at the second trial the rule cannot apply. Sichterman v. Hollingshead Co., 117 Cal. App. 504, 4 P.(2d) 181, Coulter v. Howard, 113 Cal. App. 208, 298 P. 140. There is a sufficient difference in the facts developed in the two trials to permit us to re-examine the evidence in the record on this appeal in order to determine the question of the negligence of appellant.

It appears from the new evidence now before us that when appellant's car was three hundred feet from the place of the accident she had a view of the road in front of her for a distance of four hundred and fifty feet. She testified that she did not see the automobile parked on the left-hand side of the road until she was twenty-five feet from it, and neither did she see the approaching automobile until it was between fifteen and twenty-five feet from her. The evidence justifies the inference that she could have seen the approaching car when it was one hundred fifty feet back of the parked automobile. She could have seen the parked car when she was three hundred feet from it.

[2-4] The general rules governing the care to be used by the driver of an automobile are summarized as follows: "In order to establish a prima facie case, the plaintiff must prove facts from which it appears that the collision resulted from some act or omission of the defendant, and that the latter ought to have foreseen or was enabled to foresee that the collision would result from his conduct. * * * As to whether the defendant is to be deemed to have been enabled to foresee and avert the collision is to be determined from the facts and circumstances which attended the calamity. The statutory provisions [St. 1927, p. 1436, § 30] as to care, prudence and speed contemplate the 'peculiar circumstances and conditions under which a car may be operated over a public highway at a particular time—whether it be after nightfall and dark or in the daytime and light, the width of the highway and whether it is one which, by reason of its connections, is or may naturally be expected to be at all times subject to a heavy or light traffic. In other words, said section requires the exercise of that amount of care in driving a motor vehicle over the highway which the circumstances or conditions of the particular occasion exact, having in view the character of the highway and the use to which it is then being put.' In some cases the evidence may justify a conclusion that he had actual knowledge of the danger of collision; in others it may be concluded from the attendant circumstances that the defendant was advised of the peril, but in a less degree. If it appears that the defendant omitted to take a precautionary measure which was prescribed by law or usage, the imputation is that he must have had knowledge of the danger." Title, Automobiles, 1928 Supp. to Cal. Jur., pp. 93 to 95.

[5, 6] We have concluded that the evidence before the trial court at the second trial is sufficient to sustain the finding that appellant was guilty of negligence. The inference is clear that she could have seen the danger in front of her, at a sufficient distance that she need not have been placed in the position of sudden peril, if she had been alert and watchful. The trial court having found negligence on the part of appellant that proximately caused the accident, and there being competent evidence in the record to support the finding, it becomes final on appeal, even though a contrary finding would have had evidentiary support.

[7, 8] Appellant further urges that the drivers of the parked car, and of the automobile which passed it, were both guilty of negligence which proximately caused the injury to respondent and that the recovery of damages should have been against them. This may be true, but their negligence would not relieve appellant of the results of her own want of ordinary care if it was a proximate cause of the damage. "The law does not require that negligence of the defendant must be the sole cause of the injury complained of in order to entitle the plaintiff to damages therefor. All that is required in either respect is that the negligence in question shall be a proximate cause of the injury." Griffith v. Oak Ridge Oil Co., 190 Cal. 389, 212 P. 913, 914; Condon v. Ansaldi, 203 Cal. 180, 263 P. 198; Merrill v. Los Angeles Gas & Electric Co., 158 Cal. 499, 111 P. 534, 31 L. R. A. (N. S.) 559, 139 Am. St. Rep. 134.

Appellant complains of the rulings of the trial court in overruling her objections to questions propounded to the official of Fresno county concerning the condition of the road on which the accident occurred. She maintains that the place of the accident was not sufficiently fixed to show that the portion of the road described by this witness included the scene of the accident. We think there is no merit in this argument. The objection went more to the weight of the evidence than to its admissibility.

[9] The trial court found that respondent suffered general and special damages in the sum of $1,570. The judgment is for $1,750. There is evidently a transposition of figures which should be corrected.

The judgment for damages is reduced from $1,750 to the sum of $1,570 and as so reduced is affirmed. Each party will pay her own costs on this appeal.

I concur: JENNINGS, J.

Mr. Presiding Justice BARNARD, deeming himself disqualified, does not participate herein.

130 Cal.App. 733

AUSTIN v. UPJOHN, County Superintendent of Schools, et al.

Civ. 7746.

District Court of Appeal, Second District, Division 2, California.

March 31, 1933.

Hearing Denied by Supreme Court May 29, 1933.

Mandamus 🔑105.

High school district having actionable interest entitling it to employ attorneys to bring mandamus to compel county officers to pay compensation under contract for school children's transportation, mandamus lay to recover attorneys' fees.

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Proceeding by Walter C. Austin for a writ of mandate against H. S. Upjohn and another to compel defendants, as county superintendent of schools of the County of Los Angeles, and as county auditor, respectively, to honor a requisition for attorneys' fees for services rendered to the Pasadena City High School District. An alternative writ was dissolved and a peremptory writ denied, and plaintiff appeals.

Reversed, with directions.

John H. Bogardus, of Los Angeles, for appellant.

Everett W. Mattoon, Co. Counsel, and S. V. O. Prichard and Claude H. McFadden, Deputy County Counsels, all of Los Angeles, for respondents.

STEPHENS, Justice.

A contract with Pacific Electric Railway Company, a corporation, was entered into by Pasadena City High School District for the transportation of school children. The facts are fully set out in Pasadena City High School District v. Upjohn, 206 Cal. 775, 276 P. 341, 343, 63 A. L. R. 408, and the requisition for compensation under such contract was regularly approved and presented to the county superintendent of schools, and the county auditor refused to honor it in part. Some time after the contract had expired the district requested the county counsel to institute mandamus proceedings against the two county officers referred to, to compel them to honor the requisition. The county counsel refused, and the district employed plaintiff's assignors to act as attorneys in the prosecution of such a proceeding. The district thereafter, in conjunction with the railway company, instituted and prosecuted such proceedings to a conclusion. Pasadena City High School District v. Upjohn, supra. Thereafter an attorney's fee for such service was approved by the district, but the said referred to county officers refused to honor it, and a proceeding in mandamus was instituted and prosecuted in the superior court against them by the assignee of such attorneys. The alternative writ issued, but after a hearing which presented the above facts in effect, it was dissolved and the peremptory writ was denied. Findings were waived, and judgment was accordingly entered.

Plaintiff below appeals and presents two points: First, the district, in proper circumstances, has the right to employ attorneys; second, the right follows from the circumstances obtaining. Respondents concede the first but contest the second on the general ground that the district has no real or actionable interest in the subject-matter of the controversy. But the Supreme Court has definitely decided this question against respondents' contention. Mr. Justice Shenk in the opinion written in Pasadena, etc., v. Upjohn, supra, concludes: "It thus appears that the high school board is holding in abeyance the exercise of the power, if it has such power, to provide further transportation for pupils residing in Sierra Madre until the determination of this matter."

Respondent presses the case of Bartlett v. Bell, 58 Cal. App. 357, 208 P. 701, as authority that the interest of the district is not such an interest as will give it the right to maintain the proceeding against the county officers. But whatever we may think of Bartlett v. Bell, supra, the fact remains, as we have seen, that the Supreme Court did recognize the district, and did find that it had an interest entitling it to maintain the proceeding.

Judgment reversed, with directions to the trial court to issue its peremptory writ of mandate in the premises.

We concur: WORKS, P. J.; ARCHBALD, Justice pro tem.

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131 Cal.App. 33

BARTON et al. v. PIERCE et al.

Civ. 1215.

District Court of Appeal, Fourth District, California.

April 5, 1933.

Rehearing Denied April 28, 1933.

Hearing Denied by Supreme Court June 1, 1933.

1. Dismissal and nonsuit ⚷60(1).

Motion to dismiss action for want of prosecution is addressed to discretion of trial court (Code Civ. Proc. § 583).

2. Dismissal and nonsuit ⚷60(1).

Where judge at first trial died after order for judgment, and cause was again brought to trial within five years from judge's death, overruling motion to dismiss action for want of prosecution *held* not abuse of discretion (Code Civ. Proc. § 583).

3. Waters and water courses ⚷152(8).

In action to establish ownership of ditch and water rights, evidence *held* to support finding that defendants' predecessor in interest had established prior water rights by appropriation.

4. Waters and water courses ⚷151, 152(10).

Abandonment of prior water rights must be determined by conduct of parties, and is question of fact for trial court.

5. Waters and water courses ⚷152(8).

In action to determine ownership of ditch and water rights, evidence *held* to support implied finding that priority of water rights in defendants through appropriation by predecessor in interest had been abandoned.

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Action by Jason E. Barton and others against James Henry Pierce and another, wherein the defendants filed a cross-complaint. From a judgment in favor of the plaintiff, the defendants appeal.

Affirmed.

W. R. Bailey and Adolph Feierbach, both of Visalia, for appellants.

H. B. McClure and Farnsworth, Burke & Maddox, all of Visalia, for respondents.

CAMPBELL, Justice pro tem.

This action was commenced by respondents to establish the ownership of all the parties to this action in and to a certain ditch and water rights, which ditch, known herein as the "Lovelace" or "Brundage" ditch, leads out of the North Fork of the Kaweah river in Tulare county, Cal. By their complaint respondents claim a three-quarter ownership or interest in said ditch and water rights. From a judgment in favor of respondents, appellants have taken this appeal. The cause was tried by the court without a jury, and written findings were filed.

In their briefs appellants set out two grounds for reversal: (1) The action should have been dismissed for want of prosecution; (2) the evidence establishes a prior water right vested in appellants, and fails to support the findings of the trial court.

[1, 2] 1. The following facts are shown by the record: The complaint was filed August 9, 1924. On October 1, 1924, appellants herein duly served and filed their answer and cross-complaint, and plaintiffs served and filed their answer to said cross-complaint January 26, 1925. Thereafter the action was tried on the 8th and 9th days of July, 1925, before the late Honorable W. B. Wallace, judge of the superior court. On the 28th day of August, 1925, the court filed its written opinion and ordered that plaintiffs recover judgment and that they prepare findings of fact and conclusions of law. On May 2, 1926, the Honorable W. B. Wallace died. No findings of fact, conclusions of law, or judgment were ever signed, filed, or entered in said action prior to the death of said judge on May 2, 1926. No further steps were taken in the action until the 4th day of September, 1930, on which date plaintiffs served and filed a memorandum of motion to set the cause for trial. This motion came on for hearing on September 15, 1930. On the 15th day of September, 1930, prior to the hearing of said motion, the defendants duly served and filed in said cause defendants' notice of motion to dismiss the action. The motion to dismiss was finally heard on October 6, 1930, and the court made its order denying the same. Appellants' motion is based on section 583 of the Code of Civil Procedure, which provides that: "The court may in its discretion dismiss any action for want of prosecution on motion of the defendant and after due notice to the plaintiff, whenever plaintiff has failed two years after action is filed to bring such action to trial. Any action heretofore or hereafter commenced shall be dismissed by the court in which the same shall have been commenced or to which it may be transferred on motion of the defendant, after due notice to plaintiff or by the court upon its own motion, unless such action is brought to trial within five years after the defendant has filed his answer, except where the parties have stipulated in writing that the time may be extended. * * *"

The court, in Kruly v. Superior Court, 122 Cal. App. 458, 10 P.(2d) 178, says: "The petitioners erroneously interpret numerous decisions requiring the dismissal of actions under the foregoing provisions which had been set for trial but had not been 'brought to trial,' as determinative of the question here presented. [Citing cases.] * * * It was said: '"The trial of an action and the setting of it for trial are quite distinct things, and an action is certainly not brought to trial until the trial is commenced."' It is not denied that as distinguished from those cases, the instant case was in fact brought to trial. It is conceded that the trial was commenced and, for aught that may be made to appear by the record before us, was concluded with the exception of final submission. The section invoked by the petitioners does not require a dismissal notwithstanding such action is brought to trial within the time therein specified, nor during suspension of proceedings after the same shall have been brought to trial. Its language is clear in this respect, and is conclusive."

This case unquestionably was brought to trial within one year after the answer was filed. The death of Judge Wallace on May 2, 1926, set the order for judgment which he had made at naught in a legal sense. Within five years, to wit, on December 3, 1930, the action was again brought to trial and judgment entered. Thus the action was "brought to trial," within the meaning of that term as defined in the case of Kruly v. Superior Court, supra, within five years after the death of Judge Wallace. It was entirely within the discretion of the trial court to either grant or deny the appellants' motion to dismiss. Under the facts as outlined in this case it cannot be said that there was an abuse of discretion on the part of the trial court in denying the motion.

2. Appellants do not direct our attention to any particular finding as not supported by the evidence. Hence we have examined all of the findings and read the entire record so that we might be better able to understand the subject-matter of this appeal.

It then becomes necessary to make a rather full statement of the history of the lands and water rights involved.

In 1869, T. A. Lovelace, predecessor in interest of appellants, while in possession of appellants' land, constructed a ditch leading out of the North Fork of the Kaweah river at a point above said lands and extending onto the same. This was a small ditch with a headgate at the river made of loose rocks. In 1873 he obtained a patent to the land. In 1875 T. A. Lovelace sold the land to John W. Lovelace, who in turn sold it to T. J. Brundage the same year. In 1875 D. R. Deming and J. A. Durham were partners, and had made an application to purchase all of section 23. They, too, then dug a ditch from the end of the ditch in the Lovelace land to and on the northeast quarter of section 23, lands now owned by Jason E. Barton and the Thorns. They went to the head of the Lovelace ditch, built a wooden headgate, and enlarged the ditch from the head down through the Lovelace land to the ditch they had first dug. Deming stayed a few months, and then sold his interest to J. A. Durham. In 1878 T. J. Brundage sold the Lovelace 160 acres of land in sections 13 and 14, which included the Pierce land, to J. A. Durham. In December, 1878, Durham granted to L. A. Rockwell the right to run water through what he called the "Brundage ditch" sufficient for irrigation purposes, on section 23.

In January, 1880, Durham granted to James Barton the land now owned by appellants Pierce and the land now owned by respondent Ben Hardin; also a "ditch of water now flowing on said land." James Barton acquired other lands, until on October 2, 1886, he held the record title to all the lands of respondents except that of the Thorns, and he also owned the land now belonging to appellants Pierce. Prior to this time, in 1885, L. A. Rockwell granted the ditch and ditch rights he acquired from Durham to James W. Griffes. Marion E. Griffes acquired the Thorn land in 1887. In 1888 Marion E. Griffes conveyed it to J. W. Griffes. By various mesne conveyances this land and its appurtenances passed to the present owners. In November, 1880, James Barton acquired by quitclaim deed 7.71 acres of land in the northwest quarter of section 13, to which patent was obtained in 1882. This was included in the lands later acquired by appellants. Thus, in 1886, James Barton held title to the Pierce lands, and to the lands of Enos D. and Jason E. Barton. In October, 1886, James Barton conveyed the north half of the northeast quarter of section 23 to his son, O. D. Barton, who granted it to the present owner, Jason E. Barton, in November, 1898. In December, 1894, James Barton conveyed the Pierce land to his son, Milton M. Barton, who owned it until 1910, when he granted it to appellants Pierce. On April 10, 1909, James Barton granted to his son Enos D. Barton the land now owned by respondent Ben Hardin. Respondents Thorn acquired their land in 1917. The lands of the parties to this action were irrigated from the "Brundage ditch," and everything was harmonious until the year 1924. The record discloses that that year the water was very low in the Kaweah river, and appellants Pierce undertook to take all of the water, to the exclusion of the respondents. This action followed. Thus we have the history of the ditch and the parcels of land involved as is disclosed by the record on appeal.

[3, 4] The evidence is sufficient to establish the fact that, by the year 1875, T. A. Lovelace, appellants' predecessor in interest, had established a prior water right by appropriation. However, we are confronted with the question of whether or not this priority between the respective parcels of land was abandoned. It is well settled that the question of abandonment is to be determined by the conduct of the parties, and is a question of fact for the trial court. 1 Wiel on Water Rights (3d Ed.) § 567, p. 604; 26 Cal. Jur. p. 104; Richard v. Hupp, 4 Cal. Unrep. 824, 37 P. 920.

The trial court found: "* * * it is true that for more than 40 years prior to * * * the month of August, 1924, the said defendants and cross-complainants and their predecessors in interest, agreed to and practiced a division of the waters of said ditch so that three-fourths of the waters flowing therein flowed down to the lands of the plaintiffs hereinbefore particularly described, and one-fourth of said waters were used upon the said lands of the defendants and cross-complainants; and during all of said time, the plaintiffs and cross-defendants and their predecessors in interest performed three-fourths of all labor and bore and paid three-fourths of all expense in and about the care and maintenance of said Brundage Ditch, and the defendants and cross-complainants and their predecessors in interest performed one-fourth of all such labor and bore and paid one-fourth of all such expense."

Excerpts from the testimony of Jason E. Barton show the status of the respective owners of the ditch and water rights:

"Q. Now, Mr. Barton, when did you go up there, yourself, to that land or any of those lands that are indicated in that map? A. In 1880. * * *

"Q. Now at that time when you went there, how far did this ditch extend? A. It extended to the same place that it does, it ended then where it ends today. * * *

"Q. What did Rockwell have on the land, outside of the house? A. Why, he had the tillable land below the ditch pastured and into alfalfa, and he had corn fields and orchards, and so forth. We were cultivating it.

"Q. Did he have—what kind of an orchard

did he have on there—on that land? A. He had quite an apple orchard, and oh, a variety of trees.

"Q. What did he raise in the way of other crops? A. Well, he had a big alfalfa field and corn field and grain and just a general farm.

"Q. Did he irrigate it from the time he went there; did he irrigate the orchard and those other crops every year? A. Yes.

"Q. From what source did he irrigate them? A. From the Brundage ditch.

"Q. And that is also known as the Barton Ditch—the ditch here in question? A. Yes.

"Q. Did he irrigate from any other source? A. No.

"Q. Yes, all right; and now the next piece that is shown on the map above the Thorn land was or is marked the J. E. Barton land, that is your land? A. Yes.

"Q. What was the state of affairs on that piece at the time you went up there? A. Practically all of the level land that could be irrigated was being irrigated at that time.

"Q. State approximately the acreage that was being irrigated on what is known as the J. E. Barton land at that time? A. Well, I would think that fifteen acres, anyhow.

"Q. Well, that J. E. Barton was—when you went there—in whose possession was it? A. It was in Mr. Rockwell's possession.

"Q. He was farming it; now the next piece north of it is marked Enos Barton; was any land being irrigated on that when you went up there? A. Yes, sir. * * *

"Q. Now in 1882 what was done with this ditch? A. Why Mr. Rockwell and my father enlarged it in 1882 from Mr. Rockwell's north line across the 80 acres that my father had got from Mr. Rockwell on up through the Lovelace place to the head.

"Q. Now by the Lovelace place—you mean the place your father had bought up there? A. Yes from Durham.

"Q. And did they enlarge it clear up to the head of the ditch? A. Yes, I worked on it.

"Q. Now, who worked on that ditch? A. My father and my brother Lan, or Milton Barton, and myself.

"Q. Did Mr. Rockwell do any work upon it? A. No, we did all of the work and Mr. Rockwell paid for his share of it. * * *

"Q. Well, now who turned out and cleaned it? A. Who turned it out?

"Q. Who did the work? A. Well, at the head of the ditch there would be four men start in at the head of the ditch, and they would clean down through father's place, and then two men would drop out and Orlando and Mr. Rockwell would clean through Orlando's portion and down to Mr. Rockwell's line.

"Q. After Orlando got his Deed to the 80 acres from your father there was apparently Orlando, Rockwell and your father interested in the waters of the ditch or used it? A. Yes, sir.

"Q. Now, it was only those three men who were interested in that water who did the work of maintaining the ditch? A. Well, Mr. Rockwell and my father, Orlando and my father.

"Q. Yes, all right. Now what portion did Mr. Rockwell do? A. One-fourth.

"Q. What portion of it did Orlando do? A. One-fourth.

"Q. What portion of it did your father do? A. One-half.

"Q. Now it appears that after that, in the year 1894, I think, your father conveyed to Milton Barton—your brother—was it not? A. Yes, sir.

"Q. He conveyed to Milton Barton the land now known as the Pierce land? A. Yes. * * *

"Q. From the time that Milton Barton took the ownership of the Pierce land, how was the work of maintaining the ditch divided between the different persons there? A. Well, Mont did one-fourth of the work, and my father and Enos did one-fourth of the work and my brother Orlando did one-fourth of the work—or I believe I had bought out my brother Orlando at that time and I did one-fourth of the work, and Mr. Rockwell did one-fourth of the work. * * *

"Q. And about when was that that Mr. Pierce took over the land that Milton Barton had owned? A. Well, I have forgotten; it was 15 or 20 years.

"Mr. Bailey: 1910 is the deed in evidence.

"Mr. Burke: 1910. In the years following 1910, Mr. Barton, after Mr. Pierce took over that land how was the work of maintaining the ditch divided between the parties? A. Just the same as it was before.

"Q. Well, what part, if any, did Mr. Pierce do? A. He did one-fourth of the work. * * *

"Q. Now up to the year 1924, what was the practice or custom in regard to dividing the waters of the ditch between the different parcels of land there? A. Each one used as near as they could one-fourth of the water.

"Q. What I am trying to get at is during those years up to 1924, did you rotate the full head or divide the full head among yourselves? A. We generally divided it.

"Q. How much did each one take out of the quantity flowing in the ditch? A. We practically used one-fourth of the water apiece.

"Q. From the time Mr. Pierce went there? A. Yes.

"Q. Now what happened in 1924? A. Mr. Pierce took all of the water.

"Q. About when in 1924? A. Well, along in July sometime.

"Q. What kind of a season—so far as run off of water in the north fork of the Kaweah River—was the year 1924? A. It was the lowest that I ever saw it.

"Q. Along about July Mr. Pierce took the entire head of water in the ditch? A. Yes, sir."

[5] The testimony quoted shows clearly the whole course of conduct of the parties and their predecessors in interest in maintaining the ditch and in using and dividing the water for their respective parcels of land from 1880 to 1924. From this testimony the trial court took the view that all priority, if any, that ever existed between the respective parcels of land had long since been abandoned, and impliedly so found. The evidence is conflicting, but from the testimony there is ample evidence to sustain the findings and judgment of the trial court.

Appellants complain that some of the rulings of the trial court on the admission of evidence are erroneous. The errors, if any, were harmless, and in no wise prejudiced the rights of the appellants.

Let the judgment be affirmed.

We concur: BARNARD, P. J.; MARKS, J.

130 Cal.App. 548

GOODFELLOW v. BARRITT et al.
(two cases).

Civ. 842.

District Court of Appeal, Fourth District, California.

March 23, 1933.

1. Reformation of instruments 🔑1.

Equity court cannot make new contract for parties.

2. Mines and minerals 🔑55(5).

Deed reserving to grantors all oil rights in east half of land conveyed conformed with agreement that reservation of grantors' one-half of oil rights should be made by reserving all right to oil in one-half of land conveyed, notwithstanding grantors had no oil rights in west half.

3. Reformation of instruments 🔑16.

Mistake relied on as ground for reformation of written instrument must be either mutual mistake or mistake of party seeking reformation, which was known or suspected by other party.

4. Reformation of instruments 🔑36(3).

Complaint seeking reformation of deed on ground that grantors were to reserve only one-half of oil rights, and that grantors had no oil rights in land conveyed without reservation, *held* demurrable, in absence of allegation regarding grantors' knowledge of such fact.

5. Pleading 🔑34(4).

Presumption exists that pleader states facts as favorably to himself as possible.

6. Pleading 🔑34(4).

Pleading must be construed most strongly against pleader.

7. Limitation of actions 🔑60(6).

Action for reformation of deed instituted approximately six years and five months after execution thereof *held* barred by limitations, where excuse for delay was plaintiff's absence from county in which land was situated (Code Civ. Proc. § 338, subd. 4).

8. Limitation of actions 🔑179(2).

If complaint shows that fraud or mistake for which equitable relief is sought occurred more than three years prior to commencement of action, complaint must show circumstances under which facts constituting fraud or mistake were brought to plaintiff's knowledge (Code Civ. Proc. § 338, subd. 4).

9. Limitation of actions 🔑199(2).

Whether there has been "discovery" of facts constituting fraud or mistake within statute of limitations is question of law to be determined by court from facts pleaded; "discovery" and "knowledge" not being convertible terms (Code Civ. Proc. § 338, subd. 4).

[Ed. Note.—For other definitions of "Discovery" and "Knowledge," see Words and Phrases.]

10. Reformation of instruments 🔑32.

Delay of almost two and one-half years after grantee had been fully informed of alleged defect in deed, during which time one of grantors died, *held* laches, barring action for reformation (Civ. Code, § 3527).

11. Equity 🔑72(1).

Mere delay does not constitute laches, but prejudice must result or lapse of time must be such that it may reasonably be assumed that prejudice will result.

12. Equity 🔑219.

Defense of laches may be raised by demurrer.

13. Mines and minerals 🔑55(8).

Evidence *held* not to sustain finding that defendants other than immediate grantors were entitled to share in oil rights plainly reserved to grantors.

14. Quieting title 🔑52.

In action to quiet plaintiff's title to land in which defendant claimed definite interest, court must declare interest held by defendant.

15. Husband and wife ⚷263.

In grantee's suit to quiet title against grantors, deed conveying land to one of grantors *held* admissible to establish that land conveyed and oil rights appurtenant thereto were community property of grantors.

16. Wills ⚷6.

Only undivided one-half of oil rights constituting community property were subject to testamentary disposition by husband.

Appeals from Superior Court, Kings County; K. Van Zante, Judge.

Action by George W. Goodfellow against R. T. Barritt, Susie F. Barritt, and others. During the pendency of the action, R. T. Barritt died, and Susie F. Barritt, as administratrix with the will annexed of the estate of R. T. Barritt, deceased, was substituted in his stead. From a modified decree, George W. Goodfellow and Susie F. Barritt, personally and as administratrix with the will annexed of the estate of R. T. Barritt, deceased, separately appeal.

Reversed, with directions.

Hugh Goodfellow and Thomas Ashby, both of San Francisco, for plaintiff, appellant, and respondent George W. Goodfellow.

W. H. Stammer and H. E. Dwelle, both of Fresno, for defendant, appellant, and respondent Susie F. Barritt.

James P. Sweeney, of San Francisco, for respondents C. W. and Phronie Barritt.

JENNINGS, Justice.

The appeals which are here presented have been taken by the plaintiff and by one of the defendants, personally and as administratrix of the estate of her husband, who was originally named as a defendant and who died during the pendency of the action, from the modified judgment rendered by the trial court.

Plaintiff's third amended complaint contains two causes of action. By the first cause of action it is sought to quiet plaintiff's title to certain real property therein described. By the second cause of action the equitable remedy of reformation is sought to be applied to the deed whereby the real property described in the first cause of action was conveyed to plaintiff by defendant Susie F. Barritt and her husband, R. T. Barritt, since deceased.

A demurrer which was interposed by the defendants to the second cause of action was sustained by the court without leave to amend. The court's order sustaining the demurrer and the effect of this action as reflected in the court's modified judgment furnish the principal complaint voiced by plaintiff on his appeal. This objection will be first considered.

It is alleged in the second cause of action in plaintiff's third amended complaint that in the year 1920 R. T. Barritt and Susie F. Barritt owned certain land described in an instrument which was by reference incorporated in said pleading as Exhibit B; that B. F. Barritt and Belle A. Barritt owned other parcels of land described in instruments marked Exhibits C and D likewise incorporated in the pleading; that C. W. Barritt, Phronie Barritt, R. T. Barritt, and Susie F. Barritt owned a fourth parcel of land described in the instrument marked Exhibit E which was also by reference made a part of the pleading; that at various times during the year 1920 plaintiff discussed orally with B. F. Barritt the project of plaintiff's purchasing the said parcels of land from the owners, and that in such discussions and the transactions that later ensued B. F. Barritt acted as the duly authorized agent of all the owners. It is then alleged that at a conference held on October 20, 1920, it was orally agreed between plaintiff and B. F. Barritt that the aforesaid owners would sell, and that plaintiff would buy, said parcels of land, and the terms of the sale were agreed upon and that one of such terms of sale was that the owners of the land would reserve one-half the oil rights in each of said parcels, and that to effect such reservation the owners should not reserve an undivided one-half of all the oil rights in each parcel, but should reserve all the oil rights in a divided portion of each of said parcels, and that for the purpose of making said reservation the various parcels should all be similarly divided in such manner as would effect the reservation of one-half the oil rights in each parcel, and that the oil rights so reserved should be reserved in the same respective portion of each parcel, and that plaintiff at said time orally agreed that B. F. Barritt should determine the manner in which said parcels should be divided and the respective portions in which the oil rights should be reserved. It is alleged that B. F. Barritt stated to plaintiff that he would cause deeds to be prepared conveying the parcels of land to plaintiff and containing the reservations of one-half the oil rights in each parcel as agreed upon; that plaintiff believed said statement, and in reliance thereon orally agreed that B. F. Barritt should cause the deeds to be prepared, and should deposit them in escrow pending completion of the sale, and that it was understood and agreed by plaintiff and B. F. Barritt that plaintiff would rely upon Barritt's preparing and depositing the deeds without further action on plaintiff's part. The following allegation is then made: "That thereafter and pursuant to said oral agreement said B. F. Barritt chose to reserve the oil rights in the easterly portion of each of the said parcels of land so agreed to be sold."

The pleading alleges that on November 6, 1920, B. F. Barritt caused the deeds to be prepared and that they were deposited in escrow to be delivered to plaintiff or recorded upon completion of the sale; that thereafter on December 15, 1920, plaintiff and B. F. Barritt, R. T. Barritt, and C. W. Barritt executed a certain written agreement which embodied the terms of the oral agreement of October 20, 1920; that, at the time the written agreement was signed, B. F. Barritt stated to plaintiff that the deeds which had been prepared and executed were in the form agreed upon orally on October 20, 1920; that B. F. Barritt knew that plaintiff would rely upon such statement; that in fact the deeds did not contain oil reservations in the form provided by the oral agreement but differed therefrom; that plaintiff, relying on said statement, signed the written agreement under the mistaken belief that the deeds did conform to the previous oral agreement; that the various owners knew that plaintiff signed the written agreement under the belief that the deeds conformed to the previous oral agreement, and that B. F. Barritt, R. T. Barritt, and Susie F. Barritt knew the contents of the deed which conveyed the real property, title to which is in dispute in the present action, and knew that this deed was not in the form provided by the terms of the oral agreement.

It is then further alleged that, prior to any of the times mentioned in the pleading, the United States government was the owner of section 28, and that, when the United States government conveyed its title to the southwest quarter of said section, it reserved the oil rights from such conveyance, as a consequence of which reservation the south half of said section 28 contained oil rights only in the east half thereof, and that therefore, when R. T. Barritt and Susie F. Barritt in their deed conveying the south half of said section 28 reserved the oil rights in the southeast quarter of said section, they reserved all the oil rights there were in the parcel so conveyed, and deprived plaintiff of one-half of such rights, contrary to the terms of the oral agreement whereby they were to reserve for themselves only one-half of such rights in said parcel. It is alleged that, because of the failure of the vendors to execute deeds reserving but one-half of the oil rights in each parcel of land conveyed in accordance with the oral agreement of October 20, 1920, both the written agreement of sale and the deeds which were executed do not represent the true intention of the parties and do not correctly evidence the actual agreement entered into between them. The prayer of the complaint is that the written agreement of December 15, 1920, and the deed from R. T. Barritt and Susie F. Barritt conveying to plaintiff the south half of section 28 be reformed so as to reserve to the grantors only the oil and gas in the east half of the southeast quarter of section 28.

The original complaint in the action was filed on May 12, 1927, approximately six and one-half years after the execution of the deed and the written agreement which plaintiff seeks to reform.

Examination of the various deeds which by reference are incorporated in plaintiff's complaint shows that four parcels of land were conveyed to plaintiff, and that in each deed the grantors made a reservation of all the oil and gas in the east half of the parcel so conveyed, with one exception, which is apparently either a typographical mistake or an error in description made by the person who drew the deed. This single exception occurs in Exhibit D. The property conveyed by this deed is the east half of the southwest quarter and the southwest quarter of the southeast quarter and lot 4 in section 4, and the southeast quarter of section 34. The reservation of oil and gas is specified to apply to the east quarter of the east quarter of the southwest quarter and the east half of lot 4 of section 4 and the east half of the southeast quarter of section 34. Even this reservation correctly specifies that it shall apply to the east half of the particular parcel mentioned with the single exception of the reservation as to oil and gas in the "east quarter of the east quarter of the southwest quarter." Whatever this description may mean, it is at least apparent that thereby the grantors reserved no more than the oil and gas in the east half of the east half of the southwest quarter of section 4. Disregarding this single exception, it is obvious that the grantors in each deed reserved the oil and gas in the east half of each parcel conveyed.

When the allegations contained in the second cause of action are considered, it is apparent that the deed and written agreement which are sought to be reformed are in exact conformity with the alleged oral agreement of October 20, 1920. By the oral agreement it was agreed, first, that the owners should reserve one-half of all oil rights in each parcel to be conveyed; second, that the owners should reserve all the oil rights in a divided portion of each parcel; third, that the various parcels should be divided similarly, and the oil rights to be reserved should be reserved in the same respective portion of each parcel; fourth, that B. F. Barritt should determine the manner in which the parcels should be divided and the respective portions in which the oil rights should be reserved; fifth, that B. F. Barritt should have deeds prepared containing reservations of one-half of the oil rights in each parcel. It is further alleged that, after the oral agreement of

October 20, 1920, had been made, and "pursuant to such agreement," B. F. Barritt chose to reserve the oil rights in the easterly portion of each parcel of land. As above noted, the deeds indicate that the reservation of oil rights in each parcel of land was made in the easterly half of each parcel, which was in exact conformity with the oral agreement.

[1, 2] It is plaintiff's contention that the oral agreement of October 20, 1920, was that the grantors should reserve one-half of all oil rights in each parcel of land to be conveyed, and that, because of the prior reservation of the United States government of all oil rights in the southwest quarter of section 28, oil rights remained only in the southeast quarter of said section, and, when the grantors reserved the oil rights in the east half of the south half of said section, they reserved not one-half of such rights but all of the oil rights in this particular parcel. To sustain this contention would amount to making a new contract between the parties. A court of equity has no such power. Ward v. Yorba, 123 Cal. 447, 56 P. 58; Hochstein v. Berghauser, 123 Cal. 681, 56 P. 547; Mabb v. Merriam, 129 Cal. 663, 62 P. 212; Wilson v. Shea, 194 Cal. 653, 229 P. 945. The oral agreement as described in the pleading was that the deeds should reserve all oil rights in the same respective portion of each parcel similarly divided, and it is alleged that, pursuant to the agreement, B. F. Barritt chose to reserve all oil rights in the east half of each parcel.

[3-6] A further reason appears for affirming the court's order sustaining the demurrer to the second cause of action. It is apparent that the second cause of action seeks reformation of the written instruments on the ground of mistake. It is well established that a mistake which is relied upon as the ground for reformation of a written instrument must be either a mutual mistake or a mistake of the party seeking reformation which was known or suspected by the other party to the agreement. Auerbach v. Healy, 174 Cal. 60, 63, 161 P. 1157. Close scrutiny of the allegations by which the pleader has set forth the facts which he asserts warrant reformation of the instruments indicates that the mistake relied upon is that there were no oil rights in the southwest quarter of section 28. There is, however, no allegation in the second cause of action that B. F. Barritt either knew or did not know of the prior reservation of the United States government, which had the effect of rendering unavailable to any subsequent purchaser oil rights in the southwest quarter of said section. For all that appears on the face of the pleading, B. F. Barritt may have known of the prior reservation and may not have known or suspected that the plaintiff was ignorant of its existence. It must be presumed that the pleader has stated the facts as favorably to himself as was possible (Silver Creek v. Hayes, 113 Cal. 142, 45 P. 191; Silvers v. Grossman, 183 Cal. 696, 697, 192 P. 534), and the pleading must be construed most strongly against the pleader (Nason v. Lingle, 143 Cal. 363, 366, 77 P. 71; Kleinclaus v. Dutard, 147 Cal. 245, 250, 81 P. 516).

[7] The demurrer to the second cause of action, in addition to being a general demurrer, also attacked the pleading on the ground that the cause of action was barred by the statute, which requires that an action based on fraud or mistake shall be brought within a period of three years after discovery of such fraud or mistake. Section 338, subd. 4, Code Civ. Proc. It appears that in sustaining the demurrer the court was of the opinion that the facts alleged in the pleading were not sufficient to establish a cause of action for reformation, and that, if they were sufficient, the cause of action was barred by the statute of limitation and by plaintiff's laches in bringing the action. In this conclusion we entertain the opinion that the court was correct. As heretofore pointed out, it is our view that the pleading is vulnerable to the attack presented by the general demurrer. However, if it be assumed that the pleading properly sets forth a cause of action for reformation based upon mistake, we think that it shows on its face that it is barred by the statute of limitations. Subdivision 4 of section 338, Code of Civil Procedure, provides that an action for relief on the ground of fraud or mistake shall be commenced within three years after the cause of action has accrued, and that the cause of action in such case shall not be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake. The allegations of the pleading show that the instruments sought to be reformed were executed in the months of November and December of the year 1920. This action was commenced on May 12, 1927. A period of approximately six years and five months intervened after the written agreement of December 15, 1920 was executed before the action seeking its reformation was commenced. It is obvious that, except for a proper showing respecting the discovery of the mistake relied upon as the ground for reformation, the cause of action would be barred. Phelps v. Grady, 168 Cal. 73, 77, 141 P. 926. The allegations of the pleading must therefore be examined for the purpose of learning what averment of discovery is therein contained.

It is alleged in the complaint that, during the time when the oral agreement was made and the deeds prepared and executed and the written agreement executed, plaintiff was not a resident of Fresno county or of Kings county, but was a resident of San Bernardino county and of the state of Nevada, and "during the times herein specified and set forth and ever since, plaintiff has been out of the state of California and in sections of the state of California other than said counties of Fresno and Kings, practically all of the time," and for a long time remained ignorant of the fact that the whole of the oil rights in the south half of section 28 had been reserved by the grantors in their deed of November 6, 1920, and in the written agreement of December 15, 1920. It is then alleged that during the latter part of the year 1923 plaintiff met one John G. McGlashan, a resident of Kings county, in Kings county, and that McGlashan suggested to plaintiff that he might be able to secure a purchaser for the lands conveyed to plaintiff by the Barritts, and at said time plaintiff and McGlashan advised of and concerning the said lands and plaintiff's rights therein, and that some time about December 1, 1924, plaintiff again met McGlashan in Kings county, and received the information from McGlashan that he did not own or have secured to him any right, title, or interest in and to one-half of the oil rights in the south half of section 28.

[8, 9] It is apparent that the only reason alleged for the failure of plaintiff to have made an earlier discovery of the fact that no oil rights in the south half of section 28 were available is that, during the four-year period which intervened between the date of the execution of the instruments sought to be reformed and the date on which plaintiff received the information from McGlashan, plaintiff was not a resident of Fresno county or Kings county, but resided either in San Bernardino county or in the state of Nevada or elsewhere in California, and that during said period he was absent from the state of California, and that he was in sections of the state other than Fresno and Kings counties "practically all of the time." The phrase "practically all of the time" is palpably vague and indefinite. Equally vague is the allegation that during the four-year period plaintiff was either outside the state or in sections of the state other than the two counties mentioned. Conceivably, during three years and eleven months of this period plaintiff may have spent all of his time in some unnamed county in California adjacent to the one of the two counties mentioned, and it is likewise conceivable that plaintiff may have been a frequent visitor to the two counties mentioned, and may have had ample opportunity to discover either from public records or otherwise that, because of the prior reservation by the United States government of all oil rights in the southwest quarter of section 28, oil rights remained only in the southeast quarter of section 28 which had been selected by B. F. Barritt as the part in which the Barritts would reserve all oil rights, which selection was alleged to have been made pursuant to the oral agreement between plaintiff and B. F. Barritt. While it is true that courts will not lightly seize upon some small circumstance to deny relief to a person plainly shown to have suffered loss through fraud or mistake (Victor Oil Co. v. Drum, 184 Cal. 226, 193 P. 243), it is equally true that a complaint seeking equitable relief on the ground of fraud or mistake which shows on its face that the fraud was perpetrated or the mistake occurred more than three years prior to the commencement of the action must contain full and complete showing of the times and circumstances under which the facts constituting the fraud or mistake were brought to plaintiff's knowledge so that the court may determine whether the discovery of the facts was within the time alleged. Lady Washington Co. v. Wood, 113 Cal. 482, 45 P. 809, 810; Bradbury v. Higginson, 167 Cal. 553, 140 P. 254; Consolidated Reservoir & Power Company v. Scarborough (Cal. Sup.) 16 P.(2d) 268; Collins v. Texas Co., 123 Cal. App. 60, 10 P.(2d) 773. As was said in Lady Washington Co. v. Wood, supra: "'Discovery' and 'knowledge' are not convertible terms, and whether there has been a 'discovery' of the facts 'constituting the fraud,' within the meaning of the statute of limitations, is a question of law to be determined by the court from the facts pleaded." The same rule is applicable to actions for relief on the ground of mistake, and the above-quoted language is apposite to the pleading under consideration. We are therefore of the opinion that, if it be assumed that the pleading alleges sufficient facts to constitute a cause of action, the court's action in sustaining the demurrer was correct, for the reason that the complaint shows on its face that the cause of action for reformation was barred by the statute of limitations.

[10] We are also of the opinion that the pleading shows on its face that the plaintiff was guilty of laches which precludes the relief sought. It is alleged that "some time about the first of December, 1924," plaintiff was informed that he did not own or have secured to him any right, title, or interest in and to one-half of the oil rights in the parcel of land conveyed to him by the deed here sought to be reformed. It also appears upon the face of the complaint that at some time subsequent to December 1, 1924, and prior to the institution of this action, B. F. Barritt died. The exact date of his death is not stated, but in paragraph VII of the second cause of action it is alleged that on May 10, 1926, B. F. Barritt, together with other named defendants, entered into a certain agreement of lease whereby the lessors granted to the lessees the exclusive right to drill for, develop, and remove petroleum from certain land located in the southeast quarter of section 28, a part of which land was located in the west half of the southeast quarter of section 28, the very land in which plaintiff

claims to be entitled to all oil rights. It is nowhere alleged that plaintiff was ignorant of the execution of this lease, and, in accordance with the familiar rule that the pleading must be construed most strongly against the pleader, we are entitled to assume that plaintiff had knowledge of the execution of the aforesaid lease. At the time of its execution, therefore, plaintiff had known of the prior reservation by the United States government of oil rights in the southwest quarter of section 28 for a period of 17 months. Nevertheless, although this lease interfered most materially with the valuable rights claimed by him on his theory that, because of mistake, the deed from R. T. Barritt and Susie F. Barritt did not conform to the oral agreement whereby he was to have one-half of the oil rights in the south half of section 28, he took no immediate action to protect these rights. On the contrary, he permitted another year to elapse before he sought the aid of a court of equity to reform the written instruments which he claims do not conform to the oral agreement which he made with B. F. Barritt. At some time during this year B. F. Barritt died.

[11] Among the most familiar maxims of equity incorporated in the Civil Code of California is the following: "Equity helps the vigilant, before those who sleep on their rights." Section 3527, Civ. Code. This fundamental principle of equitable jurisprudence is also expressed in the aphorisms that "equity abhors stale claims" and "equity will not relieve against culpable negligence or inexcusable laches." 10 Cal. Jur., p. 521. Nevertheless, in spite of equity's abhorrence of stale claims and its desire to aid the vigilant rather than the slothful, in the development of the doctrine of laches, it has become firmly established that something more than mere delay is required to sustain the claim that the remedy sought is barred. In addition to delay, it seems that it must also appear that the defendant or some other person will suffer prejudice or there must be such lapse of time that it may reasonably be assumed that such prejudice will result if the remedy is allowed. Cahill v. Superior Court, 145 Cal. 42, 78 P. 467.

[12] Among the circumstances from which it might readily appear that prejudice would result if a claim long deferred is upheld is the death of a party or of some important witness. Bell v. Hudson, 73 Cal. 285, 14 P. 791, 2 Am. St. Rep. 791; Burke v. Maguire, 154 Cal. 456, 98 P. 21; McCarthy v. McColgan, 99 Cal. App. 492, 278 P. 918. In the instant case, it appears upon the face of the complaint that plaintiff delayed assertion of his claim to the oil rights in the west half of the southeast quarter of section 28 for a period of almost 2½ years after he had been fully informed that the deed which conveyed title to the land to him did not secure to him any oil rights in the land and until after the one man with whom he alleges he made the oral agreement in accordance with which he desires to have the instrument reformed had died. B. F. Barritt was the one individual other than plaintiff who could have explained the transaction of October 20, 1920, which is the foundation of plaintiff's demand for equitable relief. An entirely unexplained delay of 2 years and 5 months after plaintiff had been informed of what he claims is a mistake, together with the additional fact appearing in the complaint that no demand for relief was made until after B. F. Barritt's death, amply justified the trial court's action in sustaining the demurrer on the ground of laches. It is well established in California that the defense of laches may be raised by demurrer. Kleinclaus v. Dutard, supra; Ewald v. Kierulff, 175 Cal. 363, 165 P. 942; Garrity v. Miller, 204 Cal. 454, 268 P. 622.

The defendant Susie F. Barritt, personally and as administratrix of the estate of R. T. Barritt, her husband, also appeals from the modified decree rendered by the court upon the conclusion of a trial of the issues raised by the first cause of action of plaintiff's complaint and the answers filed by the various defendants who appeared in the action.

As heretofore noted, the first cause of action alleged ownership in fee of the west half of the southeast quarter of section 28, township 23 south, range 19 east, M. D. B. & M., in plaintiff, that the various defendants and each of them claimed an estate or interest therein adverse to plaintiff, which was alleged to be without right. The prayer of the complaint was that it be adjudged that the defendants have no estate or interest in the land, and that plaintiff's title is good and valid. Answers to the first cause of action were filed by defendants C. W. Barritt and Phronie Barritt and by defendant Susie F. Barritt, who was sued personally and as administratrix of the estate of R. T. Barritt. The answer of C. W. Barritt and Phronie Barritt denied that the plaintiff was the owner in fee and entitled to the possession of the land described in the complaint, and contained an averment that C. W. Barritt was the owner in fee simple of an interest in the land free from all claims of plaintiff. The answer of defendant Susie F. Barritt alleged that R. T. Barritt was the husband of Susie F. Barritt; that during his lifetime he made his will devising and bequeathing to Susie F. Barritt one-half of all his real and personal property and to his daughter one-half of such property; that R. T. Barritt died on July 14, 1921; that thereafter, on December 23, 1927, Susie F. Barritt was duly appointed administratrix with the will annexed of R. T. Barritt's estate, and qualified as such administratrix; that during his lifetime, and at the time of his death, R. T. Barritt was the owner of all the oil and gas in the land described in the complaint, and that such ownership was community property of R. T. Barritt and Susie F. Barritt; that at all times since the death of R. T. Barritt Susie F. Barritt has been the owner of an undivided three-fourths of all the oil and gas in said land, subject only to the administration of the estate of her deceased husband; that defendant Susie F. Barritt, as administratrix of her husband's estate, has, at all times, subsequent to her appointment as administratrix, been entitled to the possession of all of the oil and gas in said land; and that the rights of Susie F. Barritt personally and as administratrix of her husband's estate as alleged are paramount and superior to the rights of plaintiff.

The record shows that during the trial of the action not a syllable of evidence was produced by the defendants C. W. Barritt and Phronie Barritt in support of the allegation of their answer that C. W. Barritt was the owner in fee simple of an interest in the land described in plaintiff's complaint. The record further shows that a deed conveying the south half of section 28 to plaintiff executed by R. T. Barritt and Susie F. Barritt on November 6, 1920, was admitted in evidence, and that this deed contained a specific reservation to the grantors of all oil and gas in the east half of section 28. Proof of R. T. Barritt's death and the appointment of Susie F. Barritt as administratrix of his estate was offered by the defendant Susie F. Barritt and admitted. R. T. Barritt's will was also admitted in evidence. This defendant testified to the date of her marriage with R. T. Barritt, and on her behalf a deed conveying the south half of section 28 to R. T. Barritt subsequent to such marriage was offered in evidence, but objection by plaintiff to its admission was sustained, and the instrument was rejected. The court by its modified decree adjudged that plaintiff is the owner in fee of the real property described in the first cause of action of plaintiff's complaint subject to the right, title, and interest of the defendants Susie F. Barritt, as administratrix with the will annexed of the estate of R. T. Barritt, deceased; Susie F. Barritt, Phronie Barritt, and C. W. Barritt, to the oil and gas therein, and the right to enter upon the said premises at all times to prospect or extract the same and all of the rights incident to the prospecting for and removing said oil and gas by said designated defendants.

[13] Plaintiff and defendant Susie F. Barritt, in her capacity as administratrix, and Susie F. Barritt personally complain of the modified decree thus rendered and of the findings and conclusions of law upon which the decree is based. The objection of these parties is that by the modified decree the defendants C. W. Barritt and Phronie Barritt are presented with an unsought gift of an interest in the oil rights in the land at the expense of Susie Barritt and the estate which she represents, and that a greater restriction is thereby placed on plaintiff's ownership than was claimed by the pleadings or warranted by the evidence. The objection thus presented appears to be well taken. As heretofore noted, not a syllable of evidence was produced which tended to show that C. W. Barritt and Phronie Barritt or either of them ever owned or had any right to the possession of any interest in the oil rights. The only allegation contained in the answer filed by defendants C. W. Barritt and Phronie Barritt which sets up any claim to an interest of any character in the land is contained in the second paragraph of the answer, which denies that said defendants claim an estate or interest in the land adverse to plaintiff, and avers that the defendant C. W. Barritt is the owner in fee simple of an interest in the land free from all claims of plaintiff. It is thus apparent that it is not even claimed that Phronie Barritt has an interest of any character in the land, and the vague averment that C. W. Barritt owns an indefinite, undescribed interest therein unsupported by any proof did not warrant the court in concluding that these defendants are entitled to share in the oil rights in the southeast quarter of section 28, plainly reserved to the grantors, R. T. Barritt and Susie F. Barritt, in their deed of November 6, 1920.

While, however, the plaintiff and defendants who have presented their appeals from the modified decree are in accord that the decree is erroneous for the reasons stated, they do not agree as to the mode whereby the error may be rectified. Plaintiff contends that he is entitled to a reversal of the judgment and a retrial of the action. Defendant Susie F. Barritt, both personally and in her capacity as administratrix, maintains that this court should make findings consistent with the evidence presented by the record, draw the conclusions of law which are warranted by the findings thus made, and direct the trial court to enter a decree in conformity therewith. We find ourselves impelled to agree with the position taken by the defendants.

The power of an appellate court to make findings based upon the evidence adduced before the trial court is specifically conferred by section 956a of the Code of Civil Procedure. The concluding sentence of this section declares that the statute "shall be liberally construed to the end, among others, that wherever possible causes may be finally disposed of by a single appeal and without further proceedings in the trial court, except where the interest of justice requires a new trial." We are unable to discover from the record herein that a new trial is required in the interest of justice, and the case appears to be peculiarly one where final disposition should be made on the appeals here presented without further proceedings in the trial court.

[14] It is to be remembered that we are here dealing with an action to quiet plaintiff's title to certain land in which the defendants claim a definite interest. It is well established that, in an action of this character which is brought for the purpose of determining any adverse claim that may be asserted by a defendant to the land in controversy, the object sought is not simply to ascertain, as against a plaintiff shown to have a legal interest, that the defendant has some undefined interest, but that the court shall go further and shall define and declare the interest held by the defendant, if any, so that the plaintiff shall have a decree adjudicating the extent of his interest in the property in controversy and the defendant's estate or interest in the land shall likewise be settled and determined by the judgment. Peterson v. Gibbs, 147 Cal. 1, 81 P. 121, 109 Am. St. Rep. 107; Title Insurance Company v. Miller & Lux, 183 Cal. 71, 88, 190 P. 433; Pitcairn v. Harkness, 10 Cal. App. 295, 101 P. 809; White v. McManus, 69 Cal. App. 50, 51, 230 P. 472; Hurt v. Pico Investment Co. (Cal. App.) 15 P.(2d) 203.

In conformity with the above-stated rule, it becomes proper to inquire what interest or estate in the land in controversy is shown by the evidence adduced to have been established in the defendants Susie F. Barritt as administratrix and Susie F. Barritt personally.

[15, 16] As heretofore stated, during the trial of the action there was offered in evidence and marked for identification a deed executed on March 4, 1918, conveying to R. T. Barritt the south half of section 28. The offer was refused and the deed rejected. It is our opinion that the deed should have been received in evidence and that the court erred in rejecting it. Had the instrument been admitted, it would have established that the land conveyed thereby, together with the oil rights appurtenant thereto, was community property of R. T. Barritt and Susie F. Barritt. The reservation of oil rights by R. T. Barritt and Susie F. Barritt preserved the ownership of such rights as community property. Since this ownership was community property only, an undivided one-half of such oil rights was subject to testamentary disposition by R. T. Barritt. By his will of June 11, 1921, R. T. Barritt devised and bequeathed to Susie F. Barritt an undivided one-half of all property which he owned. By the will, therefore, Susie F. Barritt acquired an additional one-fourth in the oil rights subject only to the administration of the estate of R. T. Barritt, deceased. The estate of R. T. Barritt, and Susie F. Barritt as administratrix thereof, is shown by the aforementioned evidence to be entitled to possession of an undivided one-half of the oil and gas in the land.

This court therefore makes the following findings to take the place of the findings heretofore made by the trial court:

"(1) That each and all the allegations of paragraph I of the first cause of action in the third amended complaint are true.

"(2) Plaintiff is the owner in fee and entitled to the possession of that certain parcel of land situate in the county of Kings, state of California, and described as follows, to wit:

"The west one half (W½) of the southeast one-quarter (SE¼) of section 28, township 23 south, range 19 east, M. D. B. & M., except the oil and gas therein; subject to the rights of the defendants Susie F. Barritt and Susie F. Barritt as administratrix with the will annexed of the estate of R. T. Barritt, deceased, as hereinafter found and specified.

"(3) That during his lifetime and at the time of his death R. T. Barritt was the owner and entitled to the possession of all of the oil and gas in that certain real property situate in the county of Kings, state of California, described as follows, to wit:

"The west one half of the southeast one quarter (W½ of SE¼) of section 28, township 23 south, range 19 east, M. D. B. & M., together with the right to enter upon said real property at all times to prospect for and extract the said oil and gas therefrom, and all of the rights incident to the prospecting for and removing of said oil and gas.

"(4) That each and all the allegations in paragraphs I, II, and IV of the answer of the defendants Susie F. Barritt and Susie F. Barritt as administratrix to the first cause of action in the third amended complaint are true.

"(5) As against the plaintiff, the defendant Susie F. Barritt as administratrix with the will annexed of the estate of R. T. Barritt, deceased, has been at all times since the 23rd day of December, 1927, and now is entitled to the possession of all of the oil and gas in the west half of the southeast quarter of section 28, township 23 south, range 19 east, M. D. B. & M., together with the right to enter upon said land at all times to prospect for and extract said oil and gas and all of the rights incident to the prospecting for the removing of said oil and gas.

"(6) As against the plaintiff, the defendant Susie F. Barritt is the owner and entitled to the possession of an undivided three-fourths of all of the oil and gas in the west half of the southeast quarter of section 28, township 23 south, range 19 east, M. D. B. & M., together with the right to enter upon said land at all times to prospect for and extract said oil and gas and all of the rights incident to the prospecting for and removing of said oil and gas, subject only to the administration of the estate of R. T. Barritt, deceased.

"(7) The defendants Belle A. Herrick, as the administratrix with the will annexed of the estate of B. F. Barritt, deceased, Belle A. Herrick, C. W. Barritt, Phronie Barritt, William Gilbert, D. Ogden, and Nathaniel Akst have not, nor has any of them any right, title, claim, or interest in or to said real property or any part or portion thereof, or any of the oil or gas therein, as against the plaintiff."

From the findings thus made this court draws the following conclusions of law, which are to replace the conclusions of law heretofore drawn by the trial court:

"As conclusions of law from the foregoing facts the court finds that a judgment and decree should be entered in this action ordering, adjudging and decreeing that:

"(1) Plaintiff is the owner in fee of all of the real property described in the first cause of action in said third amended complaint and in the foregoing findings of fact, except the oil and gas therein, subject to the right, title and interest of the defendants Susie F. Barritt and Susie F. Barritt as administratrix with the will annexed of the estate of R. T. Barritt, deceased, as hereinafter specified.

"(2) That the plaintiff has no right, title or interest in or to any of the oil or gas in said real property as against the defendants Susie F. Barritt and Susie F. Barritt as administratrix with the will annexed of the estate of R. T. Barritt, deceased.

"(3) That as against the plaintiff the defendant Susie F. Barritt as administratrix with the will annexed of the estate of R. T. Barritt, deceased, is entitled to possession of all of the oil and gas in said real property, together with the right to enter upon said real property at all times to prospect for and extract the oil and gas therefrom and all of the rights incident to the prospecting for and removing of said oil and gas.

"(4) That as against the plaintiff the defendant Susie F. Barritt is the owner of an undivided three-fourths of all of the oil and gas in said real property, together with the right to enter upon said real property at all times to prospect for and extract the said oil and gas therefrom and all of the rights incident to the prospecting for and removing of said oil and gas, subject only to the administration of the estate of R. T. Barritt, deceased.

"(5) That the defendants C. W. Barritt, Phronie Barritt, Belle A. Herrick and Belle A. Herrick as administratrix with the will annexed of the estate of B. F. Barritt, deceased, William Gilbert, D. Ogden, and Nathaniel Akst have not, nor has any of them, any right, title or interest in or to said real property or any portion thereof, or in or to the oil or gas therein, as against the plaintiff."

For the reasons herein set forth, the modified decree from which these appeals have been taken is reversed, and the trial court is directed to enter its decree in conformity with the findings of fact and conclusions of law hereinabove set forth.

We concur: BARNARD, P. J.; MARKS, J.

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130 Cal.App. 760

PEOPLE v. WILSON.

Cr. 2302.

District Court of Appeal, Second District, Division 2, California.

April 3, 1933.

1. False pretenses 🔑49(1).

Evidence that defendant, selling interest in business of painting awnings, misrepresented daily earnings and cost of materials, and that he had secret formula, supported grand theft conviction (Civ. Code, § 1572, subd. 4).

2. Criminal law 🔑938(1).

Denying new trial *held* not error; newly discovered evidence not changing decision, and no diligence being shown.

Appeal from Superior Court, Los Angeles County; W. T. O'Donnell, Judge.

William C. Wilson was convicted of grand theft, and he appeals.

Affirmed.

Donald MacKay, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Alberta Belford, Deputy Atty. Gen., for the People.

ARCHBALD, Justice pro tem.

A jury having been waived by him, defendant was tried by the court on an information charging grand theft. From a judgment of conviction and from an order denying his motion for a new trial he has appealed.

[1] It is contended that the evidence is insufficient to sustain the judgment in that there was no evidence showing (1) an intent to defraud, (2) the perpetration of an actual fraud, (3) any material false representation made to the complaining witness, (4) that the money was obtained by any false pretenses inducing the owner to part therewith; and, further, that the complaining witness made

an independent investigation of his own and did not rely on any representations made by appellant.

A. S. Vaughan, the complaining witness, a man seventy years of age and unemployed, testified that in answering an advertisement to the effect that a man could make from six to seven dollars a day painting awnings he went to the office of one Dietz, a broker on Hollywood boulevard, Los Angeles, where he met appellant, who arranged to go to Vaughan's home the next evening to talk things over; that appellant came to his home one evening thereafter and said he was making from eight to fifteen dollars a day painting awnings, that he had more work than he could do in Los Angeles and wanted to sell Vaughan an interest in his business, to conduct the same at Long Beach, that he had worked three years developing a secret formula for the waterproofing and painting of awnings, and that he would teach the witness all the secrets of the mixture and how to mix and apply the solution, that there was big profit in the work and that the materials did not cost over 6 or 7 per cent. of the job done, that Vaughan would soon make back the money he put in, and that any time the latter was not satisfied "that he would take me out with a profit." Wilson asked Vaughan $600 for a one-third interest at first, but later offered to take $500 for it, saying that one Moffitt had paid him $600 for an interest and that he would have to give him back $100 if he sold for that. He finally agreed to take $300 from Vaughan, the balance of $200 to be paid out of the business. Vaughan delivered his check for $250 at the time the agreement was consummated, and later appellant consented to take $45 in payment of the $50 still due on the $300, which $45 Vaughan also paid by check, receiving in return therefor appellant's receipt for $50.

The work in Long Beach started a short time after the contract was executed, with Vaughan, Wilson, and apparently Moffitt as partners. Moffitt showed Vaughan how to apply the mixture, but the latter testified that neither Moffitt (who seemed to know how to mix the solution) nor Wilson ever taught him "all of the secrets of the mixture" used, or in fact any of them. According to Vaughan, the three worked together for a time and then one day Wilson brought a man named Tabler to him, telling him that Tabler was his (Vaughan's) "partner now." Vaughan saw no more of Wilson thereafter, and Moffitt likewise apparently left him. The complaining witness testified that he did not get any money after Tabler came in; that all the work they did was to finish a job they had started before. After Tabler quit a man named McElfish, who roomed in the same home with Wilson at Long Beach and who was given a copy of a supposed formula by Wilson similar to a copy handed by appellant to Vaughan, presented himself and apparently suggested to Vaughan that if they could get any work to do that they do it. Vaughan had previously sewed up an awning and he then got the job of painting it. McElfish mixed the solution and the two did that one job together. Apparently that was the finish of the business. Vaughan testified that he stayed with it about three months and a half, and that during all that time there was taken in the sum of $110, of which he was given $55 by Wilson, but from which he had to deduct the sum of $28.74, paid by him for materials and garage rent. The testimony of two men, Adams and Freeman, who met Wilson in the same way Vaughan did and to both of whom practically the same representations were made and to neither of whom were any secrets of the mixture explained, was introduced to show intent and a plan and system of carrying it into effect. Adams was a partner of Wilson in Los Angeles at the time the latter made the representations as to his earnings from the enterprise, and was working on a job at Grauman's Chinese Theater in Los Angeles when Wilson took Vaughan and his wife there to show them the kind of work he was doing. According to Adams the contract price of the job was $200 and there were four of them working on it, including Wilson and Moffitt. He testified that the job took three weeks and that his share of the earnings was $22 cash and advances amounting to $8 that Wilson had made to him from time to time to pay for carfare and lunches while he was working. This last evidence was stricken by the trial court as immaterial, for some unaccountable reason, as it would seem to be very material on the question of Wilson's earnings at the time. The latter could not possibly have been making from $8 to $15 per day, as he represented, if a man who had a third interest in his business was making less than $1.70 per day at the same time.

A witness named Newmarch was presented by defendant, who testified that he bought an interest in Wilson's business in Los Angeles for $500 and kept it until trouble with his knee compelled him to stop, when Wilson bought back the interest for $250. He testified that there were several formulas, but that they all amounted to practically the same thing; that Wilson did not give him any formulas, but that being an engineer he did not need one, as after he had worked with Wilson and mixed the solution once or twice he had no use for it; that the proportion varied with the materials used and the nature of the material to which it was applied. He identified a formula introduced as Exhibit 10, which he said was the general formula and used on nine-tenths of the work, and which differed somewhat in the proportions used as well as in one ingredient from the copy of the formula given McElfish and Vaughan by Wilson. Neither one would appear on its face to be anything that appellant worked on for three years to develop, as the waterproofing element contained therein consisted of Oronite Waterproofing Compound, which was undoubtedly developed in the laboratories of one of our large oil companies. Both formulas, however, would require some instruction concerning the mixing of the solution before a person who was not a painter could use them.

It appears from the evidence also that in addition to Vaughan there were some ten or more individuals who had interests at different times with Wilson in the business, three of them, including Vaughan, getting in because of the same representations as those made to the complaining witness. It also appears from appellant's testimony that all of these supposed partners were given the secret of the solution and that they were free to use it anywhere and at any time. The court might well have concluded that there was nothing very valuable about the supposed secret formula, both from the nature of the contents of the mixture and the fact that McElfish was given one by Wilson, as well as from the fact that all of the supposed partners were let into the mystery of the solution without any restrictions on them. It would also seem to be a reasonable conclusion that the representation that there was big money in the business by reason of the expenses being only 6 to 7 per cent. of what was taken in on a job was not true, as the percentage shown by the evidence of Vaughan, assuming that he bought all the materials, as compared with what was taken in during the time Wilson was with him, was nearly 25. Appellant urges that such a representation is not one of fact, inasmuch as the business was not established in Long Beach and it would be impossible to tell what could be done in the way of building it up. That would undoubtedly be true so far as the volume of business is concerned, but we think the representation is shown to be false, and must have been made well knowing it could not be true, as the evidence of the plaintiff shows that, taking the respective jobs completed under the leadership and direction of Wilson, the net returns were a mere pittance for the time each partner put in on each job; so that even had they been busy all the time there could not have been "big money" in it, and Vaughan could never have accumulated enough to pay back what he put into the business, or hoped for anything more than an extremely scant living. The same is true also as to the representation that appellant was making in Los Angeles from $8 to $15 per day, even without the material evidence stricken. There is nothing in the evidence to show that so far as the jobs actually done in Long Beach are concerned they were not taken on the same contract basis as in Los Angeles. That was entirely in Wilson's hands, and it is to be presumed that on each job the margin of profit would be the same in Long Beach as in Los Angeles. As $8 per day, the minimum for each, the total daily earnings of the three so-called partners would have to be $24. The evidence given by Vaughan shows that the total taken in was $110, with at the very least $28.74 expense, or $81.26 net, which would make less than three and one-half days' work for the partnership. The evidence of Vaughan shows that they had some thirteen jobs from which such return was obtained and that they worked on one job four days and another three. The evidence does not specify the time put in on the other eleven, but some must have been consumed. The only chance that appellant could have to earn the money which he represented he was getting from the business would seem to have been through the selling of interests in the partnership, which, of course, he did not tell Vaughan. The representations made to and relied on by the latter were not opinions of what would happen in the future, except as to the promise to take him out "at a profit" if he were not satisfied. As to that the court might well conclude from evidence introduced that it was a promise made without any intention of performance (section 1572, subd. 4, Civ. Code); and as to any of the representations not in writing there would seem to be evidence of at least one or more persons as well as corroborating circumstances.

We find no evidence of any independent investigation by Vaughan before going into the business, and it is apparent that he went in relying on the truth of what Wilson had told him concerning it.

[2] Nor do we think there was any error in denying appellant's motion for a new trial. If the receipt signed by Vaughan, which appellant's affidavit states he found after the termination of the trial, had been introduced in evidence we fail to see how it would have changed the decision. The affidavit of McElfish was to the effect that he bought a truck, some brushes, paints, etc., from Vaughan for "$1.00 and other consideration." Vaughan had previously testified that he did not have possession of a truck at any time. It appears from the evidence that McElfish and Vaughan roomed at the same home in Long Beach, and Vaughan's testimony concerning McElfish came out on the first day of the trial, July 22d. On that day the trial was continued to August 9th and the case was closed August 19th. Wilson must have known at all times whether or not he left a truck in the possession of Vaughan, and under the circumstances no diligence is shown or McElfish could have been produced at the trial. It is noteworthy, however, that the witness Adams testified to using a truck in the Los Angeles business after Wilson left, but that it got to the point where it wouldn't

run and was left at the home of Wilson's father, where it was kept.

Judgment and order affirmed.

We concur: WORKS, P. J.; STEPHENS, J.

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130 Cal.App. 655

KARSEY et ux. v. CITY AND COUNTY OF SAN FRANCISCO et al.

Civ. 8712.

District Court of Appeal, First District, Division 2, California.

March 29, 1933.

1. Carriers 🔑320(19).

Whether street car motorman was negligent in making unusual and violent stop by "slugging" car, which broke passenger's hold on door handle and threw her to floor, *held* for jury under res ipsa loquitur doctrine (Civ. Code, § 2100).

2. Negligence 🔑136(12).

Whether defendant has made showing required to rebut prima facie case made under res ipsa loquitur doctrine is ordinarily for jury.

3. Negligence 🔑136(12).

Where plaintiff has made prima facie showing under res ipsa loquitur doctrine, and evidence produced by way of explanation, though uncontradicted, is such that reasonable minds might draw different conclusions as to whether defendant was negligent, question is for jury.

4. Carriers 🔑320(19).

In action by passenger injured when thrown to floor when street car made unusual and violent stop, whether, notwithstanding defendant's explanation, motorman exercised required care, *held* for jury under evidence (Civ. Code, § 2100).

5. Carriers 🔑347(6).

Under evidence, it could not be said as matter of law that passenger remaining on feet for two blocks after boarding street car and violently thrown to floor when car made unusual and violent stop was contributorily negligent; hence directed verdict for defendant was erroneous.

Evidence for plaintiff disclosed that, after entering closed portion of car, and while plaintiff was holding door handle in act of closing door, motorman "slugged" car, bringing it to sudden stop, thereby breaking plaintiff's hold on door handle and throwing her violently to floor and causing injuries, and contention that plaintiff was guilty of contributory negligence as matter of law was based on fact that she had remained on her feet for two blocks after boarding street car, and on claim that she assumed risk of sudden stop.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Richard Karsey and wife against the City and County of San Francisco and another. From a judgment on a directed verdict in favor of defendants, plaintiffs appeal.

Reversed.

Hubbard & Hubbard, of San Francisco, for appellants.

John J. O'Toole, City Atty., and Henry Heidelberg, Deputy City Atty., both of San Francisco (John R. Golden, of San Francisco, of counsel), for respondents.

SPENCE, Acting Presiding Justice.

Plaintiffs brought this action against the city and county of San Francisco and L. E. Boynton, its motorman, to recover damages arising out of personal injuries sustained by plaintiff Josephine Karsey, while riding as a passenger on a Municipal Street Railway car. The cause was tried by the court sitting with a jury. Upon motion of defendants made at the close of the testimony, the trial court directed the jury to return a verdict in favor of defendants. From the judgment entered upon said directed verdict, plaintiffs appeal.

Plaintiff Josephine Karsey boarded an eastbound car on Geary street at Octavia, and said car again started on its way. After paying her fare, said plaintiff proceeded through the rear open portion of the car and opened the door for the purpose of entering the closed portion thereof. After entering, and while plaintiff was holding the door handle in the act of closing the door, the motorman "slugged" the car, bringing it to a sudden stop, thereby breaking plaintiff's hold on the door handle, throwing her violently to the floor, and causing the injuries. There is no dispute concerning the manner in which the car was stopped. Both the motorman and conductor testified that the car was "slugged." When asked how the "slug" took that day, the motorman stated that, "It took very good," and further stated that the car stopped in about 8 feet. The car came to a stop in the intersection of Geary and Franklin streets. An inspector was called as a witness by defendants, and he testified that a "slug" is the quickest way to stop a car. He explained the manner in which the "slug" is accomplished through the use of the reverse lever. He further stated that "slugging" a car causes it to stop "pretty abruptly." Counsel for defendants stated that Franklin street is about 39 feet wide from curb to curb and then asked the inspector whether the stop would be unusually violent if the "slug" was applied at the curb line while the car was going 10 miles per hour and the stop was made at the center of the intersection. The inspector answered, "Not unusually violent, no." It will be noted that the motorman testified that the stop was made in about 8 feet while the last-mentioned testimony of the inspector involved a stop made in about 19½ feet. It therefore appears that the stop made by the car was not the ordinary sudden stop sometimes made by means of the application of air brakes, but was an unusual and violent stop made by means of "slugging."

The only eyewitnesses produced upon the trial were plaintiff Josephine Karsey, the defendant motorman, and the conductor. Plaintiffs rested after introducing testimony showing that plaintiff Josephine Karsey, while riding as a fare-paying passenger, was thrown to the floor and was injured by the sudden stopping of the car as above described. Defendants then introduced testimony in an attempt to explain the unusual and violent stop which was made. This testimony was offered to show that the stop was made in the manner described in order to avoid a collision with a Ford automobile which was proceeding in a southerly direction along Franklin street.

[1] Appellants contend that the trial court erred in directing a verdict in favor of respondents, and in our opinion this contention must be sustained. In support of the action of the trial court, respondents argue that the doctrine of res ipsa loquitur is inapplicable to the facts in the present case. This argument is based upon the assumption that the stop was one of the usual types of more or less sudden stops which are made by street cars every day. This assumption is not warranted by the evidence, which shows that the stop was both unusual and violent. Even the inspector, whose testimony was directed to a stop made in 19½ feet rather than a stop made in 8 feet, went no further than to describe a stop made in that distance by means of "slugging" as not "unusually violent." It may be inferred from said testimony offered by respondents that a stop made in 19½ feet would be both unusual and violent, although not necessarily "unusually violent," and there can be no doubt as to the nature of the stop in question, which was made in less than half that distance. Whatever conflict of authority exists regarding the applicability of the doctrine of res ipsa loquitur to cases involving the usual jolts and jerks ordinarily incident to the operation of street railway cars, the great weight of authority supports the view that the doctrine is applicable when the jolt or jerk may be said to be unusual or violent. See numerous authorities cited in the following notes: 7 L. R. A. (N. S.) 1076; 13 L. R. A. (N. S.) 601; 29 L. R. A. (N. S.) 808; L. R. A. 1916C, 364. See, also, 4 Cal. Jur. 980, and following and cases cited. The distinction between the two classes of cases is referred to in many of the authorities cited and relied upon by respondents herein. Partelow v. Newton & B. St. Ry. Co., 196 Mass. 24, 81 N. E. 894; Kentucky Traction & Terminal Company v. Peel, 185 Ky. 207, 214 S. W. 874; Ottinger v. Detroit United Railway, 166 Mich. 106, 131 N. W. 528, 34 L. R. A. (N. S.) 225; Vincent v. New Orleans Railway & Light Company, 134 La. 654, 64 So. 654; Boston Elevated Railway Company v. Smith (C. C. A.) 168 F. 628, 23 L. R. A. (N. S.) 890; Ewing v. Wichita R. & Light Co., 91 Kan. 388, 137 P. 940. We are therefore of the opinion that the doctrine of res ipsa loquitur was applicable in the present case.

[2-4] Respondents further argue that, even conceding that doctrine to be applicable, it merely placed upon defendants the burden of going forward with evidence in explanation of their conduct and "having explained their conduct, the defendants have done all required of them by the doctrine." Thereupon respondents apparently draw the conclusion that a directed verdict in their favor was proper, stating that "there is nowhere to be found a case holding that the presence of the doctrine prevents a directed verdict." We are not called upon to decide the question of whether a directed verdict in favor of a defendant should ever be granted in a case where the plaintiff has made out a prima facie case under the doctrine referred to. There is no doubt, however, that the question of whether a defendant has made the showing required to rebut such prima facie case (Scarborough v. Urgo, 191 Cal. 341, 216 P. 584; 19 Cal. Jur. 719) is ordinarily one for the jury. Lauder v. Currier, 3 Cal. App. 28, 84 P. 217; 10 C. J. 1069 and cases cited. And it is clearly a question for the jury where the evidence produced by way of explanation, even though uncontradicted, is such that reasonable minds might draw different conclusions as to whether or not such evidence shows negligence on the part of the defendant. 19 Cal. Jur. 726. In the present case the respondent motorman testified that he knew that Franklin street was "a very dangerous street" with heavy traffic thereon; that he was going down a slight grade at about ten miles per hour as he entered the intersection; that he saw the Ford automobile when the front end of the street car was just about even with the westerly property line on Franklin street; that the Ford was traveling at about 20 to 25 miles per hour; that he had plenty of time to stop the

street car before he went into the intersection; but that he nevertheless proceeded without stopping and intended to go through the intersection ahead of the Ford, although he knew that, if the Ford continued without stopping, a collision would occur. His testimony was somewhat ambiguous and inconsistent regarding the position of the Ford with relation to certain fixed objects when he first saw it, but he definitely stated that the Ford traveled about 30 feet from the time he first saw it until it passed in front of the street car. There is no evidence that the Ford decreased its speed or showed any sign of stopping at any time, but, on the contrary, the motorman testified that it increased its speed and swung to the left in passing in front of the street car. The jury could have accepted the motorman's testimony as to speeds and distances and could have concluded that he used poor judgment in attempting to cross the intersection ahead of the Ford, which he had seen traveling at from 20 to 25 miles per hour at a distance of 30 feet from the track; or, on the other hand, the jury could have rejected as improbable the estimate of the speed at which the street car entered this "dangerous" intersection and concluded that the speed was too great, thereby necessitating a stop by "slugging" as soon as the Ford was first seen by the motorman. In either case the jury could have properly concluded that, even though the driver of the Ford may have been negligent, the motorman failed to exercise the "utmost care and diligence" for the safety of his passengers as he was required to do. Civ. Code, § 2100; Forsythe v. Los Angeles Railway Company, 149 Cal. 569, 87 P. 24; Dorr v. Lehigh Valley Railway Co., 211 N. Y. 369, 105 N. E. 652, L. R. A. 1915D, 368, Ann. Cas. 1915C, 763; Fetherstone v. Cleveland R. Co., 32 Ohio App. 93, 167 N. E. 606; Adelsperger v. City of Detroit, 248 Mich. 399, 227 N. W. 694.

[5] Respondents further contend that appellant Josephine Karsey was "clearly guilty of contributory negligence." We find no merit in this contention. It is based upon the fact that the injured woman had remained on her feet for two blocks after boarding the street car and upon the claim that she assumed "the risks of sudden stops, etc., which are ordinary incidents of transportation by street cars." We know of no rule of law which compels a passenger at her peril to take a seat within any fixed distance after boarding a street car nor which compels a standing passenger to assume the risk of an unusual and violent stop such as was made in the present case. Reviewing the record, we doubt whether there is any evidence tending to show contributory negligence on the part of the injured woman, but it is certain that it cannot be said that she was chargeable with contributory negligence as a matter of law.

From what has been said it follows that the trial court should not have directed a verdict in favor of respondents and that the cause should have been submitted to the jury under appropriate instructions.

The judgment is reversed.

We concur: STURTEVANT, J.; GOODELL, Justice pro tem.

PEOPLE v. DAY.*

Cr. 2308.

District Court of Appeal, Second District, Division 1, California.

March 29, 1933.

Hearing Granted by Supreme Court April 27, 1933.

1. Criminal law ⚷543(2).

Facts *held* not to show due diligence by district attorney in attempting to ascertain whether prosecuting witness could be found within state, rendering admission of testimony given at preliminary examination of defendant erroneous (Pen. Code, § 686).

> Facts disclosed that district attorney's investigations in question respecting whereabouts of witness were not commenced until day after trial had begun; that witness had resided at Long Beach and had written from San Diego to district attorney and judge who presided at former trial that she would not testify; and that inquiries were made of witness' landlady, of some person who lived "next door," at postoffice and at police headquarters in cities of Long Beach and San Diego, at office of sheriff, and on board a boat to which husband of witness was attached as an enlisted man, where it was learned that he was away on vacation; and on question of admissibility of testimony, it appeared further that immediately preceding date when prosecuting witness gave testimony at preliminary examination she had been detained in a hotel and held incommunicado for five months, although not under legal arrest, by district attorney and his detectives.

2. Criminal law ⚷543(2).

To render admissible testimony given against defendant at preliminary examination, search for absent witness should be timely and thorough (Pen. Code, § 686).

3. Criminal law ⚷1169(1).

In prosecution for contributing to delinquency of minor, erroneous admission of pros-

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⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 27 P.2d 909.

ecuting witness' testimony given at preliminary examination *held* ground for reversal, where such testimony was only evidence in proof of guilt (Pen. Code, § 686).

Appeal from Superior Court, Los Angeles County; B. Rey Schauer, Judge.

Olive Clark Day was convicted of contributing to the delinquency of a minor, and she appeals.

Reversed.

See, also, 13 P.(2d) 855.

Lorrin Andrews and Edward Moran, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and William F. Cleary, Deputy Atty. Gen., for the People.

HOUSER, Justice.

This appeal is from a judgment rendered in pursuance of a verdict of "guilty" of the offense of contributing to the delinquency of a minor, and from an order by which the motion of defendant for a new trial was denied.

The principal point presented by appellant as a reason for the reversal of the judgment and the order relates to an alleged error committed by the trial court in that by its order, over the objection of defendant, in the absence of the prosecuting witness from the trial, the testimony given by said witness at the preliminary examination before the committing magistrate was permitted to be read in evidence.

Section 686 of the Penal Code is the source of authority relied upon for the ruling made by the trial court. As far as is here material, in effect the provision is that when it has been "satisfactorily shown to the court" that a witness who testified at the preliminary examination of the defendant "cannot with due diligence be found within the state, * * * the deposition of such witness may be read."

In order that a better understanding may be had of the situation with which the trial court was confronted, it becomes necessary to narrate some of the history of the case:

The action against defendant has been twice tried. At the first trial, although the prosecuting witness had been regularly subpœnaed by the prosecution to appear as a witness, she failed to be present or to testify at said time. On it being "satisfactorily shown to the court" that theretofore the witness had repeatedly declared that she would not testify on the trial of the action; that her husband would divorce her if she did become a witness in the case; and that deliberately, and solely for the purpose of preventing her testimony from being taken, she intentionally had left the jurisdiction of the court, the deposition which she had given at the preliminary examination of defendant was permitted to be read in evidence. At the same time evidence was introduced from which it was made to appear that theretofore, on the trial of another action in which the evidence therein adduced was closely related to that in the instant action, and in which other action the prosecuting witness was the prosecuting witness herein, on the advice of counsel the said witness refused to testify on the ground that her testimony was privileged, etc.

Preceding the second trial of the instant action, to wit, on September 8, 1932, by order made by the superior court, the cause was set for trial on the 14th day of October of the same year. At the time said order was made, in open court counsel for defendant made the statement that he had been informed by a representative of the office of the district attorney that the prosecuting witness was then within the jurisdiction of the court; that "in view of all the testimony which had been produced in the former case" counsel for defendant "was satisfied she would make another attempt to escape from the jurisdiction"; that counsel for defendant "considered it would be unfair to the defendant" if the prosecuting witness "disappeared again," and that the prosecution should thereupon "read the transcript" of the testimony given by the prosecuting witness at the said preliminary examination of defendant; and in effect suggested the propriety of the district attorney instituting the proceedings provided by sections 879, 881, and 882 of the Penal Code, which relate to the security to be given for the appearance of a witness, his commitment to jail on his refusal to give such security, or his "conditional examination" as a witness. The evidence further shows that four days after the date when the cause had been set for trial, to wit, on September 12th, the prosecuting witness was actually served with a subpœna to appear at the trial to be commenced on October 14th; that on September 27th, as related by "a member of the detective department of the district attorney's office," the following conversation occurred between the said detective and the prosecuting witness, to wit: "I asked her if she was ready to come into court and testify in this case, and she said yes, she guessed she was. And I asked her if there would be any doubt about her being here, and she said no, that she would be here, and I said, 'Of course, you know you have been subpœnaed, and you are expected to be there in court,' and she said, 'Yes, I realize that.'"

At a time three days before the trial was scheduled to commence, to wit, on October 11, 1932, the deputy district attorney in charge of the prosecution, received from the prosecuting witness a letter of date October 10th, a copy of which being as follows: "I am writing to remind you that some months ago my husband told you that he did not wish me to testify or have any more publicity in connection with the case. I want you to understand that I absolutely will not go on the stand and be forced by you to testify regarding facts which will further degrade my character. I have also written the judge and explained to him why I do not wish to testify in this case."

On the same day, the judge of the superior court before whom the first trial of defendant had taken place, also received a letter from the prosecuting witness of which the following is a copy: "I am writing this letter to tell you that I am going away and will not be able to appear in court to testify in the Olive Clark Day case. The reason for this, as I have told the District Attorney's office before, is because I have now been married for over a year and am trying to live a clean and decent life. I do not intend to be forced into making statements which the District Attorney's office have insisted that I make, because I do not wish any publicity that would further degrade my character."

[1] As hereinbefore has been stated, the cause was set for trial on October 14th, which fell on a Friday. Notwithstanding full knowledge of all the foregoing facts by the district attorney, other than the service upon her of a subpœna directing her to attend the trial of the action, and having the conversation to which reference has been had, nothing was done by the district attorney either in the way of compelling the prosecuting witness to give bond for her appearance as a witness, or, on her refusal to give such bond, her commitment to jail, or "the conditional examination" of the prosecuting witness in accordance with the provisions of the statutes to which reference hereinbefore has been had.

On Friday, the 14th day of October, after a jury had been sworn to try the cause, and it then and there appearing that the prosecuting witness was not in attendance at the trial, the prosecution offered to read in evidence the deposition of the prosecuting witness given by her at the preliminary examination of defendant, to which offer defendant objected on the ground that the statutory requirement of "due diligence" had not been shown. At the request of the deputy district attorney in charge of the prosecution, by order of the trial judge a bench warrant was then issued for the arrest of the missing witness. Before reaching a decision with reference to the question of the admissibility of such proffered evidence, an adjournment of the trial was ordered until the following Monday morning, at which latter date testimony was received by the trial court to the effect that following said adjournment of court, to wit, on the preceding Saturday, inquiries regarding the whereabouts of the prosecuting witness had been made by representatives of the office of the district attorney, both at Long Beach, which was her place of residence, and at San Diego, at which place each of the letters respectively to which reference hereinbefore has been had apparently had been written and mailed; and from such inquiries it appeared that the husband of the prosecuting witness, who was an enlisted man in the United States navy, had secured a 30-day furlough; that about one week before the date when the action was set for trial he and the prosecuting witness had left their place of residence in Long Beach, had taken their radio and automobile with them, and had left no forwarding address; also that inquiries had been made at dance halls in the city of San Diego, which were frequented by sailors, and that no trace of them was found. Furthermore, that inquiries were also made at the United States postoffice at San Diego and no clue as to their whereabouts was learned. It also appears that information regarding the whereabouts of the prosecuting witness was casually sought from the respective headquarters of the police and at the postoffice in each of the cities of Long Beach and San Diego; also at the office of the sheriff of the county of Los Angeles.

In addition to the foregoing, and forming a part of the evidence submitted to the trial court on the question of the admissibility of the testimony given by the prosecuting witness at the preliminary examination of defendant, it should be noted that immediately preceding the date when the prosecuting witness gave such testimony, by order of the district attorney and by his detectives or "investigators," she had been detained as a witness and continuously held "incommunicado" for a period of five months in a hotel in the city of Los Angeles.

It may be assumed that ordinarily a determination of the question of whether a witness "cannot with due diligence be found within the state" rests within the discretion of the trial court. 8 Cal. Jur. 131; 1928 Supp. to Cal. Jur. 608; People v. Hayes, 72 Cal. App. 292, 305, 237 P. 390, and authorities there cited. It also may be conceded that solely for the purpose of procuring the attendance of the witness at the trial of the action, the service of a subpœna upon the witness on September 12th, which was about one month prior to the date when the action was set for trial, together with the fact that at a later date, to wit, on September 27th, the witness at least tentatively assured the representative of the district attorney's office that she expected to be present at the trial and thereat to testify as a witness, constituted some evidence of good faith, if not of diligence. In the case of People v. Flannery, 3 Cal. App. 41, 84 P. 461, it is held: "The fact that the prosecution, at the time of the examination, knew the witness would be absent at the time of the trial, and failed to request the magistrate to order him to be put under bonds to secure his appearance, * * * was not a failure to exercise 'due diligence' to produce the witness, and does not render his deposition inadmissible at the trial." But that is not the question here under consideration. The question here involved is whether the other acts, inquiries, or investigations of the district attorney, not commenced until the day after the trial of the action had actually begun, were such as to show that "due diligence" was exercised by the district attorney in his attempt to ascertain whether the witness could be found "within the state."

As hereinbefore has been stated, on September 12th, which was about one month preceding the date set for the commencement of the trial, the witness actually was served with a subpœna, and later, to wit, on September 27th, which date preceded the trial date by seventeen days, as appeared from the testimony of the "investigators" who interviewed the witness, she still was "found" within the state; also, by still later evidence it was shown that as late as one week before the date of the trial she was residing at Long Beach; and finally, the two letters to which attention has been directed indicate that four days preceding the date when the trial was commenced the witness was in San Diego. But each and all of those facts constituted evidence of her presence within the state, and not either that she was without the state, or that she could not "with due diligence be found within the state." So that, as far as the real question here under consideration is concerned, far from establishing the point that the witness could not be found within the state, the evidence tends to prove quite to the contrary. On the other hand, considering the area and the population of the state, and in that connection, the possibilities in general, the efforts put forth by the district attorney on the day following the commencement of the trial, as hereinbefore set forth, were rather indifferent. Inquiries were made of the "landlady" of the witness, of some person who lived "next door," at the post-office, and at police headquarters in each of the cities of Long Beach and San Diego, at the office of the sheriff, and finally on board a boat to which the husband of the witness was attached as an enlisted man, where it was learned that he was away on vacation. Giving due consideration to such evidence, when measured by the judicial standard adopted in the authorities to which reference is had in the cited case of People v. Hayes, 72 Cal. App. 292, 305, et seq., 237 P. 390, it will be found far short of the legal requirements. Therein, as compared to the efforts which were made in the instant case, a search covering a much longer period of time, greater effort, and in many ways much more intensive work along many different lines of investigations of various possibilities was made, and it was held that in admitting in evidence the testimony given by a witness at the preliminary examination of the defendant, the trial court had abused its discretion. To similar effect, where like conditions prevailed, see People v. Ballard, 1 Cal. App. 222, 81 P. 1040.

Considering the facts that for a period of more than five months preceding the giving of her testimony at the preliminary examination of defendant, by order of the district attorney, without placing the prosecuting witness under legal arrest, she had been detained and held "incommunicado"; that thereafter in a related action she availed herself of the privilege of refusing to testify; that on the former trial of the instant case, for the avowed purpose of escaping the responsibility of giving her testimony personally, she had fled the jurisdiction; and that four days preceding the date of the trial herein she had expressly, in writing and in unmistakable terms, notified the district attorney that she would not be present at the trial, or "be forced into making statements which the district attorney's office have insisted that I make * * *"—without herein repeating the several points regarding which appellant asserts that she desired to inquire personally of the witness, the reason is apparent why the attorney who represented defendant so vigorously resisted the reading of the deposition of the prosecuting witness taken on the preliminary examination of defendant.

[2] In the circumstances, it would seem but a travesty to claim or to seriously represent that the rights of defendant "to be confronted with the witnesses against him," as provided by section 686 of the Penal Code, had been secured to her. The correlative of that right afforded the prosecution, and which necessarily is a limitation upon the right of the defendant, if not in derogation thereof, to wit, to read his "deposition" taken at the preliminary examination of the defendant "upon its being satisfactorily shown to the court that he * * * cannot with due diligence be found within the state," should admit of no perfunctory search. If not exhaustive, at least it should be timely made and with that thoroughness which the situation regarding the possible effects upon the life or the liberty of the defendant demands, as otherwise the practical result of a careless or incomplete search may be tantamount to a denial of the right vouchsafed to defendant by the provisions of the statute and virtually amount to its abrogation.

[3] Ordinarily it well might be that an error such as appears to have been committed in the instant case would not be of such importance to a defendant that it would necessarily result in a prejudice to his substantial rights in the premises; but in the instant case the testimony given by the prosecuting witness was the only evidence offered by the

prosecution in proof of the guilt of defendant. Necessarily, upon the testimony of the prosecuting witness the verdict entirely depended; but since the proper foundation for the admission of such testimony was lacking, it follows that the judgment and the order by which the motion for a new trial was denied should be reversed. It is so ordered.

We concur: CONREY, P. J.; YORK, J.

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130 Cal.App. 628

LATON JOINT UNION HIGH SCHOOL DIST. v. ARMSTEAD et al.

Civ. 1219.

District Court of Appeal, Fourth District, California.

March 28, 1933.

Hearing Denied by Supreme Court May 25, 1933.

1. Schools and school districts ⇒154.

Pupils residing in one high school district cannot attend high school of another district, in absence of agreement authorizing such attendance between authorities of respective districts (School Code, §§ 3.302, 3.309, as amended by St. 1931, pp. 2428, 2429, §§ 2, 4).

2. Schools and school districts ⇒154.

High school district of pupil's residence has such legal right to attendance of pupils residing therein that it may maintain action to prevent another high school district unlawfully receiving these pupils (School Code, §§ 3.302, 3.309, as amended by St. 1931, pp. 2428, 2429, §§ 2, 4).

3. Injunction ⇒118(1).

Complaint, in action by high school district to prevent another high school district unlawfully receiving pupils residing in former district, need not allege that plaintiff has endeavored to reach agreement with defendant and has failed (School Code, §§ 3.302, 3.309, as amended by St. 1931, pp. 2428, 2429, §§ 2, 4).

Appeal from Superior Court, Kings County; K. Van Zante, Judge.

Action by Laton Joint Union High School District, a high school district located partly in Fresno County and partly in Kings County, against George W. Armstead and others, constituting the Board of Trustees of Hanford Union High School District, and others. From an adverse judgment, plaintiff appeals.

Reversed, with directions.

Hearing denied by Supreme Court; THOMPSON, J., dissenting.

Glenn M. De Vore, Dist. Atty. (by Arthur C. Shepard, Deputy Dist. Atty.), both of Fresno, for appellant.

Clarence H. Wilson, Dist. Atty., of Hanford, for respondents.

CAMPBELL, Justice pro tem.

A general demurrer to plaintiff's complaint was interposed by defendants, and it was sustained by the court below, and plaintiff granted 15 days within which to amend. Plaintiff declined to amend the complaint, and, following a judgment of dismissal, has taken this appeal. The material allegations of the complaint filed in this action are as follows:

"I. That plaintiff, Laton Joint Union High School District is a duly organized and existing High School District of the State of California located partly in the County of Fresno and partly in the County of Kings; that Hanford Union High School District is a duly organized and existing High School District located wholly within the County of Kings and maintains a high school called Hanford Union High School. * * *

"III. That during the school year 1930–31 and the school year 1931–32 down to the time of the filing of this complaint no agreement fixing terms whereby pupils residing in Laton Joint Union High School District might attend said Hanford Union High School has ever been executed, made or reached, nor were any terms prescribed by the County Superintendent of Schools of the County of Kings for such attendance, nor have the County Superintendents of Schools of the County of Fresno and the County of Kings executed, made or reached any agreement as to the terms of such attendance. * * *"

[1] Both appellant and respondents agree that the questions before this court are:

"1. Can pupils residing in one high school district be permitted to attend the high school of another district without one of the forms of agreement provided by the School Code sections noted being entered into?

"2. Assuming the answer to question No. 1 to be in the negative, has the district of residence such a legal right in the attendance of pupils residing therein that it is entitled to maintain an action against the high school district unlawfully receiving these pupils in order to prevent such unlawful acts?

"3. Is it necessary for the complaint to allege that the plaintiff has endeavored to reach an agreement with the defendant and that the County Superintendent of Schools of Fresno County has endeavored to reach an agreement with the County Superintendent of Schools of Kings County and that the defendant district and Kings County Superintendent of Schools have refused to enter into such an agreement?"

In 1931 (St. 1931, pp. 2428, 2429, §§ 2, 4), the sections of the School Code of the state of California particularly applicable to the case at bar were amended to read as follows:

"3.302. * * * Any person who is, under the provisions of this article, eligible to attend high school and who resides in a high school district lying in two or more counties, may attend high school in a high school district in a county other than the county the superintendent of schools of which has jurisdiction over the high school district wherein he resides, only upon such terms as may be agreed upon by the governing board of the two high school districts concerned, or, if such boards fail to agree, upon such terms as shall be agreed upon by the county superintendents of schools of the two counties concerned."

"3.309. No student residing in one high school district shall be admitted to the high school of another high school district if there is no room to receive such student or if terms have not been agreed upon for the admission of such student as required by this article."

The section of the School Code above quoted was the statutory outgrowth of section 1751, and section 1751 was the statutory outgrowth of section 1670 of the Political Code, paragraph 25, as said section appeared prior to the year 1909. We have little to assist us in the way of precedent from courts of the last resort. However, in Wood v. County of Calaveras, 164 Cal. 398, 403, 129 P. 283, and in Rice v. McClellan, 202 Cal. 650, 654, 262 P. 1092, we find the Supreme Court indicating its feeling that the Legislature intended to say what it actually did say, and that attendance of high schools should be permitted only under conditions set forth in the sections of the Political Code referred to. In 1931, by the enactment of the amendment to section 3.309 of the School Code, the Legislature gave further and more positive rules as to attendance and stating in definite terms the Legislature's intention that pupils should be restricted to the district of residence, unless one of the exceptions noted in section 3.302 occurs.

[2] The next query is whether or not a school has a valuable interest in the attendance of pupils residing within it. The Constitution of the state of California has mandated the establishment of the system of primary and secondary schools; the financial support of such schools is to a great extent provided from county and state funds on the basis of average daily attendance. It must necessarily follow, then, that the school district of residence has a valuable interest in the attendance of pupils residing within it.

[3] Section 3.309 provides that no pupil shall be admitted to a nonresident district if terms have not been agreed upon before the admission of such student as required by this article. Respondents contend that appellant is not entitled to relief in a court of law until every remedy and method for settlement provided for by the School Code has been exhausted, unless the exceptions therein provided have been made, and that appellant should have tried to agree with the respondents. In case of failure, then the county superintendent of the resident counties should have tried to reach an agreement, and, in case of failure, then to have resorted to the court with appropriate allegations in the complaint alleging such failure. However, to accept such construction as sought by respondents would be to ignore the plain provisions of the law. Appellant has set up facts showing that the condition maintained by the general rule exists and that no procedure provided to cause the exception has in fact taken place. It appears that these sections were intended for the district of residence as well as the district of attendance, and the district of residence has a right to appeal to the courts for the protection of its interests. There being no necessity of the district making any attempt to reach an agreement in order to maintain such action, it follows that the demurrer to the complaint was improperly sustained.

The judgment is reversed, with directions to the trial court to overrule the demurrer and allow defendants time within which to answer.

We concur: BARNARD, P. J.; MARKS, J.

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130 Cal.App. 589

SODA v. MARRIOTT et ux.

Civ. 4763.

District Court of Appeal, Third District, California.

March 24, 1933.

1. Costs ⟹203.

Trial court has reasonable discretion in determining necessities and reasonableness of each request for relief from failure to file cost bill within statutory period, as well as determining reasonableness of time within which relief is asked (Code Civ. Proc. §§ 473, 1033, 1034, 1054).

2. Costs ⟹203.

Where there has been a failure to file cost bill within statutory period, trial court has power to extend time (Code Civ. Proc. §§ 473, 1033, 1034, 1054).

3. Appeal and error ⟹956(1).

Appellate court will reverse granting or denying of motion to extend time within which cost bill may be filed, only in case of trial court's plain abuse of discretion (Code Civ. Proc. §§ 473, 1033, 1034, 1054).

4. Costs ⚷203.

Under affidavit, trial court did not abuse his discretion in extending time within which cost bill could be filed (Code Civ. Proc. §§ 473, 1033, 1034, 1054).

Affidavit recited that while case was pending on appeal attorney for party awarded costs was appointed to superior court, and all his pending matters requiring a great deal of and immediate attention were left in hands of another attorney in his office; that there were several trials set for early dates, with which such attorney had to familiarize himself and to try; that stenographer who was accustomed to take full responsibility in matters of filing pleadings and watching time, found employment elsewhere, and her services were not available to such other attorney; that he inadvertently failed to personally ascertain if and when the remittitur had been filed; and that he filed cost bill promptly on ascertaining filing of remittitur.

Appeal from Superior Court, Placer County; J. B. Landis, Judge.

Action by Mate Soda against J. E. Marriott and wife. From an order allowing plaintiff to file a cost bill after the expiration of the statutory thirty days, defendants appeal. Affirmed.

See, also, 118 Cal. App. 635, 5 P.(2d) 675.

Myrick & Deering and Scott, of San Francisco, for appellants.

Anson H. Morgan, of Sacramento, for respondent.

PARKER, Justice pro tem., delivered the opinion of the court.

This is an appeal from an order granting respondent's motion for relief under section 473 of the Code of Civil Procedure and allowing respondent to file a cost bill after the thirtieth day provided for by section 1034 of the Code of Civil Procedure.

It is agreed that respondent was entitled to costs had the cost bill been filed within the proper time. Likewise, it is undisputed that the cost bill was not filed within the statutory period provided by section 1034 of the Code of Civil Procedure. It was filed some twenty-four days late.

The appeal presents two questions: First, Has a court any authority to relieve respondent from his failure to file his cost bill within the thirty days allowed by section 1034, Code of Civil Procedure; second, If such power or authority is found, did the respondent here make a sufficient showing to be entitled to relief?

The original cost bill was filed, as noted, some twenty-four days late. Appellants at once moved to strike said cost bill from the file and likewise moved to tax costs. Upon receipt of this motion to tax, respondent filed and served notice of motion for relief from the failure to file cost bill within the statutory period and for an order permitting respondent to file forthwith his cost bill, a copy of which was attached to the notice of motion.

The notice of motion filed by respondent set forth that said motion would be made on the ground that the default was by reason of mistake, inadvertence, surprise, and excusable neglect. The notice of motion further stated that such relief would be asked pursuant to section 473 of the Code of Civil Procedure. Attached to said notice of motion were affidavits, of which more hereinafter.

The motion to strike and the motion for relief came on to be heard at the same time. Appellants' motion to strike the original cost bill then on file was granted. The motion of respondent was likewise granted. The default was excused upon the showing made and respondent permitted to file a cost bill. No question arose on the accuracy or correctness of the items of cost. The controversy is embraced within the two propositions outlined hereinbefore.

We will take up first the question of the court's power to grant relief. Section 1034 of the Code of Civil Procedure reads, in part, as follows: "Whenever costs are awarded to a party by an appellate court, if he claims such costs, he must, within thirty days after the remittitur is filed with the clerk below, deliver to such clerk and serve upon the adverse party a memorandum of his costs, verified as prescribed by the preceding section."

There is no judicial construction of the section that exactly covers the point here involved. We must therefore proceed on a course of comparison and analogy.

It has been held that a trial judge has power to extend the time within which a cost bill may be filed. Beilby v. Superior Court, 138 Cal. 51, 70 P. 1024. The court uses this language: "We think, however, that the service and filing of a cost bill is fairly within a proper construction of section 1054 of the Code of Civil Procedure, authorizing extensions of time. It is substantially 'a notice other than of appeal.'"

Section 1054 of the Code of Civil Procedure reads: "When an act to be done, as provided in this code, relates to the pleadings in the action * * * or to the service of notices other than of appeal, the time allowed by this code, unless otherwise expressly provid-

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⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

ed, may be extended, upon good cause shown," etc.

The cited case leaves nothing for construction. It holds flatly that a cost bill is a notice, a notice that the successful party, claiming his costs, presents an itemized account thereof for audit. It initiates no new proceeding, it imposes no new liability upon the opposing party. A prevailing party to whom costs have been awarded is put to the task of making express claim for his disbursements, not for the reason that his legal right to costs is undetermined, but solely that the exact amount thereof may be ascertained. The general trend of the decisions is to the effect that if the cost bill is not served and filed within the statutory period the claim is conclusively deemed to have been waived. Griffith v. Welbanks & Co., 26 Cal. App. 477, 147 P. 986; Holmes v. Anderson, 90 Cal. App. 276, 265 P. 1010.

In Griffith v. Welbanks, supra, it is held that the sections governing filing of cost bills are statutes of limitation and cannot be extended by court order. This rule would completely nullify the holding in Beilby v. Superior Court, supra. Appellants here do not seriously question the rule of the Beilby Case and in as far as the conflict exists between the two cases we feel bound by the holding of the Supreme Court. Beilby v. Superior Court.

In the case of Combs v. Eberhard, 120 Cal. App. 25, 7 P.(2d) 338, 341, the cost bill was served some time before the findings and judgment was filed, and the court says: "While it is true the cost bill was not apparently served in accordance with law, we think that this was but an irregularity, and that the judgment for costs is not void on its face."

In the case of Coast Electric Service, Inc., v. Jensen, 111 Cal. App. 124, 295 P. 346, 347, we find this language: "It is also claimed that it was discretionary with the trial court, under section 473 of the Code of Civil Procedure, to relieve plaintiff from its default in failing to serve said memorandum within the statutory period. Conceding this to be true, the record before us fails to show that any such relief was ever applied for or granted."

In Dow v. Ross, 90 Cal. 562, 27 P. 409, 410 (on the subject of filing cost bill), we find similar language, as follows: "Conceding, without deciding, that, under the provisions of section 473 of the Code of Civil Procedure, relief in a matter of this kind might be granted by the court upon a proper showing, still we are satisfied that the showing here made was altogether insufficient to authorize the relief asked for."

Thus we find the point presented to the Supreme Court and to the District Court of Appeal, a point going directly to a controversy before each court and in each instance the court concedes the power of a trial court under section 473 of the Code of Civil Procedure to grant relief from a default under sections 1033 and 1034 of the Code of Civil Procedure.

[1, 2] More particularly in matters of procedure do the trial courts feel compelled to follow the construction placed on procedural rules by the courts of last resort. When these courts concede a rule, the trial court would seem indeed presumptuous to question it. Section 473 has been held applicable to various cases of default. Cal. Nat. Bank v. El Dorado, etc., Co., 200 Cal. 452, 253 P. 704; service and filing of bill of exceptions; Valine v. Valine, 48 Cal. App. 418, 192 P. 69; notice to prepare transcript; Spear v. Monroe, 181 Cal. 728, 186 P. 149. And there are innumerable cases wherein one has been relieved from the effect of a judgment against him where the party seeking relief brought himself within the terms of the statute. On principle there seems no hardship involved in a rule recognizing this power in the trial court. No one is deprived of any substantial right nor is any one granted any special privilege. The trial court has a reasonable discretion in determining the necessities and the reasonableness of each request for relief as well as determining the reasonableness of the time within which relief is asked. The whole theory of our laws is that substantial rights shall not be heedlessly sacrificed. And, indeed, the history of our law discloses that whenever and wherever the written law has been found to lack in efficient administration of justice then new rules have supplanted the old. To this thought we owe the entire branch of equity jurisprudence and equitable relief. It is our opinion that a trial court has the power to grant relief pursuant to the provisions of section 473 of the Code of Civil Procedure, where there has been a failure to file and serve a cost bill within the statutory time as provided in section 1034 of the Code of Civil Procedure.

[3] We come next to the sufficiency of the showing made. The granting or denial of a motion of this character is very largely a matter of discretion to be liberally exercised by the trial court in furtherance of justice, and appellate courts are very reluctant to interfere with the exercise of such discretion and will only do so when it clearly appears that there has been a plain abuse of discretion. Dunn v. Standard Acc. Ins. Co., 114 Cal. App. 208, 213, 299 P. 575. Many authorities are cited in support of the rule anounced. Nevertheless, cases do occur when the appellate court is obliged to say that the action of the trial court involves a plain abuse of discretion and in such a case it is the duty of the appellate court to reverse the action of the trial court. Shearman v. Jorgensen, 106 Cal. 483, 39 P. 863; Redding, etc., Min. Co. v. National Surety Co., 18 Cal. App. 488, 123 P. 544. It may be noted that action of the ap-

pellate court is called for in cases of "plain abuse of discretion."

It appears from the record that the attorney for respondent here, appellant on the appeal out of which this judgment for costs arose, was Martin I. Welsh. While the case was pending on appeal he was appointed a judge of the superior court of the state of California, in and for the county of Sacramento. This appointment came on January 5, 1932, and forthwith the appointee qualified and ever since said date has held the office of judge of the superior court. Judge Welsh thereupon retired completely from his practice. As is usually the case, he left a large practice and a great amount of unfinished business. The law office of Judge Welsh had been conducted by himself and two other lawyers with two stenographers. Upon his retirement the office disorganized and the entire matter of pending and unfinished business fell to one lawyer, aided by one stenographer. As is a general custom, the matter of checking time had been assigned to a stenographer-secretary. This person obtained employment elsewhere. Accordingly, the mass of business was without chart and the affairs of the clients unfamiliar to the one remaining attorney in charge. This case was among the unfinished. On January 5, 1932, a petition for rehearing after decision in the District Court of Appeal (118 Cal. App. 635, 5 P.(2d) 675) was pending in the Supreme Court. On January 25th the petition for hearing was denied in the Supreme Court and not later than January 28th the attorney handling the matter was so informed. Instantly the question of costs arose in the mind of counsel. His affidavit recites that he engaged other counsel to assist in the forthcoming retrial of the case and directed the same counsel to watch for the filing of the remittitur and advise him so that the cost bill could be prepared and served and filed.

[4] The affidavit recites that counsel believed that the remittitur from the Supreme Court would not issue until thirty days after a petition for hearing had been denied and he therefore thought that the remittitur in this case would not come down until thirty days after January 25th and accordingly under the provisions of section 1034 of the Code of Civil Procedure he would have thirty days more to file the cost bill. The remittitur did come down and was filed on January 28, 1932, being, of course, the remittitur from the District Court of Appeal, the going down of which had been stayed by the proceedings taken for a hearing by the Supreme Court. Counsel was mistaken in this thought. Nevertheless he had no notice as to the filing of the remittitur until about the time he actually filed and served his cost bill. That is to say, regardless of his notion of the procedure, he did file and serve the cost bill promptly upon ascertaining the filing of the remittitur. So it appears that counsel's conclusion as to the law was not the sole cause of the delay. It would seem equally true that his failure to ascertain the date of the remittitur was more a reason for the delay of the cost bill. Counsel then specifies the conditions under which he labored as follows:

"That when said Martin I. Welsh was appointed to the Superior Bench as aforesaid, an exceedingly large amount of pending matters were left in the hands of affiant that required a great deal of attention, and immediate attention, a large part of which matters were entirely unfamiliar to affiant, said matters being handled personally by said Martin I. Welsh; and by reason thereof affiant was greatly harassed; that there were several trials set for early dates with which affiant had to familiarize himself and to try; that the stenographer for Judge Welsh who was thoroughly familiar with the detail work of the office and who was accustomed to taking full responsibility in matters of filing pleadings and watching time, found employment elsewhere and her services were not available to affiant in handling the enormous volume of unfamiliar work which devolved upon affiant; that after Judge Welsh ascended the Bench, the burden of the work in said office, heretofore handled by three attorneys and two stenographers fell upon affiant and an assistant who did the stenographic work and some law work. That the appointment of Judge Welsh to the Superior Bench was unanticipated and there was no opportunity on the part of affiant to familiarize himself with the work prior to Judge Welsh's discontinuance in the practice of the law; that by reason of the foregoing affiant inadvertently failed to personally ascertain if and when said remittitur had been filed in the above entitled cause assuming that he would be advised thereof as hereinabove alleged."

Thus will be noted a situation differing from that presented in Dow v. Ross, 90 Cal. 562, 27 P. 409, where a claimed "press of business" was the excuse offered. Here, the work of a busy office was, without warning, suddenly thrown on the shoulders of one almost wholly unfamiliar therewith. The former attorney in charge was completely removed from the scene, almost as effectively as though some less fortunate happening had forced his removal.

While there has been feeble suggestion that a judge is no longer a lawyer, it is not denied that one elevated to the bench is no longer an attorney at law. If Judge Welsh had passed on, an event which we hope will be long deferred, there seems little doubt but that the same conditions as here shown would suffice to justify the delay. As far as the business in hand went the same practical result followed.

The language of the trial judge in his opinion filed was as follows: "With respect to the showing made in support of and justifying the relief sought, it clearly appears that the showing is proper and sufficient."

We might not go exactly that far, but we are of the opinion that the action of the trial court does not show a plain abuse of discretion.

The judgment is affirmed.

We concur: R. L. THOMPSON, J.; PLUMMER, Acting P. J.

SUMMERS v. INDUSTRIAL ACCIDENT COMMISSION et al.*

Civ. 8891.

District Court of Appeal, Second District, Division 2, California.

April 6, 1933.

Rehearing Granted May 5, 1933.

1. Master and servant 🔑397.

Where jurisdiction of Industrial Accident Commission depends upon existence of certain facts, commission has jurisdiction to determine whether they exist, and its determination is conclusive on collateral attack.

2. Certiorari 🔑68.

Certiorari is not a collateral but a direct attack under which existence of jurisdictional facts may be inquired into.

3. Master and servant 🔑387.

"Serious misconduct" of employer means conduct which he knew or ought to have known was likely to jeopardize employees' safety.

[Ed. Note.—For other definitions of "Serious Misconduct," see Words and Phrases.]

4. Master and servant 🔑387.

While "willful misconduct" involves knowledge that conduct is wrong, it is unnecessary to show that employer was notified of unsafe condition of his premises; it being sufficient if circumstances show reckless disregard for safety of others and willingness to inflict injury complained of.

[Ed. Note.—For other definitions of "Willful Misconduct," see Words and Phrases.]

5. Evidence 🔑8.

It is common knowledge that to contact electricity or uninsulated conduit through which it is passing is dangerous.

6. Master and servant 🔑405(6).

Finding of Accident Commission that employer's conduct was not "serious and willful misconduct" *held* unsupported by evidence, where, contrary to rules of Accident and Railroad Commissions, electric conduit on top of pole was not insulated, so that employee was killed (St. 1911, p. 1040, § 1, as amended by St. 1915, p. 1061; St. 1917, p. 862, §§ 34, 35).

[Ed. Note.—For other definitions of "Serious and Willful Misconduct," see Words and Phrases.]

7. Master and servant 🔑417(9).

Where Accident Commission's finding that employer's conduct was not serious and willful misconduct was unsupported by evidence, commission acted without jurisdiction, and its award based on finding will be annulled (St. 1911, p. 1040, § 1, as amended by St. 1915, p. 1061; St. 1917, p. 862, §§ 34, 35).

Proceeding under the Workmen's Compensation Act by Rena Summers, claimant, for the death of her husband, opposed by the Metro-Goldwyn-Mayer Corporation, employer, wherein compensation was awarded claimant and an additional amount was allowed upon ground that death was proximately caused by the serious and willful misconduct of employer. Upon rehearing, the Industrial Accident Commission disallowed the additional amount, and claimant files petition for review.

Award annulled.

J. L. Kearney, of Los Angeles, for petitioner.

A. I. Townsend, of San Francisco, for respondents.

CRAIG, Justice.

As a result of injuries received by an employee of the respondent corporation in the course of his employment which resulted fatally, compensation was awarded the petitioner, and an additional amount was allowed upon the ground that said injury was proximately caused by the serious and willful misconduct of the employer. Upon rehearing, this latter amount was disallowed. A petition for review of the proceedings last mentioned was thereupon filed, based upon the ground that there was no substantial evidence sufficient to sustain the conclusion of the respondent commission upon rehearing.

It appeared that said employee, while engaged in removing electric wires at the top of a pole, came in contact with a metal conduit which the employer had neglected to insulate at its upper portion. It is contended that exposure of the conduit at the time in question constituted a dereliction amounting to serious and willful misconduct of the employer. By section 1, Statutes of 1911, c. 499, p. 1040, as amended in 1915, c. 600, p. 1061, it is provided that no "person, firm, or corporation shall * * * erect or maintain vertically on any pole any wire or cable

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🔑For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 24 P.2d 366.

used to conduct or carry electricity, without causing such wire or cable to be at all times wholly incased in a casing," etc. Sections 34 and 35 of the Workmen's Compensation, Insurance and Safety Act (St. 1917, p. 862) require that every employer furnish employment and a place of employment safe for employees, and forbid a failure or neglect so to do. Orders of the California State Railroad Commission further recite that "any portion of the riser or iron pipe enclosing the riser, extending within eight feet of any supply conductor shall be covered with a casing," etc. The petitioner asserts that, even if the decedent's superiors in charge of such facilities had not known that this conduit was not insulated at the time, the defective condition which caused the injury was apparent, that it should have been observed, and that said employer and its agents in charge must be held to have known the law. We think this contention must be upheld.

[1-7] "Where the jurisdiction of a board depends upon the existence of certain facts, the board has jurisdiction to determine whether or not those facts exist (In re Grove Street, 61 Cal. 438), and its determination that they exist is conclusive on collateral attack (Id.; People [ex rel. Skelton] v. Los Angeles, 133 Cal. 338, 65 P. 749). Certiorari, however, is not a collateral, but a direct attack (Vanfleet, Coll. Att. § 2), and under this writ the existence of the jurisdictional facts may be a subject of inquiry. * * * The question whether the accident was caused by the 'willful misconduct of the employee' is one that goes to the jurisdiction of the board, and is therefore open to inquiry on certiorari." Great Western Power Co. v. Pillsbury, 170 Cal. 180, 149 P. 35, 38. It has been held that serious misconduct of an employer must be taken to mean conduct which the employer either knew, or ought to have known, if he had turned his mind to the matter, that it is conduct likely to jeopardize the safety of his employees, and that while willful misconduct involves the knowledge of the person that the thing which he is doing is wrong, it is not necessary for the evidence to show positively that the person was notified of the unsafe condition of his premises, but that it is sufficient if it appears that the circumstances surrounding the act of commission or omission are such as to show a reckless disregard for the safety of others and a willingness to inflict the injury complained of. E. Clemens Horst Co. v. Industrial Accident Comm., 184 Cal. 180, 193 P. 105, 16 A. L. R. 611. It appears that the lower half of the pole had been insulated until the day before the injury, and the official in charge of power supply and his subordinate in charge of the decedent and the latter's coemployees testified that they were not aware of the rules of the respondent commission or of the Railroad Commission above mentioned. They testified, however, that their first information of the absence of the insulation was after the accident. However, under both commission rules and statutes this conduit situated as it appears to have been was undoubtedly required to be insulated, not merely over the lower portion of the pole, which was 33 feet 10 inches high, but over the upper portion as well. The line had been erected for some time. The gang foreman, Moss, and Winchester, who had charge of the power supply plant of the studio, a branch of the electrical department of the studio where the work was being done, had been present and about this pole. It is common knowledge that to contact electricity or a conduit through which it is passing and which is uninsulated is dangerous. The evidence established the foregoing facts without conflict. We hold that the finding that the employer's misconduct was not willful is unsupported by the evidence, and that therefore the commission acted without jurisdiction in making its award based upon that conclusion.

The award is annulled.

We concur: WORKS, P. J.; ARCHBALD, Justice pro tem.

RYKER v. LINDENBERG.

Civ. 8780.

District Court of Appeal, Second District, Division 1, California.

April 6, 1933.

Hearing Granted by Supreme Court June 5, 1933.

1. Money received 🔑1.

Generally action for money had and received lies where one person has money which in equity and good conscience he should pay to another.

2. Money received 🔑15.

Action for money had and received is in nature of equitable one.

3. Money received 🔑17(1).

Pleading in form of common count for money had and received is sufficient (Code Civ. Proc. § 426, subd. 2).

4. Money received 🔑17(1).

Complaint containing single count for money had and received presumptively stated case in equity.

Complaint alleged, in substance, that defendant, physician and surgeon, received from plaintiff, patient, to and for use of plaintiff, sum of $300, that defendant refused upon demand made upon him by plaintiff to return said money, and that neither the money nor any part thereof had been repaid, and that plaintiff had no plain, adequate, or complete remedy at law, and prayer was for judgment for such sum with costs and for such other relief as to court might seem just in premises.

5. Courts ⚷125.

Where complaint to recover $300 on count for money had and received presumptively stated case in equity and findings bore out that theory, superior court of Los Angeles county had jurisdiction.

Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Suit by Zona Ryker against Fred Lindenberg. From the judgment for plaintiff, defendant appeals.

Affirmed.

Don Marlin and Isador Gralla, both of Los Angeles, for appellant.

Thomas Hart Kennedy, of Los Angeles, for respondent.

CONREY, Presiding Justice.

The complaint, filed in the superior court of Los Angeles county, alleged that the defendant received from the plaintiff, to and for the use of the plaintiff, the sum of $300; that the defendant refused upon demand made upon him by the plaintiff to return said money, and that neither said money nor any part thereof had been repaid; that plaintiff has no plain, adequate, or complete remedy at law. The prayer was for judgment for said sum with costs, and "for such other and further relief as to this court may seem just in the premises." The answer denied "generally and specifically" the allegations contained in each paragraph of the complaint.

Defendant interposed a general demurrer to the jurisdiction of the court, which demurrer was overruled. The findings of fact go into the details of the transaction wherein and whereby said sum of $300 passed from the plaintiff into possession of the defendant. Briefly summarized, they are: That the defendant is a physician and surgeon; that the plaintiff, while in a condition of serious ill health, became the patient of defendant and submitted to an operation performed upon her by the defendant; that, while the plaintiff after said operation was confined to her bed in the hospital, the plaintiff, upon the demand and insistence of the defendant, and without independent advice from any other person, gave to the defendant an order for $300 on the bank where the money was deposited; that the defendant immediately cashed the order; that soon thereafter the plaintiff demanded the return of said money, but the same has not been repaid, although the defendant told the plaintiff that he would "arrange everything" to her satisfaction; that, "if any contract was entered into" between plaintiff and defendant, whereunder defendant might have claimed a right to said money, the consideration for said contract has wholly failed and the contract has been rescinded by the mutual agreement of the parties, and, further, that, if said contract ever existed, said contract is now hereby ordered rescinded, and the plaintiff has the sole right to said $300; that plaintiff never received any consideration for any purported contract between plaintiff and defendant, and that, if any such contract existed, the consideration therefor has failed: that the defendant became a trustee for the plaintiff for any moneys so held by him, especially said sum of $300, and the same is now held by defendant in violation of his trust; that the defendant in obtaining said sum of money exercised undue influence over the plaintiff.

As shown by appellant's opening brief, the sole ground of appeal upon which appellant relies for reversal of the judgment is that, under the facts alleged in the complaint, the action is an action at law, of which the municipal court would have exclusive jurisdiction, and was not within the jurisdiction of the superior court.

The appeal is presented upon the judgment roll alone. Respondent moves for dismissal of the appeal or affirmance of the judgment. The notice of motion does not state in direct terms the grounds of the proposed motion. There is, however, a statement that the motion would be made on the certificate of the clerk and the affidavit attached to the notice, and by reason of the law as set forth in the attached points and authorities. Inasmuch as the merits of the motion as discussed before the court on the oral argument were fully presented so far as the real question at issue is concerned, it would be a useless formality to require a new notice for the sole purpose of supplying a more definite statement of the grounds of the motion. For that reason we are assuming that the motion is properly before the court, and ready for decision on the merits.

[1, 2] We are of the opinion that the superior court acquired jurisdiction of the action. "The basis for an action for money had and received is that the defendant has money which in equity and good conscience he ought to pay to the plaintiff, and, generally speaking, the action lies in all cases where one person has in his possession money which in equity and good conscience he ought to pay over to another. Sacramento County v. Southern

Pacific Co., 127 Cal. 221, 59 P. 568, 825. This action is in the nature of an equitable one. A debt sufficient for such a purpose may arise from the operation of purely equitable principles. Fontaine v. Lacassie, 36 Cal. App. 175, 171 P. 812; Spitzer v. City of Oakland, 32 Cal. App. 748, 163 P. 1044." Hillwig v. Boyer, 81 Cal. App. 763, 771, 254 P. 662, 665. The cited case was referred to with approval in Young v. Hoagland, 212 Cal. 426, 432, 298 P. 996, 75 A. L. R. 654.

[3] It is true that in some cases a complaint containing a count for money had and received has been treated as stating a cause of action at law. Thus, in Taback v. Greenberg, 108 Cal. App. 759, 292 P. 279, a complaint set out a contract followed by failure of consideration, and rescission by notice to the defendant. A second count of the complaint was for money had and received, accompanied by a promise to repay, and followed by demand and nonpayment. This was held to be an action at law, and properly brought in the municipal court because it was merely an action for the recovery of money and not for rescission of the contract; the contract having been rescinded by the notice of rescission. In Stone v. Superior Court, 214 Cal. 272, 4 P.(2d) 777, 77 A. L. R. 743, the proceeding was in mandamus to compel the superior court to grant a motion for the discharge of an attachment. The complaint in the action where the attachment had issued was in two counts. The first count stated a cause of action for equitable relief arising out of a certain transaction. The second count was in the form of a common count for money had and received. The Supreme Court held that, since the cause of action was admittedly the same in each count, and was founded upon the facts set forth in the first count, the case presented was not one in which the plaintiff was entitled to a writ of attachment. This would be so whether the first count be considered as stating the facts of a suit in equity for rescission, or as stating a cause of action sounding in fraud and deceit entitling the plaintiff to damages. There was no direct decision that the second count, if it had stood alone necessarily would have presented the case as an action at law. Ingalls v. Superior Court, 121 Cal. App. 453, 9 P.(2d) 266, was another case wherein it appeared that a complaint, filed in the superior court of Los Angeles county, was in two counts, of which the first count stated a cause of action based upon fraud, and the second was for money had and received; both counts, in fact, relating to the same transaction. The prayer for judgment demanded cancellation of the contract and return of the money, amounting to the sum of $1,900. The court in the mandamus proceeding relied upon Stone v. Superior Court, supra, as authority, and held that the superior court had jurisdiction of the action.

The confusion which has arisen in many minds as to the nature of the cause of action stated in a complaint solely "for money had and received," etc., arises out of the indefinite quality of the pleading, which in reality does not present "a statement of the facts constituting the cause of action. * * *" Code Civ. Proc., § 426, subd. 2. "If the question were new, there might be good ground for saying that the common counts do not comply with the provision of our Code of Civil Procedure (section 426) that the complaint must contain 'a statement of the facts constituting the cause of action in ordinary and concise language.' But the practice of pleading in this form has been too long established in this state to be now open to question." Pike v. Zadig, 171 Cal. 273, 276, 152 P. 923, 924.

[4, 5] For the purpose of determining jurisdiction, in the face of these established rules of pleading, it is necessary to have a rule of presumption with respect to the question of the nature of the stated cause of action. In accordance with what appears to be the prevailing opinion, we think that the complaint in this action, containing a single count for money had and received, presumptively stated a case in equity. Since the findings bear out that theory, the presumption is further sustained by the record. But it does not follow that in the county of Los Angeles, where there is a municipal court, a plaintiff seeking to recover a sum of less than $2,000 due upon contract may confer jurisdiction upon the superior court, in an action at law by the simple expedient of suing upon a common count for money had and received. In such case, if in the progress of the action the fact is established that the case is only an action at law, it would become the duty, as well as the right, of the superior court to dismiss the action for want of jurisdiction. The situation points to the need of legislation which would authorize the transfer of such a case to the court of appropriate jurisdiction in lieu of dismissing the action.

In the case at bar, since it appears that the superior court had jurisdiction of the action, and that the appeal rests solely upon a claimed lack of such jurisdiction, it is manifest that the appeal is without merit. For that reason the judgment is affirmed.

We concur: HOUSER, J.; YORK, J.

HAMILTON v. OAKLAND SCHOOL DIST. OF ALAMEDA COUNTY et al.*

Civ. 8451.

District Court of Appeal, First District, Division 1, California.

March 24, 1933.

Hearing Granted by Supreme Court May 22, 1933.

1. Schools and school districts ⟹82(1).

If compromise made by board of education with contractor was based upon illegal consideration, courts would not enforce it.

2. Schools and school districts ⟹90.

Word "gift" as used in constitutional provision prohibiting gift of public funds includes appropriations of public money for which there is no authority or enforceable claim (Const. art. 4, § 31).

[Ed. Note.—For other definitions of "Gift," see Words and Phrases.]

3. Appeal and error ⟹1011(1).

Trial court's finding on conflicting evidence was binding on appeal.

4. Schools and school districts ⟹90.

Compromise by board of education of building contractor's claim merely because compromise would result in payment of claims of subcontractors and materialmen was "gift" of public funds, and therefore void (Const. art. 4, § 31).

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Action by John Hamilton, individually and as the Hamilton Construction Company, against Oakland School District of Alameda County and others. From the judgment, plaintiff appeals.

Affirmed.

Robert L. McWilliams and Shelton, Gray & McWilliams, all of San Francisco, for appellant.

Earl Warren, Dist. Atty., Ralph E. Hoyt, Chief Asst. Dist. Atty., and James H. Oakley, Deputy Dist. Atty., all of Oakland, for respondents.

JAMISON, Justice pro tem.

On November 13, 1928, plaintiff and defendants entered into a contract for the erection of a school building. The said contract called for the commencement of the work within ten days thereafter and for the completion of said building on or before July 31, 1929. Time was expressly made of the essence of the contract. The contract provided that liquidated damages should be allowed to defendants to the amount of $50 per day for each day the work remained uncompleted after the date specified for completion, provided that allowance should be made for unavoidable delay. The contract also provided: "If it appears to any contractor that he will not complete the work provided in his contract in the time agreed, he shall make written application to the Board at least thirty (30) calendar days prior to the expiration of the time for completion, stating the reason why and the amount of extension which he believes should be granted. The Board may then in its discretion grant or deny such extension." The contract also provided that the contractor should be paid monthly as the work progressed, and the remainder of the contract price 35 days after the completion and acceptance of the work. The building was completed on December 3, 1929, 124 days after the time specified in the contract for its completion. Formal acceptance of the completed building was made by the board at a meeting held on December 5, 1929, and the auditor was directed to draw a warrant in favor of appellant for the remainder of the contract price less $6,200, the liquidated damages for the delay of 124 days. In the meantime this remaining fund was held up by notices filed with the board by plaintiff's subcontractors and materialmen. Thereafter the matter of deducting the $6,200 was taken up and discussed by the board and plaintiff's attorney at meetings of the board held on February 25 and March 4, 1930.

Plaintiff's attorney stated to the board that there was about $48,000 of the contract price remaining unpaid; that $44,000 in claims had been filed by subcontractors and materialmen that had been approved by appellant, and that there was an additional $10,000 in claims that had not been approved by him, but was disputed; that, while appellant claimed that he was not responsible for the delay in the completion of the said building, he was willing to compromise the matter by allowing a deduction of $2,000 from the balance owing to him. At the meeting of the board held on March 4, 1930, this offer of compromise was accepted by the board and a resolution was passed authorizing the auditor to draw a warrant in favor of plaintiff for the remainder of the contract price less the $2,000. Performance of certain conditions were required of plaintiff before the delivery of the warrant to him. On March 18, 1930, after the warrant had been issued, but before its delivery to plaintiff, the board rescinded its resolution made on March 4, 1930, and ordered that the said warrant be not delivered to plaintiff. Thereafter a warrant for the balance of the contract price less the $6,200 was issued and paid to plaintiff.

Plaintiff filed his claim for the $4,200 resulting from the said compromise, and, the same being disallowed, he brought this action to enforce the said claim. Upon the trial

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⟹For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 26 P.2d 296.

thereof judgment was rendered for defendants, and from this judgment plaintiff has appealed. The only question for determination on this appeal is whether or not the compromise entered into between appellant and the respondents is binding upon the latter.

Respondents contend that there was no consideration for the compromise, that there was no actual bona fide dispute relative to the delay in the completion of the building, and that the action of the board in agreeing to the reduction of $4,200 was void for the reason that it amounted to a gift of the public funds in violation of section 31, article 4 of the Constitution.

The minutes of the board that contained the resolution to compromise are as follows: "That the amount of liquidated damages to be exacted of the Hamilton Construction Co. on account of the delay in the completion of the Bret Harte (Allendale-Fruitvale) School, as stated in the minutes of December 5th, 1929, be changed from $6,200 to $2,000. This action was taken after a conference with Mr. Charles A. Beardsley, attorney representing the Hamilton Construction Co., the contractor agreeing that if the Board reduced the amount of liquidated damages to $2,000, he would secure releases of withhold notices filed against his contract, and file with the Board of Education bonds in the amount of 125 per cent. of the withholds for all disputed claims, in order that the balance due on the contract may be released for distribution to the subcontractors."

There was no evidence produced before the board excusing or justifying the delay, but appellant's attorney stated to the board that the contractor was not responsible for the delay, but that it was caused partly by weather conditions and was partly due to the delay occasioned by the fault of respondents as represented by the building inspector, and he stressed the fact that, unless his offer of compromise was accepted by the board, the payments of the amounts owing to the numerous subcontractors and materialmen would be indefinitely delayed.

It appears that on June 29, 1929, 30 days before the time limit expired, appellant made application to the superintendent of buildings and grounds for an extension of 23 days, setting forth therein that the work had been delayed for 19 days by adverse weather conditions and by the intervention of four holidays. The record does not show that the board had any knowledge of this application for extension.

The trial court found that defendants agreed to the said compromise for the sole reason that the subcontractors and materialmen would be paid; in part the finding being as follows: "* * * It is true that defendants entered into said compromise agreement in the belief that they were thereby making funds available to plaintiff to pay said subcontractors and materialmen, and that their action so taken would result in such payment; that defendants expressly rejected all other reasons advanced for reaching said compromise agreement, and that there was no other consideration therefor; that said compromise agreement, by reason of the facts herein determined, was wholly without consideration and beyond the power of said defendant to consummate and therefore was invalid and of no force or effect and did not constitute a legal obligation." While the court found that appellant disputed the right of defendants to retain the $6,200, it also found that the dispute had no substantial basis.

[1] Respondents contend that a board of education is without authority to compromise a contract let by competitive bidding. No authorities are cited in support of this contention. Appellant cites Smith v. Cloud, 28 Cal. App. 453, 152 P. 950, and other cases upholding the authority of the board to compromise doubtful claims. Conceding that a board of education possessed the power to compromise a claim where it is a doubtful one and is asserted and maintained in good faith, yet, if the compromise is based upon an illegal consideration, the courts will not entertain an action to enforce it. Union Collection Co. v. Buckman, 150 Cal. 159, 164, 88 P. 708, 9 L. R. A. (N. S.) 568, 119 Am. St. Rep. 164, 11 Ann. Cas. 609. In the case of Tatterson v. Kehrlein, 88 Cal. App. 34, 49, 263 P. 285, 291, the court, speaking of a contract in violation of an express mandate of the law, said: "Such a contract has no legal existence for any purpose and neither action nor inaction of a party to it can validate it * * *"—citing authorities. To the same effect is First Nat. Bk. v. Thompson, 212 Cal. 388, 405, 406, 298 P. 808, 815. In this latter case the court said: "Undoubtedly the compromise of pending litigation, prosecuted in good faith, whether actually well founded or not, is ordinarily sufficient consideration for a promise. It has been held, however, that the compromise of an obligation given for an illegal consideration furnishes no consideration for a new promise, and that that is true whether, when the promise is made, an action is pending on the original obligation or not."

[2] In other jurisdictions the courts have held that compromises similar to that in the instant case were gifts of the public funds to private individuals. Farnsworth v. Town of Wilbur, 49 Wash. 416, 95 P. 642, 19 L. R. A. (N. S.) 320; People v. Holten, 287 Ill. 225, 122 N. E. 540; Herder v. Clifford, 252 N. Y. 141, 169 N. E. 118. In Conlin v. Board of Supervisors, 99 Cal. 17, 33 P. 753, 21 L. R. A. 474, 37 Am. St. Rep. 17, in passing upon the meaning of the word "gift" as used in section 31, article 4, of the Constitution, the court said

that this word as used in the Constitution includes appropriations of public money for which there is no authority or enforceable claim.

[3, 4] Upon conflicting evidence the trial court found that the sole object and purpose of the compromise was that it would result in the payment of the claims of the subcontractors and materialmen. This finding, under the well-settled law, is binding on this court. This constituted a gift of the public funds of the school district, and was therefore, under the provisions of section 31, article 4, of the Constitution, void.

In the case of McBean v. San Bernardino, 96 Cal. 183, 187, 31 P. 49, 50, the court said: "* * * the question is directly presented, whether this naked declaration or resolution of the board of trustees had the effect to create a binding obligation where none existed before. We are of the opinion that it did not. The resolution is without any consideration to support it, and, if it had been executed, the payment of the money named in it would have been in the nature of a gift,—a purely voluntary payment by the city." This language applies with equal force to the question presented here.

The judgment is affirmed.

We concur: KNIGHT, Acting P. J.; CASHIN, J.

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131 Cal.App. 2

PECHT v. COLBY MANAGEMENT CORPORATION.

Civ. 7594.

District Court of Appeal, Second District, Division 2, California.

April 4, 1933.

1. Licenses 🔑39.

Statement in stock subscription agreement that copy of corporation commission permit was printed on reverse side *held* not to nullify finding that permit was not "exhibited" to buyer as required by permit.

> Statement on front of stock subscription agreement that copy of corporation commission permit was printed on reverse side did not nullify finding that permit was not exhibited to buyer of stock as required by the permit, since the word "exhibit" implies some affirmative act or at least some conduct on the part of the person charged with the duty of exhibiting a thing or who exhibits it, and when the corporation commissioner charged the seller to "exhibit" the permit, the commissioner meant that the seller should "show" it.
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> [Ed. Note.—For other definitions of "Exhibit" and "Show," see Words and Phrases.]

2. Licenses 🔑39.

Evidence sustained finding that corporation's stock was issued in exchange for mortgages and not sold for cash as required by corporation commissioner's permit.

Appeal from Superior Court, Los Angeles County; Edwin F. Hahn, Judge.

Action by Jacob W. Dean against the Colby Management Corporation. Judgment for plaintiff, and defendant appeals. During the pendency of the appeal the plaintiff died and Zona Dean Pecht, as administratrix of the estate of Jacob W. Dean, deceased, was substituted in his stead.

Affirmed.

Kelly, Stuart & Hendrick, of Los Angeles, for appellant.

Neil S. McCarthy, Earl L. Banta, and Howard P. Hall, all of Los Angeles, for respondent.

WORKS, Presiding Justice.

This action was commenced for the purpose of recovering the consideration paid by plaintiff, because of the fraud and misrepresentation of defendant, for certain alleged void certificates of stock in defendant, a corporation. Judgment went for plaintiff, and defendant appeals.

Since the appeal the original respondent has deceased, and his administratrix has been substituted in his stead. Throughout this opinion, however, we shall refer to respondent as if the substitution had not been made.

The commissioner of corporations had issued to appellant a permit to sell certain shares of its stock. The permit required: "That a true copy of this permit be exhibited and delivered to each prospective subscriber for, or purchaser of, said securities before his subscription therefor shall be taken or any sale thereof made to him." The trial court found that no copy of the permit was exhibited to respondent before he purchased his stock, and it is claimed by appellant that there was evidence to support this finding; indeed, that the evidence shows the contrary without dispute. Respondent signed eight separate "subscriptions" for the stock which he purchased, and on each of the subscription blanks was printed, immediately above the place where he signed, this language: "(Copy of Corporation Commission Permit is printed on reverse side.)" A copy of the permit was actually printed on the back of each of the blanks.

As a preliminary to the final consideration of the finding that appellant did not exhibit the permit to respondent, it is proper to observe that there was evidence from which the trial court could properly have found the following facts: When respondent signed the eight subscription agreements he did not read from any of them the copy of the permit printed on its back, nor did he ever read the permit until a few months before this action was commenced. When respondent had signed the "subscriptions," an agent of appellant gave him a receipt corresponding with each and took the "subscriptions" away with him. The receipts showed no copy of the permit, and contained no reference to it.

[1] This leaves for consideration the bare question whether the statement on the front of each of the subscription agreements, "(Copy of Corporation Commission Permit is printed on reverse side)," nullifies the finding that the permit was not exhibited to respondent. We think it does not. The word "exhibit" implies, as every one understands, some affirmative act or at least some conduct upon the part of the person charged with the duty of exhibiting a thing or who exhibits it. When the corporation commissioner charged appellant to "exhibit" the permit, he meant that appellant should "show" it. The language printed above the place where respondent signed the subscription agreements did not exhibit or show the permit. It did not invite respondent to read the permit, nor even suggest that he read it. Suppose a man says to another, "I have a Jersey cow in my pasture." Surely he cannot be said, by this remark, to exhibit the cow to the man he addresses. The finding that the permit was not exhibited to respondent is supported by the evidence.

In upholding the finding we have not overlooked Gridley v. Tilson, 202 Cal. 748, 262 P. 322, and other cases referred to by appellant. The one just cited is apparently the strongest decision upon which appellant relies. In that case the corporation commissioner had issued a permit to sell corporate stock and had required that the permit be "exhibited and delivered" to prospective purchasers of the stock. The permit was printed on the back of application blanks for the purchase of the output, but the application contained on its face the statement: "I have read the copy of the permit which is printed on the back of this application." The application also contained a provision limiting the authority of agents of the corporation to make binding representations, and in considering this provision the Supreme Court said that a signer of one of the applications could not escape its effect "by testifying that he did not have his glasses with him at the time he signed. * * *" Later on the court used the following language, which is closer to the particular question presented here: "The plaintiff contends that the finding of the court that a true copy of the permit was not exhibited and delivered to defendant is without support in the evidence. There was no issue in the pleadings on this point and as a copy of the permit was printed on the back of the subscription contract the finding of the court appears to be unsupported." This latter language is very general, so general indeed that, if we but look at the letter, it governs a case in which the copy of a permit is printed on the back of a subscription contract without reference to it on the face; a state of affairs which is unthinkable. The language is, of course, to be considered in connection with and is limited by the fact that the signer of the agreement had certified in it that he had read the permit on its back; in effect, that it had been "exhibited" to him. Thus viewed the situation is very different from the one presented here. The statement on the face of the agreement now before us, "(Copy of Corporation Commission Permit is printed on the reverse side)," was not even made by respondent. It was but a voluntary statement of appellant inserted in its printed form of subscription contract. It put no notice whatever upon respondent, either that the permit had been required to be exhibited to intending purchasers, or that there was any mandate in it which the agent of appellant was about to violate. Respondent, on seeing the statement concerning the permit, had the right to assume that it was made, and that the permit was printed on the reverse side of the contract merely to show that the corporation had procured the corporation commissioner's sanction for the sale of its stock. In short, we think the decision of the Supreme Court has no bearing here.

[2] The permit issued by the corporation commissioner required that the stock of appellant be sold for cash. The trial court found that the stock issued to respondent was issued in consideration for certain mortgages theretofore owned by respondent and by him transferred to appellant. It is contended that this finding was unsupported by the evidence for the reason that there was a substantial compliance with the requirement that stock be sold for cash. This contention is based upon the testimony of the agent of appellant who consummated the deal with respondent. Although the mortgages were undoubtedly transferred to appellant, this witness testified to a conversation with respondent which resulted in an agreement that the stock should not be issued until the mortgages were converted into cash. It is enough to say that this conversation was categorically denied by respondent. In addition, however, the receipts issued by the agent at the time the subscription agreements were executed specifically recited that the

mortgages were received in payment for the stock. As an instance of this state of affairs, one of the papers issued by the agent, after acknowledging the receipt of $800 as part payment for a certain number of shares of stock, concluded: "Also a certain first mortgage in amount of $2500.00 * * * as balance of payment on same."

Appellant makes another point, but it is disposed of by what we have said in discussing the first question above considered.

Judgment affirmed.

We concur: STEPHENS, J.; ARCHBALD, Justice pro tem.

130 Cal.App. 750

SMITH et al. v. TRISTRAM.

Civ. 7602.

District Court of Appeal, Second District, Division 2, California.

April 1, 1933.

1. Action 🔑25(2).

Where complaint alleged performance of vendor's covenants and purchaser's refusal to pay, and prayed for order requiring purchaser's payment on delivery of deed, and answer denied agreements were equitable, suit *held* within jurisdiction of equity.

2. Specific performance 🔑6, 28(1).

Specific performance will be denied unless mutuality of remedy exists and contract is certain.

3. Specific performance 🔑28(2).

Agreement that purchase price should be specified amount per lot "on all or any portion of" lots *held* not susceptible of specific performance.

4. Appeal and error 🔑193(9).

Objection that agreement is not susceptible of specific performance sought may be presented any time where defect appears on face of complaint.

5. Pleading 🔑200.

Allegation in answer that complaint fails to state cause of action constitutes in effect general demurrer.

Appeal from Superior Court, Ventura County; Edward Henderson, Judge.

Action by W. D. V. Smith and another against L. E. Tristram. Judgment for defendant, and plaintiffs appeal.

Affirmed.

Norris Montgomery, of Santa Barbara, for appellants.

Blackstock & Rogers and Merle J. Rogers, all of Ventura, for respondent.

WORKS, Presiding Justice.

In this action judgment went for defendant, and plaintiffs appeal.

The action is one to compel specific performance of a contract for the purchase of real property. It being an action in equity, respondent contends that this court has not jurisdiction of the appeal, which was directly prosecuted to it, the Constitution requiring that appeals in equity cases be taken directly to the Supreme Court. Through inadvertence a transfer of the case was not made to the Supreme Court at the time when the transcript of the clerk of the trial court was filed with the clerk of this court. Since the briefs were filed, a transfer to the higher tribunal has been made and a retransfer to this court has been ordered by it. The action is therefore now properly before us for decision under the Constitution.

We have already stated that this is a suit in equity for specific performance, but a direct issue upon that question is presented in the briefs. Appellants, the vendors, contend that the action is one at law for the mere recovery of money. The complaint alleges the making of the agreement between the parties, the deposit with an escrow holder of certain escrow instructions concerning the proposed deal and the acceptance thereof by respondent, the tender by appellants to respondent of "a good and sufficient deed" which respondent refused to accept, that appellants had performed all the terms of the contract by them agreed to be performed, that they then demanded payment of the purchase price from respondent, but that he refused and still refuses to pay, that "the agreements hereinabove alleged to have been made by and between plaintiffs and defendant at all times have been fair and equitable and the land in said agreements agreed to be conveyed at all times has been and now is a fair and adequate and equivalent consideration and value for the purchase price in said agreements provided to be paid therefor, and said agreements at all times as to the defendant had been and now continue to be just, reasonable, fair and equitable agreements; that defendant above named is able to keep, fulfill and perform all of the terms, covenants and conditions of said agreements on his part to be kept, fulfilled and performed, that there is no adequate remedy to plaintiffs in this matter except relief by way of this court specifically enforcing the terms, covenants and conditions of the agreements hereinabove alleged to have been made and entered into by and between defendant and plaintiffs; that plaintiffs were * * * and now are ready, able and willing to keep, fulfill and perform all of the covenants and conditions of the said agreements made and entered into by and between defendant and plaintiffs and do hereby offer to keep, fulfill and perform under said agreements upon defendant's likewise keeping, fulfilling and performing the terms, covenants and conditions of said agreements on defendant's part to be kept, fulfilled and performed." The prayer contained no demand for a money judgment, but asked that the court "order the defendant to pay to plaintiffs" a certain sum "upon delivery by plaintiffs of a deed of good and sufficient form conveying title," etc., together with interest and costs of suit, and that plaintiffs have "such other and further relief as to the above entitled court may seem fit and proper."

By his answer to the complaint respondent "denies that said plaintiffs have performed all of the conditions of said agreements, or of any written agreement on their part to be performed; and denies that the written agreements mentioned in said * * * complaint, or either thereof, at all times have been or ever were or are now fair or equitable; and denies that the land described in said agreements or either thereof or in said * * * complaint was or is a fair or equitable or adequate or equivalent consideration or value for the purchase price stated in said agreements or either thereof; and denies that said agreements are or either of them is or was at any time as to the defendant a just or reasonable or fair or equitable agreement or agreements. * * *" The answer also "denies that the real property described in said agreements or either thereof is a fair or reasonable or adequate consideration for the purchase price stated in said agreements or either thereof, and on the contrary alleges the fact to be that said real property had at the time said agreements were made and now has a value not greater than [a certain sum]; and alleges that said agreements are not, and each of them is not, as to defendant fair or equitable or just."

[1] Under the issues tendered by the complaint and accepted by the answer, and under the allegations of new matter contained in the latter pleading, it is too plain for argument that the trial court was required to exercise its functions as a court of equity. The matters pleaded were utterly beyond the cognizance of a court of law. Cases like O'Gorman v. Wachter, 71 Cal. App. 268, 235 P. 57, and Work v. Associated Almond Growers, 76 Cal. App. 709, 245 P. 790, have no bearing upon the question here presented.

[2, 3] There are several points made by respondent which show that appellants cannot recover, but we need not notice them all. No contract may be the basis of an action for specific performance unless there be under it a mutuality of remedy between the parties and unless it be certain in its terms. These propositions are so well understood that it is unnecessary to cite authority in support of either of them. The escrow instructions lodged by respondent in the present case, which are alleged in the complaint to have been "accepted by the plaintiffs herein," are referred to in the complaint and attached thereto as an exhibit. The real property described in the instructions consisted of twenty-four town lots. The paper contained the following language: "The buyer and seller agree that the purchase price shall be $225.00 per lot on all or any portion of the above described lots, payable in cash." This sentence certainly rendered the contract uncertain. Clearly, also, there could be no mutuality of remedy under it, regarding it from the standpoint of the parties on each side. Suppose the sellers desired to convey all the lots, but the buyer desired only one of them, or suppose the direct contrary, that the buyer desired all, but the sellers insisted on clinging to all but one. What would be the result? In short, how could a court of equity determine the number of lots which were to be bought and sold under the contract? The agreement was not susceptible of specific performance.

[4, 5] Appellants object that this point is made for the first time on appeal, but it could properly have been presented at any time, as the defect appeared on the face of the complaint. Further, it is not now first presented. One of the paragraphs of the answer alleged that the complaint failed to state a cause of action. This was in effect a general demurrer.

Judgment affirmed.

We concur: STEPHENS, J.; CRAIG, J.

130 Cal.App. 741

In re WATTERSON'S ESTATE.

WATTERSON et al. v. BRADSHAW.

Civ. 8942.

District Court of Appeal, Second District, Division 2, California.

March 31, 1933.

1. Evidence 🔑413.

Parol evidence *held* inadmissible to show that agreement of wife's executor to make certain payments to surviving husband in full settlement was intended to operate only during husband's lifetime (Code Civ. Proc. § 1856).

> The contract in question was entitled, "settlement of all claims against estate," and concluded, "this is in full settlement of all claims of every kind and nature against said W. H. B., either personally or as executor and against said estate." In this proceeding to revoke letters of administration of the husband's estate, defendant, who was the executor under the wife's will, sought to show that at time of the agreement with husband he had stated to husband that he would sign if the agreement ended at husband's decease, and there would be no liability on his part to husband's heirs or relations, and that object of agreement was testamentary.

2. Evidence 🔑385.

Evidence of real intention other than that clearly expressed in writing is inadmissible.

3. Executors and administrators 🔑32(1, 2).

Revocation of letters of administration lies within trial court's discretion, and decision is conclusive where different conclusions may be drawn from evidence (Probate Code, §§ 521, 523).

Appeal from Superior Court, Los Angeles County; Lester William Roth, Judge.

Petition by Pater Watterson and others for an order revoking letters of administration issued to William H. Bradshaw upon the estate of Daniel E. Watterson, deceased. From an order granting the petition and revoking the letters of administration, the administrator appeals.

Affirmed.

John F. Poole, of Los Angeles, for appellant.

Barry Sullivan, of Los Angeles, for respondents.

CRAIG, Justice.

Upon petition for an order revoking letters of administration issued to the appellant upon the estate of Daniel E. Watterson, deceased, an order granting the same was entered after trial of the issues presented, from which order said administrator appealed.

During the lifetime of Daniel E. Watterson, the appellant became the executor of the last will and testament of Annie Watterson, deceased wife of the former. Thereafter by contract in writing the surviving spouse assigned to said William H. Bradshaw all his right, title, and interest in and to said estate arising from her will or by reason of the marriage relation, in consideration of $1,000 then paid in cash, and $5,000 to be paid in three consecutive annual installments. The parties agreed that, should Bradshaw sell certain real property of said estate, the two final installments should be paid in advance without interest if the proceeds should prove sufficient and that "this is in full settlement of all claims of every kind and nature against said William H. Bradshaw, either personally or as executor and against said estate, and the property, real or personal, belonging thereto." Thereafter, upon the decease of Daniel E. Watterson, the appellant was appointed administrator of his estate. About three years following this latter appointment, the brothers and sisters of said last-mentioned deceased, respondents herein, as heirs at law, petitioned the superior court that said letters of administration be revoked, that an amended inventory be required, and that they have judgment against Bradshaw for the sum of $5,000. By their petition and amendment thereto in opposition to affirmative allegations of the answer, said heirs averred that on numerous occasions the filing of a petition for distribution had been requested, and that the administrator had failed and neglected to file an account; that he had wasted and mismanaged the estate and had not brought the same to a close. Subsequently by inventory and report it appeared that an automobile of Annie Watterson, deceased, had been sold by Daniel Watterson, that her real property was incumbered beyond its sale value, and that "the matters concerning said will and said inheritance were settled between your petitioner personally and Daniel E. Watterson personally, and the matter was duly heard and considered" by said superior court. The trial court in the instant proceeding found that, pursuant to an order of court, the administrator had filed said inventory, showing on hand the sum of $1,047.53, that the transactions represented by the above-mentioned contract had not become res judicata, and that the estate of Annie Watterson was not indebted to said administrator. It further found that the interests of William H. Bradshaw personally and as administrator were conflicting, that he had failed to account or to bring said estate to a close, and that it would be to the best interests of the estate that the letters of administration be revoked.

The findings of fact are set forth in full by appellant under a caption that the evidence was not sufficient to sustain them in whole or in part. And as specifications of error it is urged that the contract above described was inadmissible in evidence, that certain testimony relating to its terms was erroneously excluded, and that it was error below to hold that the administrator had not performed his duties and that his letters should be revoked. Authorities to the effect that any question of fact once put in issue and determined cannot be contested in a subsequent dispute are of no avail here. Not alone did the prior controversy determine only that the automobile was sold by the decedent, that the contract was executed without duress in satisfaction of his claim against the estate of Annie Watterson, deceased, but the same was pleaded both as to its provision and alleged effect in the instant proceeding by the appellant's answer. Questions as to the separate or community status of the properties of Annie Watterson, deceased, as to the fulfillment or breach of said contract in the interest of Watterson's estate, or that the interests of the appellant were conflicting, were not previously determined.

[1, 2] It is insisted that evidence offered tending to show an intention other than as expressed by said agreement should have been admitted. The appellant alleged that he would not have signed the same except under the belief that it was purely personal to himself and the decedent, Watterson. Said contract was entitled, "Settlement of all claims against estate," and concluded, "This is a full settlement of all claims of every kind and nature against said William H. Bradshaw, either personally or as executor and against said estate, and the property, real or personal, belonging thereto." By his answer, the administrator alleged that he "would not have entered into said personal contract or agreement if it had not been for the belief and understanding that he was signing an agreement which was purely personal with said Daniel E. Watterson, and all liability or obligation thereunder ceased upon the death of said Daniel E. Watterson," and, further, that said agreement "that the same should be at an end upon the decease of said Daniel E. Watterson was made by said Watterson under his agreement and statement with said Bradshaw, that all his possessions, real and personal, should go to said William H. Bradshaw. In other words, said contract was made in lieu of a testament by said Watterson leaving his said property to said William H. Bradshaw." The offered testimony was in part: "That said Daniel E. Watterson wrote out an agreement in longhand setting down the points agreed upon between said Daniel E. Watterson and said William H. Bradshaw, as they discussed the matter back and forth. That at said time said William H. Bradshaw stated to Daniel E. Watterson that he would sign this agreement if the agreement would be at an end upon his (Watterson's) decease; that it was purely personal to him (Watterson) and that there would be no liability or responsibility on the part of said Bradshaw to Watterson's heirs or relations." The appellant contends that this evidence was admissible as tending to show that the alleged contract did not contain the whole agreement, and that its true contents and intent had theretofore been adjudicated. "When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be between the parties and their representatives, or successors in interest, no evidence of the terms of the agreement other than the contents of the writing, except in the following cases: 1. Where a mistake or imperfection of the writing is put in issue by the pleadings. * * * (Code Civ. Proc., sec. 1856.)" The "mistake or imperfection" in effect asserted is, not that the questioned instrument embraced or omitted through oversight or inadvertence any identification, description, or explanatory provision as to property or consideration, but that its object was testamentary and intended to convey all of Watterson's estate to Bradshaw personally to the exclusion of heirs, in return for property and moneys received through Bradshaw as executor from the estate of Annie Watterson, deceased, without accounting or decree of distribution. Parol evidence of the intention of parties may be received to clear up an ambiguity by reason of which such intention is not definitely expressed. Redondo First National Bank v. Spalding, 177 Cal. 217, 170 P. 407. But evidence of a real intention other than that clearly expressed in writing is not admissible. Hershey v. Los Angeles Pacific Co., 171 Cal. 353, 153 P. 230. It must be such as tends to explain or interpret the language used. Wilmarth v. Pacific Mutual L. Ins. Co., 168 Cal. 536, 143 P. 780, Ann. Cas. 1915B, 1120. Otherwise it falls within the rule forbidding the introduction of parol evidence to vary, contradict, or defeat a written instrument. Cheda v. Bodkin, 173 Cal. 7, 158 P. 1025; Arnold v. Arnold, 137 Cal. 291, 70 P. 23. One may be permitted to show the situation of the parties, surrounding circumstances, and such matters of fact as tend to place the court in the situation of the parties; but objections to evidence as to their intentions or as to the meaning or legal effect of the writing were properly sustained. Paige v. Akins, 112 Cal. 401, 44 P. 666.

[3] The revocation of letters testamentary or of administration lies within the sound judicial discretion of the trial court, and, where minds might differ upon conclusions to be drawn from the evidence, its decision is

conclusive. Probate Code §§ 521, 523; Estate of Healy, 137 Cal. 474, 70 P. 455.

Of course, we are not called upon to rule that the evidence offered and excluded would not be admissible in an action to reform the contract between Watterson and Bradshaw. This is not such an action and in this probate proceeding the testimony was properly ruled out.

The finding upon the quoted allegations of extrinsic agreements of the parties to the contract was that the same were untrue. We cannot hold as a matter of law, in the absence of legal evidence to the contrary, that such finding of fact was erroneous.

The order revoking said letters and the resultant judgment are affirmed.

We concur: WORKS, P. J.; ARCHBALD, Justice pro tem.

HERMANSON v. BOARD OF PENSION COM'RS OF CITY OF LOS ANGELES et al. *

Civ. 7660.

District Court of Appeal, Second District, Division 1, California.

April 5, 1933.

Rehearing Denied April 27, 1933.

Hearing Granted by Supreme Court June 1, 1933.

1. Municipal corporations 🔑200.

Fireman's right to pension became vested upon order granting pension, and could be divested only by due process of law.

2. Mandamus 🔑105.

Mandamus is proper proceeding to test alleged right of ex-fireman to payment of pension theretofore awarded.

3. Municipal corporations 🔑200.

Power of city pension commissioners "to hear and determine" whether pension should be terminated is not executive or ministerial, but judicial, power, which cannot be arbitrarily exercised.

> "To hear and determine" is English equivalent of "oyer and terminer" which was a commission or writ issued to royal judges, sergeants, and others, empowering them to hear and determine treasons, felonies, and misdemeanors. In the United States, "to hear and determine" is used with reference to various superior courts of similar jurisdiction. The power "to hear and determine" is an essential ingredient of jurisdiction, and involves a judicial investigation and settlement of an issue of fact which implies the weighing of testimony offered by both sides, from a consideration of which the relief sought by the moving party is either granted or denied.
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> [Ed. Note.—For other definitions of "Hear and Determine," see Words and Phrases.]

4. Municipal corporations 🔑200.

Revocation of fireman's pension by city pension commissioners without notice or opportunity to be heard *held* void.

5. Limitation of actions 🔑34(2).

Ex-fireman's action to compel payment of pension was not barred by three-year statute relating to action upon liability created by statute other than penalty or forfeiture, where revocation by pension commissioners was void (Code Civ. Proc. § 338, subd. 1).

6. Mandamus 🔑143(2).

Where no prejudice appears from delay in bringing mandamus to compel payment of pension previously awarded to city fireman, defense of laches cannot be sustained, particularly where raised for first time on appeal.

Appeal from Superior Court, Los Angeles County; J. Walter Hanby, Judge.

Mandamus by Paul H. Hermanson against The Board of Pension Commissioners of the City of Los Angeles and others, to compel defendants to cause a pension to be paid to plaintiff. From judgment for defendants, plaintiff appeals.

Reversed.

Michael F. Shannon and Thomas A. Wood, both of Los Angeles, for appellant.

Erwin P. Werner, City Atty., Frederick von Schrader, Asst. City Atty., and Loren A. Butts, Deputy City Atty., all of Los Angeles, for respondents.

HOUSER, Justice.

In the course of his duty as a member of the fire department of the city of Los Angeles plaintiff sustained certain injuries which resulted in his disability to perform active service in such employment, and by reason of which he was granted a pension. Some time thereafter, without any notice having been given to plaintiff of its intention to take any action regarding the possible discontinuance of the payment of any pension theretofore awarded to plaintiff, the respondent revoked its order by which said pension was granted, and directed plaintiff to report for active duty in his former employment, which order or direction plaintiff neglected and refused to execute. After a period of more than three years had elapsed following the issuance of such order, plaintiff filed in the superior court a petition for a writ of mandamus to compel the respondent to cause the said pension to be paid to plaintiff. In pursuance of a hearing

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*For subsequent opinion see 28 P.2d 21.

before the lower court on an order to show cause, issued contemporaneously with the alternative writ which was issued in response to said petition, judgment was rendered in favor of the respondent; and it is from said judgment that the appeal herein is prosecuted.

Aside from certain alleged defenses interposed by the respondent to the assumed right of plaintiff to maintain the action or proceeding (hereinafter to be noticed), the question of the legality of the judgment herein turns upon the subsidiary question of the validity of the order made by the respondent by which its former order granting a pension to plaintiff was revoked. The authority under which the respondent assumed to act in the premises, contained within the provisions of section 182 of the charter of the city of Los Angeles, adopted after the "pension award" was made to plaintiff, is as follows: "* * * Provided, further, that the Board of Pension Commissioners shall have the power to hear and determine all matters pertaining to the granting and termination of any pension award as provided for in this section. Said board shall make its findings in writing, based upon the report of at least three regularly licensed, practicing physicians, and such other evidence concerning such disability as it may have before it."

In assumed pursuance of such authority, but in the absence of any notice to plaintiff of its intention to terminate the order by which the pension was granted to him, or of any notice of any intended hearing or proceeding in the matter, or without giving to him, or to any witnesses whom he might desire to produce at such hearing, any opportunity to be present, or to give testimony, or to introduce evidence therein or thereat, the respondent board made certain "findings in writing, based upon the report of * * * three regularly licensed, practicing physicians," and thereupon made and issued its order by which it terminated the "pension award" theretofore granted to plaintiff.

On behalf of appellant, although it is not exactly conceded that the board of pension commissioners was empowered to terminate its former order by which the "pension award" was granted to plaintiff, the burden of appellant's contention is to the effect that the means or method adopted and pursued by said board was unauthorized, and consequently that its ensuing order of termination of the said "pension award" was void and of no effect.

[1] Preliminarily, it should be observed that following the rendition by the respondent of its original order by which a pension was granted to plaintiff, the right of plaintiff to the payment of such "pension award" became vested in him, of which he could not be devested except and only by due process of law. Kavanagh v. Board of Police Pension Fund Commissioners, 134 Cal. 50, 66 P. 36; French v. Cook, 173 Cal. 126, 160 P. 411; Sheehan v. Board of Police Commissioners, 197 Cal. 70, 239 P. 844; Sheehan v. Board of Police Commissioners, 47 Cal. App. 29, 190 P. 51.

[2] Especially in the case last cited is it directly held, and in each of the others is it inferentially ruled, that in circumstances such as are here present mandamus is a proper proceeding for the purpose of testing the alleged right of one assumed to be entitled to the payment of a pension theretofore awarded to him to compel the awarding body to make, or cause to be made, payment of such pension to such person.

[3] Reverting to the provisions of section 182 of the charter of the city of Los Angeles hereinbefore quoted, it is noted that the respondent is granted "power to hear and determine all matters pertaining to the * * * termination of any pension award. * * *" Assuming, without deciding, that under such provision the respondent was possessed of the requisite power to terminate any "pension award" at any time theretofore made to the petitioner, it becomes necessary to direct inquiry to the point of whether in attempting to exercise such power the respondent proceeded either in accordance with the express words of guidance contained within the enabling act, or with the directions implied therein. In that regard, attention at once becomes attracted to the language of the quoted section by means of or through which the commission is authorized to reach a conclusion of whether a given "pension award" should be terminated. Its phraseology is neither obscure nor involved; to the contrary, it is plain and direct. It would seem apparent that in the exercise of its functions, the respondent is authorized to act in a particular and restricted manner; that is to say, in deciding upon the question of whether a "pension award" should be terminated, the respondent may not act arbitrarily, or in an executive or a ministerial capacity, but only in a judicial capacity; or, as definitely and clearly stated in the section to which reference, has been had, the respondent has power "to hear and determine." In a legal sense, when used in connection with the administration of justice, the phrase "to hear and to determine" is understood as the English equivalent of the expression "oyer and terminer." As explained in Webster's New International Dictionary, formerly it was a commission or writ issued to royal judges, sergeants, and others, by which they were empowered to hear and determine treasons, felonies, and misdemeanors. "In the United States the phrase is used with reference to various superior courts of similar jurisdiction." To the same effect, see Anderson's Law Dictionary. It is therefore apparent that in its original, or at least in its earlier, application, the expression "to hear and determine" related to

a judicial power conferred upon some person, commission, or inquisitorial body, which power carried with it as an essential attribute the authority to hear testimony produced by either or both of the respective parties to a controversy and thereupon to reach a legal conclusion and judgment. Nor, as is indicated by the later adjudications, has the original significance of the phrase been altered either in practice or in principle. The case of Applegate v. City of Portland, 53 Or. 552, 99 P. 890, 891, involved the validity of a reassessment by a city council of property assertedly benefited by a certain street improvement. In effect, the governing statute provided that in specified circumstances the owners of affected property should be given notice; that "within ten days thereafter they might file with the auditor their objections in writing to the assessment"; and that "at the time appointed in such notice the council shall hear and determine the objections which have been filed by any party interested." From the report of the case, it appears "that the record of the council shows that the objections interposed by the plaintiffs were read and referred to the committee on streets which reported that having had the same under consideration they recommended 'that said objections be placed on file,' which report was adopted by the council. These objections having been 'read,' the council evidently 'heard' them in the popular sense of giving heed to the perusal, but no determination of the objections was made except to place them on file." In determining whether the council had proceeded properly, in part the court said: "The power to 'hear and determine' is an essential ingredient of jurisdiction, and the quoted words refer to a judicial investigation and settlement of an issue of fact, which implies the weighing of testimony offered by both sides, from a consideration of which the relief sought by the moving party is either granted or denied."

In the case of Stanton v. United States (C. C.) 37 F. 252, 255, it was held that the words "hear and determine" refer to judicial determination after the hearing and weighing of testimony on both sides, and do not include an ex parte accounting. See, also, Quarl v. Abbett, 102 Ind. 233, 1 N. E. 476, 52 Am. Rep. 662; Cole v. State, 102 N. Y. 48, 6 N. E. 277; Commonwealth v. Simpson, 2 Grant Cas. (Pa.) 438, citing 4 Bl. C. 270.

In apparent recognition of the force of the authorities which have a bearing upon the question of the powers and the duties of the respondent in connection with its action in the premises, the brief submitted herein by the respondent contains the admission "that the pension board of the city of Los Angeles is authorized and empowered to hear and determine all matters in connection with the granting, and termination of pensions, and the determination of such matter is a judicial function." And again, within respondent's brief may be found the following declaration: "It seems to us elementary that the determination of all matters concerning the granting or termination of a pension is a judicial function. * * *"

[4] When the facts are considered that, in accordance with the authorities hereinbefore cited, the "pension award" made to plaintiff created in him a vested right of which he could be devested by "due process of law" only; that in effect the respondent was empowered to terminate that right, and to render a judgment in accordance therewith only after "hearing testimony on both sides," which contemplated the receipt from plaintiff, if he so desired, of evidence produced by him; that plaintiff was afforded no opportunity to be heard in his own behalf, or to cross-examine witnesses who might testify in opposition to his claim, but, to the contrary, that the only evidence considered by the respondent was that contained in a "report of three regularly licensed, practicing physicians"—it becomes apparent that the respondent acted in excess of its authority, and consequently that its order by which the "pension award" to plaintiff was terminated was void and of no effect.

[5] Since the order in question was invalid, it is clear that the defense of the statute of limitations, as provided by subdivision 1 of section 338 of the Code of Civil Procedure, interposed by the respondent to the action, can have no application. In no other connection is the question of the effect of any statute of limitations either presented by counsel or intended to be passed upon by this court.

[6] With respect to what may be termed the defense of laches suggested by the respondent, since in no way does it appear that the respondent suffered any prejudice by reason of the delay in bringing the action, such defense cannot be sustained. 10 Cal. Jur., 523, 526, 530, and authorities there respectively cited.

The only prejudice which might have resulted from a delay in bringing the action would have arisen from the possibility that, had plaintiff been more prompt in seeking relief from the order of the respondent, and had the invalidity of such order been decreed by the lower court for the reasons herein set forth, the respondent might have accepted the judgment therein rendered as final, and thereafter have proceeded in such manner that its action in the premises by which the pension theretofore awarded to plaintiff would have been revoked, would have been sustained by the courts. If it were certain that such a situation would obtain it may be that the rule announced in the case of Donovan v. Board of Police Commissioners, 32 Cal. App. 392, 399, 163 P. 69, 73, might have application, to wit: "If * * * it appears from all the circumstances * * * that prejudice must, or, from the very nature of the case may, be reasonably expected to result, the remedy will be denied." But the difficulty in connection with giving operation to such a principle herein is that it involves the assumption as true of too many facts or factors which in reality may have no existence; that is to say, a legal conclusion that prejudice would have resulted to the respondent requires the acceptance as satisfactorily established of many different facts which depend upon the favorable consummation of various contingencies. For example, it is not certain that, had plaintiff acted very promptly in instituting proceedings looking to the enforcement of his asserted rights and had been successful therein in the lower court, the respondent would not have appealed from the ensuing judgment; which appeal in ordinary conditions would have required a period of many months, if not several years, for its determination. Nor is it certain that had the respondent not appealed from such judgment, but had proceeded "to hear and determine" the facts, including such evidence as might have been presented by plaintiff with reference to whether he had recovered from his disability, the evidence therein or thereby produced would not have demonstrated, or at least have satisfactorily established the fact that he was not then in a physical condition to perform the duties that appertained to his former employment. Moreover, it is not certain that, in conducting the assumed proceedings relative to the determination of the proposed termination of the "pension award," the commission would not again have committed some error which would have prejudiced plaintiff in his substantial rights in the premises.

In addition thereto, the defense of laches was not pleaded in the answer of the respondent to plaintiff's petition in the lower court; nor was any finding of fact made by that court with reference to such a defense. Although it is a general rule that the defense of laches cannot be raised for the first time by an appellant on his appeal (10 Cal. Jur. 556 et seq., and authorities there cited), it is possible (although not herein so decided), that the respondent to the appeal, who is the defendant in the action, may urge the laches of the plaintiff therein as a reason for sustaining the judgment. But in any event, such a course would not be proper where, as in the instant case, neither the facts as disclosed by the allegations in the complaint, the allegations contained in the answer, the evidence adduced at the hearing, nor the findings of fact made by the trial court, either irrefutably or at all show that the plaintiff was guilty of such an inexcusable delay in commencing his action that laches as a legal conclusion should necessarily follow. As far as shown by the record herein, plaintiff had no knowledge nor notice that the defendant would claim or assert that the delay in bringing the action would be urged as a defense thereto. For aught that appears in the record, had such a reason been assigned by the defendant in the lower court, plaintiff might have been able to introduce evidence by means of which he would have completely and satisfactorily accounted for his failure in that regard. In such circumstances, it would be unfair to the plaintiff to sustain the judgment for such a reason.

From the foregoing it follows that the judgment should be reversed. It is so ordered.

We concur: CONREY, P. J.; YORK, J.

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130 Cal.App. 526

DOAN v. CITY OF LONG BEACH et al.

Civ. 7617.

District Court of Appeal, Second District, Division 2, California.

March 23, 1933.

1. Evidence 🔑83(2).

Funds with which to provide salary in 1930 for municipal position declared vacant in 1928 must be assumed unavailable until shown to contrary (Const. art. 11, § 18).

2. Mandamus 🔑143(2).

Municipal employee claiming to have been unlawfully removed is guilty of laches, unless he brings action for writ of mandate promptly.

3. Municipal corporations 🔑971(1).

Municipal deputy assessor's delay of about 18 months after dismissal and about 15 months after city council allegedly rescinded approval of dismissal *held* precluded by laches from obtaining reinstatement (Const. art. 11, § 18).

4. Municipal corporations 🔑971(1).

Where city manager, on recommendation of city's assessor, served notice in writing that deputy assessor was summarily dismissed for good of service, and such dismissal was approved by city council in regular session, deputy assessor *held* effectively discharged.

5. Municipal corporations 🔑971(1).

City council's attempted rescission of approval of dismissal of city deputy assessor *held* ineffective.

Appeal from Superior Court, Los Angeles County; Walter J. Desmond, Judge.

Action by Mary Ann Doan against the City of Long Beach and others. From an adverse judgment, plaintiff appeals.

Affirmed.

Burr A. Brown, of Long Beach, for appellant.

Nowland M. Reid, City Atty., and Edmund J. Callaway, Deputy City Atty., both of Long Beach, for respondents.

CRAIG, Acting Presiding Justice.

The appellant, a deputy assessor in and for the city of Long Beach, was summarily dismissed from employment by notice in writing signed by the city manager. She thereafter petitioned the superior court for a writ of mandamus to review the proceedings effecting her dismissal and to require her reinstatement and the payment of salary to the date of said petition. A demurrer interposed by the defendants was sustained without leave to amend, and judgment was entered accordingly, from which she appealed.

By the allegations of the petition it appeared that the appellant here was employed by the city assessor of said municipality under "Class A" of the city civil service rating; that upon recommendation of the assessor the city manager issued and caused to be served a notice in writing that she was "summarily dismissed as Class A deputy assessor and from the service of the city * * * for the good of the service. * * *" Upon the same day the city council in regular session and by unanimous vote approved such action. More than eighteen months thereafter the petitioner sought said relief from the superior court upon the ground that she "at all times herein mentioned has been and now is the duly appointed, qualified and acting 'Class A' deputy in the Division of the City Assessor * * * and an employee"; that she was ready, able, and willing to so continue, and had presented herself at the office of the assessor requesting work, but had been refused employment; that she was informed and believed that there were funds in the treasury with which to pay her claims for salary since the alleged dismissal; and that demands had been made therefor.

[1-3] As a ground of demurrer, it was contended that the petitioner was guilty of laches. It was insisted that, since the dismissal dated November 23, 1928, there remained no funds with which to pay said demands in 1930, when the petition was filed, and that the action of the municipal authorities had become final. It appeared that the city of Long Beach existed under the constitutional and statutory provisions governing political subdivisions having a city manager, council, annual budget, and civil service employment systems. Its fiscal year expired on each successive 30th day of June. The respondents urged as against demands for the period following June 30, 1929, section 18 of article 11 of the Constitution, and decisions applying it. Said section of the organic law forbids any city to "incur any indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for such year," without concurrence of the electors. We must sustain the contention that funds with which to provide a salary in 1930 for a position declared vacant in 1928 must be assumed unavailable until shown to the contrary. Again, it has been decided in such a case "that a person claiming to have been unlawfully removed is guilty of laches, unless he brings his action for a writ of mandate promptly. In Murphy v. Keller, 61 App. Div. 145, 70 N. Y. S. 405, it is said: 'In all proceedings of this character, where a person removed from office is entitled to receive from the public compensation for the services he performs, if he intends to insist that this removal was illegal, or that the law entitles him to be reinstated, his application for reinstatement should be promptly made so as to protect the city from the necessity of paying two persons for the same services.' * * * In several of the New York cases the delay was from four to eight months only, and yet it was held to bar the right to the writ of mandate." Harby v. Board of Education, 2 Cal. App. 418, 83 P. 1081, 1082. See, also, Hayes v. City of Long Beach, 105 Cal. App. 94, 287 P. 136. Here the delay was eighteen months since appellant's dismissal, and about fifteen months after the city council is alleged to have resolved that its approval of the dismissal be rescinded. We find no element alleged to distinguish the appellant's case or to justify us in holding that it is an exception to the general rule stated in these and many other authorities.

Other issues discussed in the briefs would not affect the conclusion which we have reached, and so we do not consider them here.

The judgment is affirmed.

STEPHENS, Justice.

[4, 5] I concur in the judgment and in the opinion written by Mr. Justice CRAIG, but I am of the opinion that the demurrer to the complaint was properly sustained without leave to amend, upon the ground that plaintiff and appellant was effectively and legally discharged from her position, and that the so-called rescission of such discharge was of no legal effect.

ARCHBALD, Justice pro tem.

I concur in the judgment and in both of the above opinions.

LACY v. PACIFIC GAS & ELECTRIC CO.*

Civ. 8898.

District Court of Appeal, First District, Division 2, California.

March 27, 1933.

Rehearing Denied April 26, 1933.

Hearing Granted by Supreme Court May 25, 1933.

1. Negligence ⟹136(25).

Whenever standard of duty is not fixed and substantial evidence on proximate cause is introduced, proximate cause is fact question for jury.

2. Negligence ⟹126(1).

Where injury was caused by continuing negligence of defendant and independent concurring negligence of third person, proof of proximate cause includes all attending circumstances.

3. Appeal and error ⟹930(1).

Where verdict is for plaintiff, reviewing court must assume jury believed plaintiff's evidence.

4. Electricity ⟹19(6).

Whether electric company's leaving of transformer pole beside farmer's pump house proximately caused injury to farmer when pole was struck by another's automobile, raised in air and dropped on farmer's legs, *held* for jury.

Facts disclosed that electric company's employees removed transformer pole and left it lying beside the farmer's pump house, that a mechanic performing service for the farmer left his automobile standing in reverse, parked beside the pole with the wheels cramped and throttle open, and that as the farmer stepped into the automobile and it was started, the automobile dashed backwards, throwing farmer on the ground, and struck the pole so as to raise it momentarily and drop it and break the farmer's legs.

Appeal from Superior Court, Sacramento County; John F. Pullen, Judge.

Action by G. L. Lacy against the Pacific Gas & Electric Company. From a judgment for plaintiff, defendant appeals.

Affirmed.

Thomas J. Straub and C. F. Stanley, both of San Francisco, and W. H. Hatfield, of Sacramento, for appellant.

Butler, Van Dyke, Desmond & Harris, of Sacramento, for respondent.

STURTEVANT, Justice.

This is an action to recover for personal injuries. The jury returned a verdict in favor of the plaintiff and from the judgment entered thereon the defendant has appealed.

On March 17, 1930, and for many years prior thereto, the plaintiff was engaged in farming on his ranch near Elk Grove. His farm is located on the south side of Sheldon road, a public highway running east and west. On the eastern boundary is a wire fence. In the extreme northeast corner is a gate leading from the highway into the farm. From that gate there is a piece of open ground about 50 feet by 500 feet which is not planted. On the western side of the opening the ground is planted to vineyard. In the extreme southern end of the open ground there is a pumphouse. The pump is operated by an electric motor. Near the pumphouse is a vat for dipping prunes. Along the eastern side of the open ground are wagon tracks showing travel, but it was the claim of the plaintiff that the entire strip of open ground was laid out for and used as a roadway for farming purposes. For the purpose of furnishing the plaintiff current the defendant had installed a branch line leading from Sheldon road along the border of the vineyard south to the pumphouse. For that purpose three poles were erected. On the 17th of March, 1930, the transformer pole near the pumphouse was 35 feet long. Being dissatisfied with it the defendant entered the premises, installed a pole 40 feet in length, and having done so its employees took out the other pole and toppled it over with the top end extending toward the east. Notwithstanding requests by the plaintiff, the defendant's agents did not remove the pole, but it was left lying on the ground. It continued to remain there until after the accident complained of. On May 1, 1930, the plaintiff commenced to prepare to irrigate. When he attempted to start his pump, he encountered such difficulties that he sent to the Beach Garage at Elk Grove for mechanical assistance. Thereafter Mr. Gage drove out to the plaintiff's farm in his garage service car. He entered the gate on the Sheldon road and drove along the western side of the open ground above mentioned southerly toward the pumphouse. On approaching the pole lying on the ground Mr. Gage swerved toward the east, passed around the eastern end of the pole, and turned directly west in front of the pumphouse. There he stopped his car, leaving the throttle open, threw the shift into reverse, and at the same time cramped the wheels distinctly to the right, then he got out of his automobile and he and the plaintiff made an examination of the condition of the pump. It transpired that when the defendant's employees installed the new pole the wires were so connected that the pump was operating backwards. To make the changes Mr. Gage needed a particular kind of a screwdriver. The plaintiff informed him that he had one at his house. Thereupon Mr. Gage directed him to get in the automobile and that they would go for the screwdriver. The plaintiff attempted to enter the automobile on the right-hand side. At the same time Mr. Gage stepped to the front and cranked the automobile. By that time the plaintiff had stepped upon the running board and at the same instant the automobile dashed back. Mr. Gage asked the plaintiff to shut off the ignition. Before he could do so the car hit the pole and the plaintiff was thrown off the automobile onto the ground. When the automobile hit the defendant's pole the pole was raised into the air momentarily and then fell across the plaintiff, breaking both of his legs. For the injuries so suffered the plaintiff sued to recover.

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*For subsequent opinion see 29 P.2d 781.

As we view the case we find no material conflict in any of the evidence. The defendant contends that the leaving of the 35-foot pole as it was left by defendant's line crew was not an effective and contributing cause of the injury to plaintiff unless in accordance with the usual experience of mankind the result ought to have been foreseen and apprehended. The plaintiff replies that the defendant negligently placed the pole and negligently left it in that place from March until May after being notified to remove it and that Mr. Gage so negligently operated his automobile as to cause it to collide with the pole and as a proximate result of the concurrent negligence of the employees of the defendant and Mr. Gage the pole was heaved into the air and caused to fall upon the plaintiff, thus causing the injury complained of. Continuing the plaintiff claims that the question before the court is solely a question of fact which the jury on sufficient evidence has found against the defendant and that under well-settled rules a court of review may not disturb the finding.

[1-4] The first part of the plaintiff's reply is entirely sound and is supported by a long line of decisions in this state. Pastene v. Adams, 49 Cal. 87; Merrill v. Los Angeles Gas & Elec. Co., 158 Cal. 499, 111 P. 534, 31 L. R. A. (N. S.) 559, 139 Am. St. Rep. 134; Katz v. Helbing, 205 Cal. 629, 271 P. 1062, 62 A. L. R. 825; Royal Indemnity Co. v. Public Ser. Corp., 42 Cal. App. 628, 183 P. 960, 962; Polloni v. Ryland, 28 Cal. App. 51, 151 P. 296. The second part of his reply is also sound. Whenever the standard of duty is not fixed and there is introduced substantial evidence on the subject of proximate cause it is a question of fact for the jury. 45 C. J. 1280; 1 Shearman & Redfield on Negligence, 112; Andreen v. Escondido Citrus Union, 93 Cal. App. 182, 187, 269 P. 556. When, as here, it is claimed that an injury was caused both by the continuing negligent act of one defendant and the independent concurring negligent act of a third person, many facts are to be considered in determining the proximate cause. 45 C. J. 897-925. The proof on that element includes all "the attending circumstances." 45 C. J. 914; Indemnity Co. v. Public Ser. Corp., supra; Marton v. Jones, 44 Cal. App. 299, 186 P 410. In the instant case much evidence regarding attending circumstances was introduced. The question was submitted under full and specific instructions. If the jury believed the evidence so introduced by the plaintiff, and from its verdict we must assume it did, this court may not say as a matter of law that the issue of proximate cause was not proved.

The defendant quotes from Indemnity Co. v. Public Ser. Corp., supra, as follows: "It also appears from the record that the pole is located in a field planted with barley, and that the barley was planted right up to the line of the pole. The barley was being cut and horses were being used in connection with the cutting—all of which is a usual and necessary use of the land on which the pole is situated. We think that the jury was justified in concluding that the defendant should have anticipated that the guy wire might be subjected to sufficient strain by contact with the usual instrumentalities employed in farming operations, to cause a breaking or tearing away of the strands of the wire and a consequent sagging of the wire, and should have insulated its guy wires so as to avoid injury to others in the event of such an occurrence." The defendant then argues: "The foregoing quotation is the very meat and gist of the Indemnity Company Case. But what earthly application can it have to the case at bar? Surely the leaving of an automobile in reverse gear 'because the brakes were not in very good order' and the front wheels 'cramped towards the right,' and with the throttle of the engine 'wide open, very wide,' and then starting to crank it as Mr. Lacy was getting into it, is a situation that has nothing to do with Mr. Lacy's usual ranching or farming operations and could not have been anticipated by defendant. The bare statement of the facts in the instant case and the Indemnity Company Case shows the distinction between them." These arguments are not convincing. As a matter of law this court may not say that there is any more reason to assume that a farmer will or will not mow his barley than there is to say that he or his agents will or will not drive a motor car over his pump and prune road. See, also, Carroll v. Central Counties Gas Co., 74 Cal. App. 303, 240 P. 53; Id., 96 Cal. App. 161, 273 P. 875, 274 P. 594; Rauch v. Southern Cal. Gas Co., 96 Cal. App. 250, 273 P. 1111; Marton v. Jones, supra.

The defendant cites and earnestly relies on Klarquist et al. v. Chamberlain & Proctor et al. (Cal. App.) 12 P.(2d) 664. However, we think that the case is not at all in point. As we read the case the owners were constructing a building. Bavin & Burch were the contractors. Pursuant to permits issued to them the contractors laid down a new sidewalk. In everything they did they acted legally. The work had so far advanced that the sidewalk was not usable. Plaintiff's decedent while traversing the sidewalk adjacent to the building was therefore compelled to step out into the street. As he did so the truck of one of the defendants approached in a negligent manner, knocked him down, and from the injury he died. The plaintiff sued the owner of the building, the owner of the truck, and Bavin & Burch. Judgment went against the defendants. The contractors appealed. The District Court of Appeal held that the contractors were not negligent, and as to them the judgment was reversed. But in the instant case it is not even suggested that the defendant was not negligent in leaving the transformer pole lying on the plaintiff's driveway.

The defendant also cites South-Side Passenger Ry. Co. v. Trich, 117 Pa. 390, 11 A. 627, 2 Am. St. Rep. 672; Teis v. Smuggler Mining Co. (C. C. A.) 158 F. 260, 15 L. R. A. (N. S.) 893; and Falk v. Finkelman, 268 Mass. 524, 168 N. E. 89, 90. Each case contains instructive phrases, otherwise the first two are not helpful. The case last cited is more nearly in point and requires further comment. Three cases were tried together. One of the defendants had left his automobile parked at the curb. Fire apparatus approached from two directions and in the collision that followed the first automobile was driven up onto the sidewalk and injured the plaintiff. The parking of an automobile at the particular place for more than twenty minutes was prohibited by the terms of an ordinance recently passed, but the passage of which was never called to the attention of the defendant. In passing on the case the Supreme Court of Massachusetts said: "The defendant violated no legal duty owed the plaintiff," and thereupon it ordered judgment for the defendant. In the case of Milbury v. Turner Centre System, 274 Mass. 358, 174 N. E. 471, 473, 73 A. L. R. 1070, the Supreme Court of Massachusetts cited the Falk Case, and commenting thereon, said: "The case differs from Falk v. Finkelman, supra. There the parking of the defendant's automobile at the curb was an innocent act, bare of negligence. Allowing it to remain there beyond twenty minutes, in ignorance of the ordinance forbidding parking for a longer time, although it subjected the owner to punishment, had nothing to do with the collision of fire apparatus or with causing the injury for which recovery was sought. In Rea v. Checker Taxi Co. [272 Mass. 510, 172 N. E. 612], supra, on the other hand, knowing violation of the one-way street ordinance placed the automobile where a collision could occur, one of the very things which the ordinance sought to prevent. It could be found to be negligence directly contributing to the accident. A collisión might well be found to be not something unusual and unlikely to happen as a result of such blocking of a corner as here took place—something only remotely and slightly probable—but, rather, a consequence naturally to be expected." It is clear, we think, that the Falk Case is not controlling in this case. On the other hand, the case last cited and Felix v. Soderberg, 207 Wis. 76, 240 N. W. 836, clearly support the views hereinabove expressed.

The judgment is affirmed.

We concur: SPENCE, Acting P. J.; GOODELL, Justice pro tem.

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131 Cal.App. 67

CONNELLY v. J. D. MILLAR REALTY CO. et al.

Civ. 1008.

District Court of Appeal, Fourth District, California.

April 6, 1933.

1. Appeal and error 🔑**1011(1).**

Findings of trial court on substantially conflicting evidence cannot be disturbed by appellate court.

2. Estoppel 🔑**27(1).**

Vendor of realty conditionally transferred, in view of recorded instrument, *held* estopped from asserting rights as against trustee under trust deed securing loan to vendee, and beneficiary thereunder.

> Instrument placed on record by vendor of property certified that vendor conveyed real property and was allowing grantee 60 days to deliver deed to lots given in trade in order to permit grantee to mortgage property and make cash payments, and that vendor was to receive deeds at expiration of 60 days.

3. Vendor and purchaser 🔑**266(2).**

In action to rescind contract to convey property, plaintiff *held* not entitled to assert vendor's lien, because inconsistent with right of rescission.

Appeal from Superior Court, Los Angeles County; Warren V. Tryon, Judge.

Action by Mary E. Connelly against the J. D. Millar Realty Company and others. The action was dismissed as to certain defendants. From part of judgment in favor of the defendants the Meline Bond & Mortgage Company and the Title Insurance & Trust Company, the plaintiff appeals.

Judgment affirmed.

Sherman & Sherman, of Los Angeles (by Glenn M. Still, of Los Angeles), for appellant.

Hewicker & Kearney, of Los Angeles, for respondents.

VAN ZANTE, Justice pro tem.

This action was brought by plaintiff to rescind a contract and to quiet title to a certain lot in the city of Los Angeles. The default of the defendant Fred S. O'Neill was entered, and the action was dismissed as to defendants J. D. Millar Realty Company, J. A. Ross, Security Trust & Savings Bank, and Security First National Bank.

Judgment was rendered in favor of the defendants on their answer and in favor of defendant Meline Bond & Mortgage Company on its cross-complaint to quiet title to and for possession of the same lot.

Plaintiff's contentions that the judgment as rendered should be reversed are set forth in his opening brief as follows:

"Appellant contends and alleges as grounds of error and as sustaining a reversal the following theories:

"(a) That defendants and respondents, through their duly authorized servants, agents and/or employees had notice and knowledge of the open, exclusive, and notorious possession of the said property by appellant herein at 2438–2440 Mansfield Avenue, Los Angeles, California, at all times herein mentioned, and that any rights of defendants and respondents in placing an incumbrance upon said property with knowledge of these facts are subservient and secondary to those of appellant.

"(b) That the evidence is insufficient to justify or sustain the findings of fact and conclusions of law."

It appears in the record, and is not disputed, that plaintiff was in possession of this property at the time in question. It also appears in the record that, while the plaintiff was so in possession, she executed and delivered to defendant Fred S. O'Neill a grant deed conveying this property to him; that, while this grant deed recited a consideration of $10, the real consideration was $1,000 and two lots in the Hollywood Sunnyside tract; that plaintiff received only $600, and the two lots have not been conveyed to her; that, after recording his grant deed, defendant O'Neill borrowed the sum of $3,500 from defendant Meline Bond & Mortgage Company, and executed to that company his promissory note for that sum, and secured same by executing a trust deed conveying this property to defendant Title Insurance & Trust Company as trustee and defendant Meline Bond & Mortgage Company as beneficiary.

Plaintiff contends that her possession of the property in question was notice to the world that she claimed such an interest as would place any person dealing with the property upon inquiry to ascertain the character of her claim.

We find in the record an exhibit which reads as follows:

"July 28th, 1928.

"To Whom It May Concern.

"This is to certify that I, Mary E. Connelly, being of sound mind and health, have traded my house and lot on Mansfield Street in the city of Los Angeles, for the corner of Sepulveda Blvd. and Nome Street in Hollywood Sunnyside tract, without duress being brought to bear, and that I have made this trade of my own free will and accord.

"I further affirm that I am making this deal, allowing the O'Neill organization sixty days to deliver to me deeds to the lots above mentioned, and without putting this trade through escrow for at least sixty days. This being done in order to permit them to mortgage the property, in order that they may pay me $500.00 Cash, and then within sixty days I am to receive a further $500.00, making a total of One thousand dollars to be paid to me, and I am also to receive my deeds at the expiration of the sixty days. I agree that I will not at any time perform any action that will embarrass you in the negotiations.

"Mary E. Connelly.

"Signed in the presence of J. L. Phillips."

[1, 2] We think the plaintiff is estopped from asserting any rights as against the trustee and beneficiary named in the trust deed which was executed subsequent to the execution of the above instrument. There is other substantial evidence in the record supporting the findings as made by the trial court. And, while there is also substantial evidence in the record supporting plaintiff's theory of the case, findings based upon substantially conflicting evidence cannot be disturbed by an appellate court. This rule is too well established to require citation of authorities.

[3] Plaintiff also claims a vendor's lien. This claim is inconsistent in an action for rescission of contract, and cannot be maintained. It appears in the record that subsequent to the institution of this action she filed a complaint to enforce a vendor's lien.

"The lien which the vendor of real property retains after an actual conveyance, for the unpaid purchase money, is not a specific and absolute charge upon the land, but a mere equitable right to resort to it upon failure of payment by the vendee. Sparks v. Hess, 15 Cal. 186. It is in its nature a personal privilege, unassignable, which the vendor can assert only in a suit brought for the purpose of having it decreed and enforced." Fitzell v. Leaky, 72 Cal. 477, 484, 14 P. 198, 201.

"The two causes of action rest upon different and inconsistent theories: The first upon the theory that the contract between the parties is terminated, the plaintiff electing upon defendant's repudiation to treat the contract as rescinded and to bring action for the money he has advanced as being money for which he has received no consideration; the second, upon the theory that the contract is still in force, the plaintiff electing not to acquiesce in a rescission and to maintain an action on the contract for damages for the breach. It is thoroughly settled in this state that a party to a contract may pursue either of these courses, but that he may not recover on both." House v. Piercy, 181 Cal. 247, 251, 183 P. 807, 808.

"The true principle is well stated in Whitney v. Allaire [1 N. Y. 305], supra, as follows: 'It is true that, if a party affirms a contract with knowledge of the fraud, he affirms it wholly, and this whether it is executory, or partially executed. But in neither case does he affirm it as a contract made in good faith. He consents to be bound by the provisions of the agreement, but does not thereby release or waive his claim for damages arising from a fraud collateral to the agreement.' That but one of these two courses and none other is open to a vendee under an executory contract, whether the vendor's wrong rests in fraud or breach of warranty, is not debatable under the authorities elsewhere as well as in this state. Gates v. McLean, 70 Cal. 42, 11 P. 489; Worley v. Nethercott, 91 Cal. 517, 25 Am. St. Rep. 209, 27 P. 767; Garvey v. Lashells, 151 Cal. 526, 91 P. 498.

"As it is humanly impossible for a man in the same breath to affirm and to repudiate an agreement, so is it legally impossible that he should have the same redress upon repudiation and rescission as upon acceptance and complete execution." Hines v. Brode, 168 Cal. 507, 512, 143 P. 729, 731.

See, also, Ruhl v. Mott, 120 Cal. 668, 53 P. 304.

Judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

In re PUTNAM'S ESTATE. *

Civ. 1246.

District Court of Appeal, Fourth District, California.

April 6, 1933.

Rehearing Denied April 28, 1933.

Hearing Granted by Supreme Court June 5, 1933.

1. Executors and administrators 🔑314(12).

On appeal from decree of distribution taken upon judgment roll, trial court's findings of fact are conclusive.

2. Descent and distribution 🔑6.

Law in force at time of intestate's death governs descent of his property.

3. Partition 🔑116(1).

Decree in partition does not affect title by descent which surviving widow received from deceased husband (Probate Code, § 229).

4. Conversion 🔑21(1).

Where surviving widow converted into cash realty received by descent from deceased husband, she held cash by same title (Probate Code, § 229).

5. Joint tenancy 🔑1.

Personal property may be held by two or more persons in joint tenancy, same as real property.

6. Joint tenancy 🔑8.

In contemplation of law, each joint tenant is seized of the whole estate by virtue of grant.

7. Husband and wife 🔑249.

Estate or interest of each joint tenant is separate property.

8. Joint tenancy 🔑6.

Chief incident of joint tenancy is right of survivorship, by which survivor becomes sole owner of whole estate.

9. Husband and wife 🔑14(3).

Mere assignment by spouses as joint tenants of stock to issuing corporation, and reissuance by it to wife, was insufficient to terminate joint tenancy, in absence of agreement that it should.

10. Descent and distribution 🔑58.

Stock held in joint tenancy by spouses, though purchased with proceeds of realty received by descent from wife's first husband, would form no part of wife's estate upon her death without issue (Probate Code, §§ 223, 229).

11. Descent and distribution 🔑58.

Stock held as sole and separate property of wife and purchased with proceeds of realty received by descent from first husband would pass to sole surviving heir of first husband upon wife's death without issue (Probate Code, §§ 223, 229).

Appeal from Superior Court, Tulare County; Frank Lamberson, Judge.

In the matter of the estate of Elizabeth D. Putnam, also known as Mrs. L. Putnam, also known as Elizabeth D. Halstead, and also known as Elizabeth D. Denend, deceased. From decree of distribution, Arzena Halstead appeals.

Reversed and remanded, with directions.

Feemster, Perkins & McCormick, of Visalia, for appellant Arzena Halstead.

🔑For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 28 P.2d 27.

J. A. Chase, of Visalia, for respondent Joseph A. Potter.

Farnsworth, Burke & Maddox, of Visalia, for respondent J. G. Fields et al.

CAMPBELL, Justice pro tem.

[1] This is an appeal from a decree of distribution and is taken upon the judgment roll. There can be no dispute on this appeal as to the material facts. The findings of the lower court declare those facts, and these facts are conclusive for all purposes of the appeal.

One Timothy Halstead died intestate in the county of Tulare on the 16th day of October, 1886, a resident of said county of Tulare, and left surviving him his widow Elizabeth D. Putnam, a daughter Lena May Halstead, who was a daughter of said decedent Timothy Halstead and Elizabeth D. Halstead (and who died intestate without issue or descendants prior to the death of Elizabeth Halstead and leaving said Elizabeth Halstead as her only heir at law), and also another daughter, Arzena Halstead (appellant herein), a daughter of decedent Timothy Halstead by a former marriage. Timothy Halstead left no other heirs or heirs at law surviving him. Counsel for respondents concede that Timothy Halstead left an estate in Tulare county consisting of real and personal property, all of which was his separate property. The estate of Timothy Halstead was duly probated and all of the property of the estate was distributed to his three heirs above named in equal and undivided shares, an undivided one-third thereof to each. Thereafter, the real property distributed as stated was partitioned among the three heirs of said Timothy Halstead by a decree of partition.

After the death of Timothy Halstead the surviving widow, Elizabeth D. Halstead, married again and her name changed to Elizabeth D. Denend. On the 23d day of April, 1907, she married J. F. Putnam, and they lived together up until the time of her death, August 18, 1931, and left no issue. Prior to her death, Elizabeth D. Putnam, on or about October 15, 1928, sold and conveyed certain parcels of land, being a portion of the property partitioned to her in the decree of partition above mentioned; that on or about November 8, 1928, the net proceeds of the sale above mentioned were paid by the purchasers to Elizabeth D. Putnam; that Elizabeth D. Putnam on November 9, 1928, paid the Southern California Edison Company the sum of $24,786 for 918 shares of the said company's 6 per cent. cumulative capital stock at the purchase price of $27 per share; that the purchase agreement was signed on November 7, 1928, by Elizabeth D. Putnam and by the said J. F. Putnam, and the stock, so purchased and paid for, was to be issued in the names of Elizabeth and J. F. Putnam as joint tenants with full rights of survivorship; that pursuant to said purchase the said Southern California Edison Company issued and delivered to said Elizabeth D. Putnam and J. F. Putnam on or about November 19, 1928, three certificates of stock of the said Southern California Edison Company representing the total number of 918 shares, each certificate being issued to and in the names of Elizabeth D. Putnam and J. F. Putnam as joint tenants, with full rights of survivorship; that the certificates of stock were so held from the 19th day of November, 1928, for a period of more than two years and two months, during which time quarterly dividends were paid thereon by check of said company payable to Elizabeth D. Putnam and J. F. Putnam as joint tenants with full rights of survivorship; that said checks were properly indorsed and with the consent of J. F. Putnam were deposited to the account and credit of said Elizabeth D. Putnam; that on January 30, 1931, each of said certificates were transferred and signed on the backs thereof by said Elizabeth and J. F. Putnam to Elizabeth D. Putnam; that thereupon Elizabeth D. Putnam surrendered to the Southern California Edison Company the said certificates so indorsed for the issuance of new certificates in lieu thereof; and that thereupon, on or about February 7, 1931, said Southern California Edison Company issued in lieu of said surrendered three certificates, ten certificates of stock totaling 918 shares, which shares of stock, evidenced by said ten certificates, were delivered to and owned by the said Elizabeth D. Putnam.

The principal question involved in this appeal may be summarized as follows: If the decedent leaves no issue and the estate or any portion thereof was separate property of a previously deceased spouse and came to the decedent from such spouse by gift, descent, devise, or bequest, and if said decedent in her lifetime and while seized of the title to the property which so came to her from her deceased spouse creates an estate in joint tenancy therein in favor of herself and her husband by a later marriage, and if prior to the death of decedent the husband conveys to her his interest in the property in the joint tenancy, does the creation of the joint tenancy have the effect of breaking the chain of title by which the decedent receives the property from her predeceased spouse, and thereby abrogate the rule of succession provided for in section 229 of the Probate Code? Section 229 of the Probate Code provides as follows: "If the decedent leaves no issue, and the estate or any portion thereof was separate property of a previously deceased spouse, and came to the decedent from such spouse by gift, descent, devise or bequest, such property goes in equal shares to the children of the deceased spouse and to their descendants by right of representation. * * *"

[2] The law that governs descent of property in the case of a person dying intestate is

the law in force at the time of his death. In the case of McKay v. Lauriston, 204 Cal. 557, it is said on page 567, 269 P. 519, 523: "It is equally well settled that the statutes governing the right of inheritance in force at the time of death control the disposition of property left by an intestate." Sections 223 and 229 of the Probate Code, quoted above, were the statutes in effect at the time of death of the decedent, Elizabeth D. Putnam, and are the statutes to which we must look for determining to whom the property of her estate shall descend, since she died intestate. If, therefore, any portion of the estate of Elizabeth D. Putnam, deceased, which may be identified as separate property of her predeceased spouse and which came to the decedent from such spouse by gift, descent, devise, or bequest, all of such property must go to the appellant herein, who is the sole surviving heir or descendant of the said deceased spouse, Timothy Halstead, and as to all such property, is the sole distributee of that portion of the estate of Elizabeth D. Putnam, deceased.

[3] Respondents also claim that the title to the real estate sold by Elizabeth D. Putnam prior to the purchase of the stock in the Southern California Edison Company came to her not directly from her predeceased spouse, but came to her by decree of partition, in which partition suit, which was commenced by herself, she exchanged an undivided one-third interest in the property for a title in severalty to an area decreed as equivalent in value and the title which she held, therefore, came to her not by descent but by decree or judgment entered by the court in the partition suit. In Wade v. Deray, 50 Cal. 376, at page 380, the court said: "It is well settled that a decree or judgment in partition has no other effect than to sever the unity of possession, and does not vest in either of the co-tenants any new or additional title. After the partition each had precisely the same title which he had before; but that which before was a joint possession was converted into a several one." In Rose v. Mesmer, 142 Cal. 322, 328, 75 P. 905, 907, the court said: "A judgment in partition is a mere severance of the unity of possession and community of interest, and does not in any other respect affect the character of the title or estate, unless it expressly so declares." That judgment (in partition) conferred no new or additional title, but merely ascertained and allotted to the parties to the suit their respective interests in the land. Upon this point it is said in 47 C. J. 281, § 37: "If the title to land is acquired by descent, on partition thereof, the tenants take their respective shares by descent and not by purchase." These authorities effectively dispose of this contention on the part of the respondents. The decedent's title to the property allotted to her by the decree in partition continued to be exactly the same as the title by which she held her undivided interest, viz., a title by descent or inheritance from her deceased husband, Timothy Halstead.

[4] Elizabeth D. Putnam sold the property allotted to her by the decree in partition and received therefor cash in the sum of $26,548.55. The money received by Elizabeth D. Putnam for the sale of her land was her separate property and held by her by the same character of title as to origin as that by which she had title to the land, viz., a title by descent or inheritance from her deceased spouse, Timothy Halstead. Estate of Brady, 171 Cal. 1 at page 5, 151 P. 275. With $24,786 of that money she purchased 918 shares of Southern California Edison Company stock and had certificates therefor issued to her in the names of herself and her then husband, J. F. Putnam, as joint tenants with full rights of survivorship. It is clear, therefore, that the title to the shares of stock was taken by Elizabeth D. Putnam and her husband as joint tenants. Did the joint tenancy change the character of Elizabeth D. Putnam's title as to its origin? In that respect, was it the same property that had come to her by descent from her deceased husband, Timothy Halstead? It is appellant's contention that with respect to its origin Elizabeth D. Putnam's title to the 918 shares, in their entirety, remains the same as that by which she held both the land and the money which she received from the sale of the land, and that the 918 shares, under the law, must be regarded as the same property which she received by descent from Timothy Halstead, and that the taking of title to 918 shares of stock by herself and J. F. Putnam as joint tenants did not in the least alter that situation.

The joint tenancy of Elizabeth D. Putnam in the 918 shares continuued from November 19, 1928, to January 30, 1931, a period of approximately two years and two months. The court found that during all of said time all of the quarterly dividend checks received on account of dividends on the 918 shares of stock were received by Elizabeth D. Putnam and with the consent of J. F. Putnam deposited to her account and credit. On January 30, 1931, J. F. Putnam assigned all of his interest in the 918 shares of stock to Elizabeth D. Putnam, and thereafter new certificates for the whole of the 918 shares were issued to Elizabeth D. Putnam in lieu of the joint tenancy shares. Respondents' position is that the act of J. F. Putnam, in so reconveying, was an act of purchase, and that by virtue thereof all of the stock came to the estate of Elizabeth D. Putnam not by gift, descent, devise, or bequest from a previously deceased spouse, but by the voluntary act or purchase from J. F. Putnam. In this respect the trial court found that "said shares of stock did not nor any portion thereof come to said Elizabeth D. Putnam from her predeceased spouse Timothy Halstead by gift, descent, devise or bequest, but all thereof came to said Elizabeth D. Putnam by the voluntary act of said J. F. Putnam."

In Estate of Gurnsey, 177 Cal. 211, 215, 170 P. 402, 404, in speaking of joint tenancy, the court says: "The joint tenancy referred to in the Civil Code (section 683), and here involved, is the estate known as such at common law. In Kennedy v. McMurray, 169 Cal. 287, 146 P. 647, Ann. Cas. 1916D, 515, we held that a joint deposit account made in the same manner as the account here involved, created a joint tenancy, and that such deposit was no part of the estate of the party who first died. In Estate of Harris, 169 Cal. 725, 147 P. 967, the court decided that a joint tenancy in personal property could be created by parol, and that 'upon the death of one of two joint tenants, the survivor thereupon becomes the sole owner of the entirety, not by descent, but by survivorship and in virtue of the original grant creating the tenancy.' In Hannon v. Southern Pacific R. Co., 12 Cal. App. 350, 355, 107 P. 335, the subject was treated at greater length. It was there shown that at common law the title to the joint property did not pass to and 'vest in the survivor,' upon the death of his cotenant, but that 'each tenant was seised of the whole estate from the first, and no change occurred in his title on the death of his cotenant'; that 'it simply "remained" to him,' and came to him 'wholly from the original grant,' so that after the death of one, the other, in pleading his title, could allege a conveyance by the original grantor to himself, without mention of the cotenant, citing Coke on Littleton, § 286, and 1 Washburn on Real Property, 646, and concluding with the following: 'It is therefore a mistake to say of joint tenants that the title vests in the survivor upon the death of the cotenant, or that it descends to him from his cotenant; for it had already vested in him by, and at the time of, the original grant.' This is the legal effect of a joint tenancy at common law and under our Code, and it would, of course, prevail without regard to the actual intent of the donor who created it."

Under the principles announced in the Estate of Brady, 171 Cal. 1 at page 5, 151 P. 275, Ramsdell v. Fuller, 28 Cal. 37, 42, 87 Am. Dec. 103, Flournoy v. Flournoy, 86 Cal. 286, 293, 24 P. 1012, 21 Am. St. Rep. 39, the cash thus received is property of the same character or status as to title as the land given in exchange for it, and had Elizabeth D. Putnam died intestate while in the ownership and possession of that money, the appellant herein would have been entitled to succeed to the whole thereof. In the case of Siberell v. Siberell, 214 Cal. 767, 7 P.(2d) 1003, 1004, the court says: "Respecting joint tenancy, it is only necessary to amplify the definition quoted from section 683 by a quotation from the case of DeWitt v. San Francisco, 2 Cal. 289, 297, opinion rendered in 1852, defining joint tenancy as follows: 'Joint-tenancy is a technical feudal estate, founded, like the laws of primogeniture, on the principle of the aggregation of landed estates in the hands of a few, and opposed to their division among many persons. For the creation of a joint tenancy, four unities are required, namely: unity of interest, unity of title, unity of time, unity of possession. (1 Cruise's Digest, by Greenleaf, 355, sec. 11; 2 Crabb's Real Prop. sec. 2303.) But the distinguishing incident is a right of survivorship. (1 Cruise, 359, sec. 27; 2 Crabb's Real Prop. sec. 2306.)' These four characteristics are the acknowledged elements of a joint tenancy. Tiffany on Real Property, vol. 1 (2d Ed.) p. 625, par. 191; 2 Blackstone Comm. 180. It is at once evident that there is thereby created but one estate, and that each of the four elements, unity of interest, unity of title, unity of time, and unity of possession, must be present, and an absence of any one would change the nature of the estate. * * * A joint tenancy is one estate, and in it the rights of the spouses are identical and coextensive. * * * It seems to us to be clear, as already pointed out above, that a joint tenancy, the evidence of which the law requires to be on the face of the conveyance creating it, is of necessity an expression of an intention to hold the property otherwise than as community property, and that the equal interest of the spouses must therefore be classed as their separate but joint estate in the property."

[5] In Estate of Harris, 169 Cal. 725, it is said by the court on page 726, 147 P. 967, 968: "Personal property may be held by two or more persons in joint tenancy. There is no distinction, in this respect, between real property and personal property. Denigan v. San Francisco Sav. Union, 127 Cal. 142, 78 Am. St. Rep. 35, 59 P. 390; Kennedy v. McMurray [169 Cal. 287], 146 P. 647 [Ann. Cas. 1916D, 515]."

[6-8] Thus the following general principles are definitely established: (1) That in contemplation of law each tenant is seized of the whole of the estate and by virtue of the grant; (2) that the estate or interest of each tenant is a separate property; (3) that the chief incident of joint tenancy is the right of survivorship, which means only that at the death of one of the tenants the survivor becomes the sole owner of the entirety of the estate and not the joint owner thereof as before; the whole estate remaining to him as the survivor.

The underlying characteristics of property held in joint tenancy render it inherently distinct and different from all other classes of property as to the ownership thereof.

Two important questions now present themselves to the court. First, what was the effect of the assignment of the stock of Elizabeth D. Putnam by herself and her husband, together with the reissues of that stock to her; and, second, if it should be held that this assignment vested the stock in her as her separate property, whether or not she still held it through descent from her former husband. Section 158 of the Civil Code provides that either the husband or wife may enter into any engagement or transaction with the other or with any other person, respecting property which either might have if unmarried, subject, in transactions between themselves, to the general rules which control the actions of persons occupying the confidential relations with each other. In Estate of Harris, supra, page 728 of 169 Cal., 147 P. 967, 968, the court says: "The property acquired with money taken from the bank account would retain the character of joint property, the same as the money with which it was obtained, unless by some agreement between the parties its character was changed." The only finding upon this question is as follows: "That on January 30, 1931, each of said certificates was transferred and assigned on the backs thereof by said Elizabeth D. Putnam and J. F. Putnam to Mrs. Elizabeth D. Putnam; that said J. F. Putnam signed and delivered the same by his voluntary act, and thereby transmitted and changed the character of said stock held in joint tenancy, with all the characteristics essential to joint tenancy, into stock no longer held in joint tenancy, but thereafter held in severalty by said Elizabeth D. Putnam; and thereupon said Elizabeth D. Putnam surrendered to said Southern California Edison Company the said Certificates so indorsed, for the issuance of new certificates in lieu thereof to be issued to and in the name of Mrs. Elizabeth D. Putnam; that thereupon, on or about February 7, 1931, said Southern California Edison Company issued, in lieu of said surrendered three certificates, ten Certificates of stock of said Southern California Edison Company * * * said ten Certificates, were delivered to, and held and owned by said Elizabeth D. Putnam as her separate property up to and at the time of her death, and said Elizabeth D. Putnam during said time received the quarterly dividends paid by said Company thereon as her separate property."

[9-11] It seems to us to be more a conclusion of law which the court drew from the bare fact of assignment of the stock and its reissuance by the corporation. It seems only fair to us that the case should be returned to the trial court for determination of that particular issue, for if there is no contract between the parties the Estate of Harris, supra, would be authority for our holding that the stock retained its joint tenancy nature even though it stood in the name of one of the spouses only. If the joint tenancy is broken by the reconveyance of the property to Mrs. Putnam, and she owns it as her separate property at the time of her death, then it should be classified as separate property received by her through descent from her predeceased spouse. It is well established that each joint tenant owns a separate estate in entirety in all of the joint tenancy property, subject only to a defeasance upon death. During the time of the joint tenancy Mrs. Putnam therefore had a separate estate in all of the joint tenancy property. It was the same estate that she held in the property before the creation of the joint tenancy, except the matter of the defeasance of this estate upon her death. When the property was reconveyed to her, assuming this broke the joint tenancy relation, she still owned the entire estate as her separate property; the only change being that her interest was not defeasible upon her death. In that event, the property would be directly traceable from the estate of Timothy Halstead, her predeceased husband, and she at all times had an entire estate in the property as her sole and separate property. The finding not being complete in the particulars we have indicated, this court therefore reverses the decree of distribution, with instructions to the trial court to determine the question of a contract between the parties at the time of the reissuance of the stock to Mrs. Putnam. If the joint tenancy estate applied to it after such act, the property would form no part of her estate. Estate of Harris, supra. If the joint tenancy was broken and the stock became the sole and separate property of Mrs. Putnam, it should be distributed to Arzena Halstead, the appellant herein, as the sole surviving heir of Timothy Halstead, under the provisions of section 229 of the Probate Code.

The judgment is reversed, with directions to the trial court to make a finding on the question above indicated and a decree of distribution in accordance therewith.

We concur: BARNARD, P. J.; MARKS, J.

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LUFKIN v. CITY OF BAKERSFIELD et al.

Civ. 736.

District Court of Appeal, Fourth District, California.

April 4, 1933.

Rehearing Denied April 28, 1933.

Hearing Denied by Supreme Court June 1, 1933.

1. Automobiles 🔑244(16).

Evidence showing that automobile entered intersection first and was almost across when struck on rear by police patrol approaching from right supported finding of police driver's negligence (St. 1923, p. 560, § 132, as amended by St. 1929, p. 542).

> It appeared that driver of automobile in question could see about one-half of a block to right before he entered intersection but did not see police patrol automobile approaching, and that police patrol was going faster than automobile and was not on emergency call and did not alter its course before collision. Police driver testified that he entered intersection at between 20 and 25 miles an hour; that the corner was a blind one and as soon as automobile involved became visible he applied brakes; and that patrol rolled about 25 feet with brakes fully set.

2. Automobiles 🔑245(67).

Contributory negligence of motorist first entering intersection but not seeing police patrol approaching *held* for jury (St. 1923, p. 560, § 132, as amended by St. 1929, p. 542).

3. Appeal and error 🔑1170(9).

Instruction on right of way at street intersection, though not meritorious, *held* harmless as against contention that it was formula instruction and omitted contributory negligence (Const. art. 6, § 4½).

4. Trial 🔑296(4, 5).

Instruction on respondeat superior doctrine *held* not objectionable because omitting contributory negligence covered by other instructions.

5. Trial 🔑296(4, 5).

In automobile collision case, instruction that contributory negligence would not bar recovery if not constituting want of ordinary care, although unnecessary and not to be recommended, *held* harmless; other instructions forbidding jury to compare negligence.

> In several other instructions jury was told that it must not compare negligence of the two drivers involved, that it must not attempt to determine which of the two was guilty of the most negligence, that if driver of automobile in which plaintiff was riding failed to make reasonable use of all his faculties to avoid collision, and if he failed to do all that person of ordinary prudence would have done under same or similar circumstances, he was negligent, and that if any such negligence contributed proximately to happening of accident, no matter how slightly, plaintiff could not recover.

6. Negligence 🔑4.

One is not legally "negligent" unless acts amount to want of ordinary care.

[Ed. Note.—For other definitions of "Negligent," see Words and Phrases.]

7. Appeal and error 🔑1064(1).

Instruction defining "preponderance of proof" as testimony which produces conviction in jurors' unprejudiced minds *held* harmless.

[Ed. Note.—For other definitions of "Preponderance," see Words and Phrases.]

8. Trial 🔑129.

In action for police patrol driver's negligence, argument that city was entitled to protect itself by insurance *held* harmless where argument answered improper statements that recovery would invite other damage actions and taking of taxpayers' funds, and was immediately struck out.

Appeal from Superior Court, Kern County; Erwin W. Owen, Judge.

Action by Zella G. Lufkin against the City of Bakersfield and another. Judgment for plaintiff, and defendants appeal.

Affirmed.

Harry D. Parker, of Los Angeles, for appellants.

Brittan & Brittan, of Bakersfield, for respondent.

BARNARD, Presiding Justice.

This is an action for damages for injuries received in automobile collision at a street intersection in the city of Bakersfield. M street runs north and south, and Seventeenth street runs east and west. About 6 o'clock on the night of December 5, 1930, the plaintiff was riding in an automobile driven by her husband, which was proceeding north on the right-hand side of M. Street. At the intersection of this street with Seventeenth street this car was struck by a police patrol automobile owned by the defendant city and driven by the defendant Doan, which at the time was proceeding west on Seventeenth street, and the plaintiff was thrown to the pavement, receiving the injuries complained of. A jury returned a verdict in her favor and from the judgment which followed the defendants have appealed.

[1, 2] Appellants' first contention, that the respondent's husband was guilty of contributory negligence, as a matter of law, in failing to see and avoid the other car, and their

second contention, that the evidence is not sufficient to show any negligence upon their part, are without merit and may be treated together. It appears from the evidence that at the time in question the driver of the police car was returning to the police station and was not upon an emergency call, and the facts were not such as to bring the car within the exception to the right of way rule provided in section 132 of the California Vehicle Act (as amended by St. 1929, p. 542). There is evidence that the car driven by respondent's husband entered the intersection first; that a number of other cars were approaching from different directions; that the driver of this car could see about half a block east on Seventeenth street before he entered the intersection; that he did not see the police car coming; that this car was almost across the intersection before it was struck by the police car, the front end being either just out of the intersection on the north side thereof or about to pass out of it; that the police car ran into the right rear wheel on respondent's car, breaking the wheel and crushing the rear fender; and that this car then turned around describing a figure eight, landing on the west side of M street and throwing the plaintiff through the windshield to the pavement. There is evidence that the police car had been traveling about five or six feet from the north side of Seventeenth street and that it did not alter its course, prior to striking the other car. The appellant Doan testified that he entered the intersection at between twenty and twenty-five miles an hour; that as soon as the respondent's car became visible, this being a blind corner, he applied his brakes, using all of his weight; and that, thereafter, the car rolled approximately twenty-five feet with the brakes fully set. A number of witnesses testified that the respondent's car entered the intersection first, and that it was not traveling as fast as the police car. Without further summary it may be said that the evidence was sufficient to justify a finding of negligence on the part of appellants, and that any question of contributory negligence on the part of respondent's husband was one of fact for the jury. Under the circumstances shown it can neither be said, as a matter of law, that the respondent's husband was guilty of negligence in not seeing the other car in time to avoid the collision, nor that any such negligence, if it existed, was a proximate cause of the accident.

[3] It is next urged that a number of instructions given are prejudicially erroneous. The one especially relied upon as reversible reads as follows: "You are instructed that whenever vehicles are approaching an intersection, the driver of the vehicle which has already entered the intersection has the right of way, and I instruct you that if in this case you find that the plaintiff was in the intersection first, in advance of the defendant, then I instruct you that under these circumstances the law requires the defendant to thereupon yield the right of way to the plaintiff and that the plaintiff has the right to assume that the defendant will yield the right of way to her. And if you find from the preponderance of the evidence in this case that the plaintiff did enter the intersection first and that thereupon the defendant failed to yield the right of way to her, then in that event I instruct you that unless the said defendant was responding to an emergency call or in traffic patrol duty at the time of the accident, that his failure to yield the right of way as aforesaid was negligence on his part to observe said law as aforesaid, and if you find by preponderance of the evidence that these facts are true and also find by the same degree of proof that the negligence in failure to observe said law, was the direct and proximate cause of the accident and injury to this plaintiff, then in accordance with the other instructions given you in this case, I instruct you that your verdict should be in favor of the plaintiff."

It is argued that this is a formula instruction, that it omits the matter of contributory negligence, and that in stating that if the plaintiff was in the intersection first she had the right to assume that the defendants would yield the right of way to her, it omitted the qualification that she was herself exercising ordinary care at the time. Appellants rely upon the case of White v. Davis, 103 Cal. App. 531, 284 P. 1086, 1092, in which this court said, in commenting upon a somewhat similar instruction: "The effect of this instruction was to tell the jury that in this case the plaintiff had a right to rely upon the rule stated, irrespective of whether or not he himself was negligent, and that he had a right to assume that he was not exposed to danger, even though he might know he was in a perilous position."

The circumstances here are quite different from those in the case referred to. In that case, the plaintiff was standing in an exposed position on a main highway and turned around after observing things that should have put him particularly on his guard. In the instant case, the California Vehicle Act, as it existed at that time, provided that a driver who had entered an intersection first had the right of way. The respondent's husband, before he entered the intersection, could see for half a block in the direction from which the police car came and did not see the police car approaching. At the time of the collision he had almost passed through the intersection and it cannot be said that in relying upon the right of way given him by the statute under these circumstances, that he must have known that he was in a perilous position. While we do not approve of this instruction, taking into consideration the language used, the circumstances of this case, and in view of the provisions of article 6, section 4½ of the Constitution, and of the holding in Douglas v. Southern Pacific Co., 203 Cal. 390, 264 P. 237, 238, we do not deem it necessary to reverse the case. In the case just cited, the court said: "The authorities are legion to the effect that a so-called 'formula' instruction must contain all the elements essential to a recovery, and the absence of any one of such elements may not be compensated for nor cured by a reference thereto in other instructions correctly and fully stating the law. This principle is well stated in Beyerle v. Clift, 59 Cal. App. 7, 9, 209 P. 1015, 1016, wherein it is held that: 'If an instruction by its terms purports to state the conditions necessary to a verdict, it must state all those conditions and must not overlook pleaded defenses on which substantial evidence has been introduced. "It is clear that an instruction directing a verdict for the plaintiff in the event that the jury finds certain facts to be true must embrace all the things necessary to show the legal liability of the defendant and to warrant the direction or conclusion contained therein that plaintiff is entitled to a verdict, and such is the rule in this state." * * * The court gave other instructions on the subject of contributory negligence, the correctness of which is not challenged. But this is not sufficient to overcome the prejudicial character of the erroneous instructions.'"

In that case, the court held that the instruction there under consideration was in fact an instruction only on one issue of the case and that it was not what is called a formula instruction. The court then said: "Jurors are presumed to be persons of common intelligence and capable of comprehending the ordinary use of language as applied to the particular proposition under consideration and in reference to which it is employed. We will not assume that they may not have understood the charge as we understand it. The instructions must be considered in their entirety, and if, as so considered, they state the law of the case fairly and clearly, then they are, as a whole, unobjectionable, even though by selecting isolated passages from single instructions they may in some respects be amenable to just criticism."

We think a similar situation appears here. It fully appears that the court, in giving this instruction, was instructing the jury on the rule as to the right of way and was not purporting to set forth all of the elements which were essential to a recovery. The purport of the instruction was disclosed, and the instruction limited, by the language used near the end thereof, "then in accordance with the other instructions given you in this case," etc. In other instructions the matter of contributory negligence was fully and completely covered and the jury was repeatedly told that the respondent could not recover if her husband was negligent, and that the driver of an automobile approaching an intersection, even though he has the right of way, cannot assume that the way is clear and cannot proceed blindly into the intersection, but must use ordinary care to ascertain the condition of traffic and whether he may proceed in safety, and that failure to use such care would constitute negligence.

[4] A similar objection is made to another instruction as omitting the issue of contributory negligence, which instruction was entirely an expression of the doctrine of respondeat superior, and concerned the question as to whether the defendant Doan was an employee of the defendant city.

It is next urged that in one instruction the court assumed that the driver of the police car was negligent and only left to the jury the question of whether his "negligent acts" were the proximate cause of the accident. The language used could bear no such interpretation and the point is without merit.

[5, 6] Complaint is next made of the following instruction: "You are further instructed that if you find that there was on the part of the plaintiff contributory negligence in this matter which concurred directly in producing the injury, then such negligence will not bar the right of recovery of the plaintiff if such negligence is so slight as not to amount to want of ordinary care."

It is urged that this instruction permitted the jury to compare the negligence, if any, of the drivers of the two cars. While we do not think this instruction was necessary or to be recommended, it is true, as pointed out in Strong v. Sacramento & P. R. Co., 61 Cal. 326, that in a legal sense a person is not guilty of negligence unless the acts said to be negligent are sufficient to amount to a want of ordinary care. In effect this instruction told the jury that if the acts of the plaintiff did not amount to negligence, they could not amount to contributory negligence. In some half dozen instructions the jury was told that it must not compare the negligence of the two drivers, that it must not attempt to determine which of the two was guilty of the most negligence, that if the respondent's husband failed to make reasonable use of all his faculties to make a safe crossing and avoid a collision, and if he failed to do all that a person of ordinary prudence would have done under the same or similar circumstances, he was negligent, and that if any such negligence contributed proximately to the happening of the accident, no matter how slightly, plaintiff could not recover. Under the circumstances shown by this record, we are of the opinion that no reversible error appears.

[7] Complaint is made of one instruction in which the preponderance of proof is said to be "that testimony which produces conviction in the unprejudiced minds of the jurors." Appellant relies upon the case of Bowman v. Motor Transit Co. (Cal. App.) 279 P. 1014. A

hearing in the Supreme Court was granted in that case and in the opinion therein, found in 208 Cal. 652, 284 P. 443, the contention here made is decided adversely to the appellants.

An objection is made to two other instructions which need not be referred to in detail, and in which we can find no error.

[8] The only other point raised is that respondent's counsel committed reversible error in suggesting to the jury in his argument that the defendant city carried insurance. The only basis for this claim, as shown by the record before us, is the following quotation from this argument: "I didn't intend to touch upon this point, but Mr. Osborn brought it out so emphatically I couldn't pass it by. He says if you allow a judgment in this case, the taxpayers in this city are going to be levied upon for these damages. You know this same law was referred to in previous arguments in this action; the court will instruct you in cases of this kind that the city is entitled to cover themselves by insurance against these kinds of accidents."

It appears that this portion of the argument came as a reply to some exceedingly improper statements made by counsel for the appellants, to the effect that if the jury brought in a verdict for the plaintiff in this case, it would lead to other damage actions against the city and the taking of taxpayers' funds and turning them over to other people. While an improper statement by one counsel should not be met by an improper argument from opposing counsel, in our opinion, the situation presented does not warrant a reversal. While an inference could be drawn from the remark made that the defendant city carried insurance to cover this sort of an accident, this inference is not one necessarily to be drawn. The direct statement is that the city is entitled to carry insurance, which, of course, is true of any defendant. While the remark should not have been made, it does not appear that the circumstances were such that any possible injurious effect could not be cured and the record shows that immediately afterward the court struck the statement from the record and ordered the jury to disregard it. It might well be said in this case as was said in Bach v. C. Swanston & Son, 105 Cal. App. 72, 286 P. 1097, 1100: "There is abundant authority to the effect that efforts of plaintiff's counsel to get before the jury the facts that defendant is insured against loss are prejudicial and where the evidence is closely balanced, justifies a reversal. However, in this case we do not feel that such a drastic result should follow, first, because the inference is not clear that the purpose in making said remarks was to get before the jury the fact that appellants were insured or that the jury so interpreted the said remarks, next, because the court promptly instructed the jury to disregard them, and, lastly, because the evidence in this case, upon the issues involved, is by no means equally balanced, but, on the contrary, largely preponderates in favor of respondents."

While some of the instructions as herein referred to contain matters that are not to be recommended, taken as a whole, the instructions fully and fairly set forth the law applicable in this case, and after an examination of the entire record, including the evidence, we are not of the opinion that any errors complained of have resulted in a miscarriage of justice. While it may be true that the testimony of the appellant Doan, taken by itself, would have sustained a verdict in favor of the appellants, it is also true that the great preponderance of the evidence was in favor of the respondent. The evidence of a number of disinterested witnesses indicates that respondent's machine entered the intersection first; that it was traveling slower than the other car; and had almost passed through the intersection, with its front end either out or practically out of the same, when it was struck in the rear by the other automobile. Under the circumstances appearing, we are unable to feel that the verdict of the jury could reasonably be attributed to any possible error in the instructions or in the argument.

The judgment appealed from is affirmed.

We concur: MARKS, J.; JENNINGS, J.

131 Cal.App. 58

LYNDS et al. v. LOS ANGELES-DENAIR FARMS CO. et al.

Civ. 4636.

District Court of Appeal, Third District, California.

April 6, 1933.

Hearing Denied by Supreme Court June 2, 1933.

1. Appeal and error ⚷1010(1).

Reviewing court should not set aside trial court's finding if there is evidence in record supporting finding.

2. Vendor and purchaser ⚷37(4).

Representations of vendor that land sold was free from hardpan for sufficient depth for grape production, and statements as to profits to be realized from grape-raising thereon *held* not mere expressions of opinion, in purchaser's cancellation suit.

3. Vendor and purchaser ⚷119.

Purchaser who, after discovering fraud, began investigation, resulting in notice of rescission seven months later, *held* not guilty of laches barring relief in cancellation suit.

Appeal from Superior Court, Los Angeles County; Samuel R. Blake, Judge.

Action by Edward S. Lynds and another against the Los Angeles-Denair Farms Company and others. Judgment was entered for plaintiffs against defendant named, and defendant named appeals.

Affirmed.

Henry Hay, A. C. Conway, Fred W. Morrison and Wm. B. Himrod, all of Los Angeles, for appellant.

Youngworth, McClean & Hartman, of Los Angeles, for respondents.

KING, Justice pro tem., delivered the opinion of the court.

The action is for the cancellation of a contract and deeds, with damages, plaintiffs alleging that the contract of purchase of real estate was obtained from plaintiffs by means of fraudulent representations.

Judgment was given to plaintiffs for damages and for the annulment of the deeds of conveyance. A nonsuit was granted as to defendants Hattie K. Conway and Belle L. Moir, and judgment in favor of defendants A. C. Conway and W. H. Moir. The defendant corporation appeals.

The defendant corporation owned several hundred acres of land near Denair, Cal. Up to the time of the contract the land had never been irrigated and had been used for raising grain only.

The land in question, as stated in appellant's brief, "as all land in San Joaquin valley, is underlaid with hardpan at varying depths."

The defendant A. C. Conway, the president, and W. H. Moir, the secretary of the corporation, are alleged to have made the misrepresentations complained of.

The defendant corporation planned to divide its tract of 320 acres into eight tracts of 40 acres each, of which six were to be sold, and Conway and Moir were each to buy one tract. It was proposed that the purchasers were to put the land into grapes which were to be raised without irrigation, the setting and care of which to be upon a community or co-operative basis.

The plaintiff Edward W. Lynds was introduced to defendant A. C. Conway by one Pyle who had been attorney for each. Conway met Lynds about December, 1925, or January, 1926, and in April, 1926, they went to view the place. It appears that neither Lynds, Conway, nor Moir had experience with farming or the raising of grapes. At the first conversation Conway gave Lynds a paper, of which the following is a partial copy:

"The owner has been advised by good competent authority that when the land is planted, as is proposed, to good, well rooted cuttings, the vines will produce in the two years in the neighborhood of 1 ton or better per acre, which would net the grower $50.00 per acre, that the third year would produce between two and three tons per acre, which would net the grower better than $100.00 per acre, and that during the fourth year it would be increased at least another ton per acre and should net the grower from $125. to $250. per acre.

"The first three bearing years should yield the grower $300.00 per acre. If these estimates are correct and the land at the end of the fourth year is worth $500.00 per acre, the purchaser would have a property that had really netted him $800.00 per acre, including sales-price and crop for an investment to-wit: $300.00 per acre including purchase price, care, interest on investment, and taxes. On a forty acre purchase, under these conditions it should net the purchaser in the neighborhood of $20,000.00 in four years from date of investment."

Several other conferences were had with Conway and with Moir and trips were made to the land by plaintiff, on one of which defendant Conway introduced Lynds to one Martin, a former tenant of the land, and who had farmed the same for twenty years. Martin, in the presence of Conway, made statements to Lynds regarding the land and its availability for the production of grapes, and the depth of the hardpan.

Finally, on September 14, 1926, a contract was executed for the purchase by plaintiffs of 160 acres at $33,000, the contract providing that the seller should set the land to juice grape vines before April 1, 1927. The land was conveyed in December, 1926. The land was prepared and set to grapes. On May 29, 1927, a count showed that 21,648 vines were dead. At this time Lynds was in Europe. After his return, and in September, 1927, he visited the place and testified that about two-thirds of the vines were dead and of the remainder some were in poor condition.

March 14, 1928, plaintiffs mailed a notice of rescission and this action follows.

The findings, 56 in number, cover 35 pages in the clerk's transcript. The reporter's transcript of the evidence comprises over 2,100 pages.

Appellant devotes a great part of its argument to criticism of the findings made by the court, and part of this criticism will be here noticed. As to finding II, which is criticized as not supported by the evidence, ample evidence appears to support it.

The next finding criticized is numbered V. This finds the execution of the contract, the rescission of which is asked by the plaintiff, except that the court finds that it was executed by defendant corporation as seller and by plaintiff Edward S. Lynds as buyer, and was not executed by the other plaintiff, his wife, nor by the other defendants Conway and Moir. These objections are without merit.

Finding VIII is described by appellant's brief as "the crux of the whole case." In this the trial court finds that defendants Conway and Moir for the purpose of inducing plaintiff Edward S. Lynds to sign and enter into the contract and to make the payments therein provided for "then and there falsely and fraudulently stated and represented as follows." The court then finds practically in the language of paragraph VIII of the complaint as to the statements and representations made, except that where the complaint charges that it was represented that the land was "free from hard pan," the court qualifies the finding that it was represented to be free from "hard pan for sufficient depth to make the land adapted to and suitable for the commercial production of grapes of marketable quality without irrigation by artificial means."

[1] A careful and painstaking search of the voluminous transcript discloses that there is evidence, if believed by the court, to support each and every statement in this finding. This court does not undertake to say that there is a preponderance of the evidence sufficient to prove satisfactorily the facts found, and such is not its function. The trial court had the witnesses before it, was able to judge as to their credibility, their interest, and their opportunities for observation, and, if there be evidence in the record to support a particular finding, it is not the duty of this court to set aside the finding of the court or the verdict of the jury on the facts. Fales v. N. Y. Life Insurance Co. (Cal. App.) 17 P. (2d) 174; Bancroft-Whitney Co. v. McHugh, 166 Cal. 140, 134 P. 1157; Clopton v. Clopton, 162 Cal. 27, 121 P. 720.

[2] The same observation may be made to the other findings challenged by appellant in its voluminous and ably presented briefs.

Appellant, however, presents another point which is most earnestly argued. It is to the effect that the findings that the land was represented to be of such kind and character as to be suitable for the commercial growing and production of grapes, and that the land was free from hardpan for a sufficient depth to make it so adapted and suitable for grapes, is a finding on a mere matter of opinion; that the statements found to have been made were not statements by the defendants Conway and Moir that the land was of such character, and that the hardpan was of such depth—but only that in the opinion of the officials of the corporation this was the case. It is also argued that statements as to the profit to be realized from the farming of the land to grapes are also expressions of opinion and not representations of facts; and further, that these representations were made from information given by others, and not statements by Conway and Moir of facts. That all these matters call for the exercise of judgment. The argument on these matters is sufficiently answered by a citation of cases holding otherwise, such as Scott v. Delta Land & Water Co., 57 Cal. App. 320, 207 P. 389; Herdan v. Hanson, 182 Cal. 538, 189 P. 440; Davis v. Butler, 154 Cal. 623, 98 P. 1047; Thomas v. Hacker, 179 Cal. 731, 178 P. 855; Stone v. McCarty, 64 Cal. App. 158, 220 P. 690; French v. Freeman, 191 Cal. 585, 217 P. 515.

The trial court found that these representations were made as representations of fact and not the expression of an opinion.

[3] Appellant urges that plaintiff has been guilty of laches in seeking rescission. The facts are that in August, 1927, plaintiff found many of the vines dead, thereupon began an investigation, resulting in his notice of rescission dated March 14, 1928. Even without reciting the facts he learned from August to March, this does not seem to show undue delay.

The judgment is affirmed.

We concur: PLUMMER, J.; PULLEN, P. J.

217 Cal. 749

CLARK v. SMITH.

S. F. 14798.

Supreme Court of California.

April 7, 1933.

Rehearing Denied May 4, 1933.

1. Appeal and error 🔑**994(3).**

Credibility of witness was for trial court.

2. Bills and notes 🔑**518(1).**

Evidence supported court's finding that plaintiff paid to deceased maker adequate consideration for note sued on.

3. Witnesses 🔑**252.**

Where counsel for defendant executrix used bank statement in examining plaintiff, court properly permitted plaintiff to have bank statement before her to identify checks given to deceased for purpose of investment.

4. Appeal and error 🔑**223.**

Where judgment against executrix was not in form prescribed by statute, appellate court would modify judgment in accordance with respondent's request although point was not raised by appellant-executrix (Code Civ. Proc. § 1504).

In Bank.

Appeal from Superior Court, Santa Cruz County; H. C. Lucas, Judge.

Action by Nellie P. Clark against Zetta W. Smith, as executrix of the last will and testament of Ralph H. Smith, deceased. From a judgment for plaintiff, defendant appeals.

Judgment modified and, as modified, affirmed.

Prior opinion, 13 P.(2d) 767.

Sidney Rhein and Herbert Choynski, both of San Francisco, and Milton J. Coghlan, of Santa Cruz, for appellant.

H. J. Bias and Philip B. Beggs, both of Santa Cruz, for respondent.

PER CURIAM.

This cause was transferred to this court because of a doubt concerning the sufficiency of the testimony to support the findings of the trial court, but upon a re-examination of the record and further argument of counsel, we are convinced that the cause was properly disposed of in the opinion of the District Court of Appeal, First Appellate District, Division 2, written by Mr. Justice SPENCE, which opinion, as follows, is hereby adopted as the opinion of this court:

This is an appeal by the defendant executrix from a judgment in favor of plaintiff in an action brought by plaintiff to recover upon two promissory notes executed by Ralph H. Smith, deceased, during his lifetime.

Deceased died in 1928. Plaintiff held two promissory notes, one dated January 3, 1927, for the sum of $12,000 and the other dated January 10, 1928, for the sum of $5,000. Claims were duly presented to the defendant executrix, and upon her failure to approve or reject said claims within the time provided by law, plaintiff brought this action. The trial court found in favor of plaintiff upon the issues of due execution and consideration and accordingly judgment was entered in plaintiff's favor.

[1, 2] Appellant first contends that the evidence is insufficient to support the findings. The attack is directed solely to the findings relating to consideration. Appellant had alleged in her answer that each of said notes was executed "without any consideration whatever; that said Ralph H. Smith received nothing of value for the execution of said instrument and that plaintiff parted with nothing of value." The trial court made findings that said allegations were not true and found as to each note that "plaintiff paid unto Ralph H. Smith adequate consideration for the execution and delivery of said promissory note." In our opinion these findings are supported by the evidence.

On the trial respondent introduced sufficient evidence to make out a prima facie case and then rested. Thereupon appellant called respondent to the witness stand under section 2055 of the Code of Civil Procedure in an effort to show want of consideration for the notes. Respondent was questioned in a searching examination covering her affairs over a period of almost twenty years. It appears that respondent met the deceased in 1918 when he acted as her attorney in her divorce action. From about 1920 until a few months prior to his death in 1928, respondent and deceased lived together in the same house in Santa Cruz. The evidence shows that deceased handled her affairs during that time and that respondent had the utmost confidence in the deceased. She testified that he invested and reinvested her money without rendering an accounting; that the notes represented "money that he had of mine, attending to my business"; and that at the time he gave her the $5,000 note he said "he still owed me this $5,000, and it may be some more."

In an effort to discredit respondent's testimony counsel for appellant questioned her at length. Her bank statements running back as far as 1912 were introduced in evidence. Numerous checks passing between respondent and deceased were admitted and also some receipts executed by said parties. Respondent was questioned regarding the estates of her deceased father, mother, and husband, her divorce action, the property, real and personal, owned by her over a long period of time, including notes, mortgages, bonds, and stocks. No detailed account of the financial transactions between respondent and deceased is found in the record. If respondent's testimony is true the money and property coming into the hands of deceased from time to time for her account exceeded the amount of the notes in controversy. On the other hand, the evidence showed that checks totaling several thousand dollars had passed from deceased to respondent over a period of years and that receipts for various securities had passed between the parties in 1925. It is impossible, however, to piece together the fragmentary evidence and determine just how much of respondent's money and property was held by deceased or the manner in which said money and property was invested and reinvested. The relationship between the parties was undoubtedly one of trust and confidence and this may account for the apparently informal manner in which they handled their financial affairs. Respondent claimed that the amount represented by the notes was due her from deceased and that deceased expressly stated this to be the fact at the time of executing the second note. Counsel for appellant states in his brief that the "plaintiff and respondent is practically the only witness in this case, and upon the truth or falsity of her statements rests its merits." This statement impliedly concedes that there is sufficient evidence to support the findings. It is true that during the lengthy examination covering the details of transactions many years before, respondent frequently answered that she did not know or could not recall. It is further true that some of the documentary evidence produced contradicted previous testimony given by respondent. We cannot say, however, that her testimony was so inherently improbable as to be wholly unworthy of belief and the question of the credibility of the witness was one for the trial court. As in our opinion the evidence was sufficient to support the findings without regard to the presumption of consideration arising from the execution of the instrument, we deem it unnecessary to discuss the authorities cited by counsel relating to this presumption and to the burden of proof on the issue of consideration.

[3] Appellant further contends that the trial court erred in its rulings on evidence. After appellant's counsel had completed his examination of respondent, counsel for respondent started to examine her about the withdrawals shown by one of her bank statements which is in evidence. Appellant objected to respondent's "refreshing her memory" from the bank statement. Counsel for respondent argued that the bank statement was being used "not for the purpose of recollection but for the purpose of explaining what they (the withdrawals) were for." Considerable argument followed and thereafter respondent was permitted, with the bank statement before her, to state from her "own knowledge what checks were withdrawn from your bank account and given to Mr. Smith for the purpose of investment." There was no error in permitting respondent to have the bank statement before her for this purpose. Counsel for appellant used the statement in his examination of respondent and he has relied upon said statement showing the deposits and withdrawals both in the trial court and on this appeal. An effort has been made to connect the items on the statement with various transactions. It was proper to permit respondent to identify, if she could, the items which had reference to transactions with the deceased.

[4] Respondent has called our attention to the form of the judgment and has requested a modification. The judgment against the defendant executrix is not in the form prescribed by section 1504 of the Code of Civil Procedure then in effect. We deem it proper to modify the judgment in accordance with the request of respondent, although the point is not raised by appellant.

The judgment is modified by adding thereto the following: "It is ordered, adjudged and decreed that said defendant executrix shall pay said sums so found to be due together with interest, costs of suit and attorneys' fees all in due course of administration." As so modified the judgment is affirmed, respondent to recover her costs on this appeal.

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217 Cal. 669

MARTIN v. NELSON et al.

L. A. 12864.

Supreme Court of California.

April 3, 1933.

Rehearing Denied May 1, 1933.

Judges ⚿42.

Judge, ignorant of any fraud, whose partners in oil development project secured leases under arrangement with defendants whereby oil lands were obtained at low figure through concealment of oil development possibilities *held* disqualified by pecuniary interest, in suit by landowners to declare trust as to land allocated to defendants.

> The evidence indicated that defendants had discovered oil on property adjacent to tract involved in suit, and had suppressed fact, laying plans meanwhile to secure other surrounding land, and had succeeded in obtaining a contract to purchase plaintiff's land at a reduced figure. Meanwhile, several other persons were secretly informed of the discovery and formed working agreement with judge to

secure oil leases in the vicinity under arrangement whereby the judge was to advance money for operation. Thereafter the judge's partners reached an agreement with the defendants allocating certain lands to corporation controlled by defendants and the rest of the lands to the partnership. Under this arrangement, facts concerning oil development possibilities were concealed from owners of tract, and partnership secured some six oil leases.

In Bank.

Appeal from Superior Court, San Luis Obispo County; T. A. Norton, Judge.

Action by J. B. Martin against A. L. Nelson and others. From the judgment, plaintiff and defendant Thompson appeal.

Reversed.

Frank L. Hain, of Oakland, for appellant H. T. Thompson.

J. L. Royle, of Oakland, for appellant J. D. Martin.

M. F. McCormick, of Fresno (Ivan G. McDaniel and Spencer Austrian, both of Los Angeles, of counsel), for respondents.

PER CURIAM.

In this cause the issues as finally made by the pleadings show an action by the holder of an equitable interest in 134 acres of potential oil lands in San Luis Obispo county, joined in by the holder of the legal title, who is a defendant and cross-complainant, against the other defendants, who are respondents, to declare an involuntary trust in said lands in favor of said owners, upon the ground that material false and fraudulent misrepresentations induced the conveyance of the lands. The cause was heard in due course. Findings were made in favor of the purchasers on November 6, 1929, and judgment followed on April 4, 1930. Both plaintiff Martin and defendant Thompson, interest in the ownership of said property, appealed on separate transcripts but their interests are identical.

Two major issues are present: (1) Was actionable fraud proved as a matter of law? (2) Was Judge Norton, the trial judge, disqualified, as a matter of law, to sit in the cause? In view of our conclusion on the second question, it is unnecessary to consider the first.

The evidence shows that for some years prior to October 27, 1927, the Elberta Oil Company, a corporation owned and controlled by some of the defendants, had been drilling for oil upon property adjacent to the tract involved in this suit. On that date they discovered oil, and suppressed the fact, laying plans meanwhile to secure other surrounding lands. After some negotiations, and, according to appellant, various misrepresentations, they succeeded in obtaining a contract to purchase the land of appellant for the sum of $15,000, one-half of its original cost price. Meanwhile, the head driller of Elberta Oil Company, acting under an arrangement with W. W. McCutcheon and L. A. Enos, an attorney, secretly informed them of the discovery, and these two persons formed a working agreement or partnership with Judge Norton to secure oil leases upon promising lands around the well. Under their agreement, McCutcheon was to secure the leases, Enos was to handle all the papers and consummate the transactions, and Judge Norton was to advance the money. The activities of this partnership soon came in conflict with those of the Elberta Oil Company directors, and they thereupon reached an agreement allocating to the Elberta Oil Company group all lands adjoining the oil well tract (including the land involved herein); and permitting the rest of the lands to go to the McCutcheon group. It appears that due to this arrangement, Enos actively concealed from the owners of above-mentioned tract the facts concerning its oil development possibilities, thus aiding defendants in securing it at the low figure they desired. Under this arrangement, also, the McCutcheon group secured some six oil leases.

From these facts it follows that Judge Norton had a pecuniary interest in the suit, since any profits resulting from the activities of McCutcheon and Enos necessarily benefited him as a partner. It should be definitely noted, however, that on a full hearing before a disinterested judge, Judge Norton testified and the court found that he knew nothing of the acts, conduct, or promises of McCutcheon and Enos. Consequently the court concluded that he was not disqualified. While we are satisfied with the correctness of the finding, the conclusion drawn therefrom must, we think, be deemed erroneous. As a matter of law, Judge Norton would participate in the proceeds of the partnership business, and hence has a pecuniary interest in the cause sufficient to disqualify him, notwithstanding his lack of knowledge of fraud or unlawful intent on the part of McCutcheon or Enos. See Lindsay-Strathmore Irr. Dist. v. Superior Court, 182 Cal. 315, 187 P. 1056, Hall v. Superior Court, 198 Cal. 373, 379, 245 P. 814, City of Vallejo v. Superior Court, 199 Cal. 408, 249 P. 1084.

The judgment is reversed.

217 Cal. 790

H. T. THOMPSON, Cross-Complainant, Appellant, v. A. L. NELSON et al., Cross-Defendants, Respondents.

L. A. 13218.

Supreme Court of California.

April 3, 1933.

In Bank.

Appeal from Superior Court, San Luis Obispo County; T. A. Norton and J. J. Trabucco, Judges.

J. L. Royle, of Oakland, for appellant.

M. F. McCormick, of Fresno, for respondents other than H. T. Thompson.

Frank L. Hain, of Oakland, for appellant H. T. Thompson.

C. P. Kaetzel, of San Luis Obispo, for Judge T. A. Norton on matter of qualification.

PER CURIAM.

The issues in this case are identical with those involved in Martin v. Nelson (Cal. App.) 20 P.(2d) 938, this day decided. On the authority of that case the judgment is reversed.

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217 Cal. 644

BANK OF ITALY NAT. TRUST & SAVINGS ASS'N v. BENTLEY et al.

Sac. 4644.

Supreme Court of California.

April 3, 1933.

Rehearing Denied May 1, 1933.

1. Mortgages ⚿218.

Independent action on note secured by deed of trust cannot, in absence of unusual circumstances, be brought by holder, unless and until security is exhausted (Code Civ. Proc. § 726).

Deed of trust security must be exhausted before bringing independent action on note, since history of deeds of trust in state indicates implied provision in contract between parties that land shall constitute primary fund to secure debt, and since deeds of trust, except for passage of title for the purpose of the trust, are considered as practically and substantially only mortgages with power of sale.

2. Courts ⚿92.

Both of two independent reasons given for decision should be treated as judgment, and neither may be considered dictum.

In Bank.

Appeal from Superior Court, San Joaquin County; D. M. Young, Judge.

Action by the Bank of Italy National Trust & Savings Association against G. J. Bentley and others. Judgment for defendants, and plaintiff appeals.

Affirmed.

Prior opinions, 4 P.(2d) 546, 14 P.(2d) 85.

Louis Ferrari, T. J. Bricca, S. J. Tosi, C. H. White, and Cullinan & Hickey, all of San Francisco, and R. C. Minor and Gumpert & Mazzera, all of Stockton, for appellant.

David F. Bush, of Oakdale, and Nutter & Rutherford and A. P. Hayne, all of Stockton, for respondents.

Robertson, Crawford & Nichols, of Santa Barbara, and Warren H. Atherton, Lawrence Edwards, and M. P. Shaugnessy, all of Stockton, amici curiæ for respondents.

SHENK, Justice.

Plaintiff appeals from a judgment in favor of defendants in an action brought by plaintiff on a promissory note secured by a deed of trust. The record discloses that on February 14, 1923, the defendants executed the note in question, and, on the same date, as security therefor, executed a deed of trust conveying to named trustees certain real property in Stanislaus county. The deed of trust is in the usual form, and confers upon the trustees the usual power of sale in case of default in the payment of the note. The note was made due and payable one year from its date.

On February 11, 1928, three days before the four-year statute of limitations applicable to the note would have expired, the plaintiff began this action, the complaint being in the usual form for an action on a promissory note. The facts show that, just prior to the filing of the complaint, notice of breach was filed, and thereafter, on June 8, 1928, the trustee sold the property under the power contained in the deed of trust. Thereafter the plaintiff filed an amended complaint, making no reference to the sale of the premises under the deed of trust, and praying for judgment for the amount of the note, interest, costs, and attorneys' fees. On its face, the amended complaint does not purport to be for any deficiency remaining due after the sale under the deed of trust. Neither the original nor the amended complaint alleged that the security had become valueless. The real property involved was stipulated to be of "substantial value."

The answer of the defendants admitted the execution and nonpayment of the note and, by way of defense, alleged the note was secured by a deed of trust; that the land was sold under the power therein contained; and that the action was premature, for the reason that, at the time of filing the original complaint, no cause of action existed. This contention was upheld by the trial court, on the theory that no action may be brought on a note secured by a deed of trust unless and until the security is exhausted. The correctness of this conclusion is the sole point involved on this appeal.

Before discussing this point directly, certain preliminary observations should be made. In the first place, the note and deed of trust involved in this action do not purport to grant the right to sue before exhausting the security. We have examined the provisions of the note and deed of trust, and can find no provision therein purporting to grant this privilege to the trustee or beneficiary. Plaintiff refers us to several clauses of the deed of trust, and contends that these provisions authorize such an action. The clauses in question, when read in connection with their context, clearly indicate that the powers therein conferred relate solely to the execution of the trust and to the conservation of the property, in order to protect the rights of the beneficiary.

In the second place, the plaintiff, before starting this action, did not expressly or impliedly waive the security. Plaintiff expressly repudiates any such intent, and its action in selling the security after suit was filed conclusively indicates it had no such intent.

It should also be mentioned that, although an amended complaint was filed in this action, it did not purport to be for a deficiency and it did not allege the sale by the trustees. Apparently it is the desire of the plaintiff to rely solely upon the proposition that suit can be maintained upon the note before the security has been exhausted.

Another point should also be referred to. The present action can in no sense be deemed an attempt to foreclose the deed of trust by judicial sale. It has frequently been held that ordinarily a deed of trust may not be judicially foreclosed (Koch v. Briggs, 14 Cal. 256, 73 Am. Dec. 651; Savings & Loan Society v. Burnett, 106 Cal. 514, 39 P. 922; Grant v. Burr, 54 Cal. 298; Galusha v. Meserve, 58 Cal. App. 174, 208 P. 348; Bayer v. Hoagland, 95 Cal. App. 403, 273 P. 58), but it has also been held that, when some extraordinary or special circumstance exists which will justify a court of equity in exercising its peculiar powers, a deed of trust may be judicially foreclosed. Instances of this character are where there are accounts to be settled, or where the trustee fails or refuses to act, or repudiates the trust, or is guilty of a breach of trust. Curtin v. Krohn, 4 Cal. App. 131, 87 P. 243; Smith v. Davis, 90 Cal. 25, 27 P. 26, 25 Am. St. Rep. 92; Bayer v. Hoagland, supra. It is a possibility also that, under special circumstances, a judicial foreclosure might be allowed where, before the sale under the deed of trust can be consummated, the statute of limitations will have run on the personal obligation of the debtor. We do not find it necessary to decide that point in the present case, because of the fact that the action involved on this appeal cannot possibly be held to be a foreclosure action. Not only does appellant expressly concede that it is not a foreclosure action, but the form of action, as already indicated, clearly demonstrates it is merely a legal action on a promissory note.

[1] With these preliminary observations, we turn now to a direct discussion of the question presented, viz., whether in this state, it is permissible to sue on a promissory note secured by a deed of trust without first exhausting the security or showing that it is valueless. It is our opinion that, in the absence of some unusual circumstance not present in this case, an independent action on a note secured by a deed of trust may not be brought by the holder of the note unless and until the security is exhausted. This conclusion is based on two major premises: (1) That this court has already directly so held in one case and, by necessary implication, reached the same conclusion in another and later case; and (2) that, when the history of deeds of trusts in this state is considered, the contract between the parties must be held to impliedly provide that the land constitutes the primary fund to secure the debt, and that a sale under the deed of trust will be had before a suit may be commenced on the note.

The first premise is based on the case of Powell v. Patison, 100 Cal. 236, 34 P. 677, and on the later case of United Bank & Trust Company v. Brown, 203 Cal. 359, 264 P. 482. In Powell v. Patison, supra, the plaintiff sued to foreclose two instruments as mortgages, one clearly a mortgage, the other apparently a deed of trust in form, but alleged to be a mortgage. The trial court allowed foreclosure of the mortgage, and refused to foreclose the deed of trust, but rendered a personal judgment in favor of plaintiff for the amount secured by the deed of trust. Plaintiff appealed from that portion of the judgment denying his right to foreclosure, and defendant appealed, among other things, from the personal judgment upon the note secured by the deed of trust. The two appeals were treated separately by the court. On the plaintiff's appeal from the judgment denying foreclosure of the deed of trust (100 Cal. 234, 34 P. 676), this court reversed the lower court on the ground that the precise nature of the instrument could not be determined from the record. On the appeal of the defendant from the personal judgment on the note secured by the instrument in the form of a deed of trust, this court, without referring to the ambiguous nature of the instrument, reversed the lower court. Throughout its opinion the court referred to the instrument as a "valid deed of trust," and held, in no uncertain language, that no personal action would lie on a note so secured until the security had been exhausted. At page 239 of 100 Cal., 34 P. 677 the court stated:

> "The claim that the court erred in rendering a judgment against the defendants on their promissory note secured by a valid deed of trust, and which was also sought to be foreclosed as a mortgage in this action (see case No. 18,002, just decided by this court,—[100 Cal. p. 234] 34 P. 676) must be sustained, for the reason that it is well settled on authority in this state that a 'personal judgment on a secured debt before the security has been legally exhausted is erroneous.' * * *
>
> "The personal judgment against the defendants Patison on their note secured by a valid deed of trust, * * * is reversed. * * *"

[2] What was there said cannot be considered as dicta. Even if the two appeals be considered together, at most there were alternative grounds given for the opinion, and one of these alternative grounds was that no personal action could be maintained on a note secured by a deed of trust until the security had been legally exhausted. It is well settled that, where two independent reasons are given for a decision, neither one is to be considered mere dictum, since there is no more reason for calling one ground the real basis of the decision than the other. The ruling on both grounds is the judgment of the court, and each is of equal validity. People v. Reid, 195 Cal. 249, 232 P. 457, 36 A. L. R. 1435; East Bay Municipal Utility Dist. v. Kieffer, 99 Cal. App. 240, 260, 278 P. 476, 279 P. 178; Union Pac. Ry. Co. v. Mason City & Ft. D. R. Co., 199 U. S. 160, 26 S. Ct. 19, 50 L. Ed. 134; 7 Cal. Jur. 641, § 45. It must be held that Powell v. Patison, supra, constitutes a direct and unequivocal holding that the security must be exhausted before an action will lie on a note secured by a deed of trust. As will hereafter appear, this case has never been reversed or modified, and the rule therein enunciated must now be held to have become a rule of property which may not now be disturbed.

The second case reaching the same result is United Bank & Trust Co. v. Brown, supra. Although the opinion does not directly mention the point, the case on its facts necessarily stands as a direct authority on the question. Here the action was to recover an alleged balance due on two promissory notes secured by a deed of trust, after the security had been sold at a trustee's sale. The defense to the action was that proper notice of the sale had not been given; that the sale was therefore void; that it followed that the security had not been exhausted and that therefore the action had been prematurely brought. The trial court so found, and this judgment was affirmed on appeal. Although there is nothing directly said in the opinion on the point involved in the present appeal (although discussed in the briefs), the conclusion reached is a substantial affirmance of the rule that the security must be exhausted before a suit will lie on the note. The judgment of the trial court could not have been affirmed upon any other theory. This is so because, if a valid sale were not a condition precedent to an action on the note, plaintiff would have been entitled to a judgment on the note whether or not a valid sale had been had.

The Patison and Brown Cases would seem to fully and completely settle the point involved, were it not for dicta in several cases questioning the effect of the Patison Case. Appellant contends that these more recent cases have modified the rule therein enunciated. This is not so. The case relied on by appellants most strongly is Herbert Kraft Co. v. Bryan, 140 Cal. 73, 73 P. 745, 747. Here, as in the Brown Case, the action was for a deficiency after a sale under a deed of trust. The defendant contended that the sale was invalid. The court held that the sale was valid, and further held, on well settled authority, that a suit on the note for a deficiency after a valid sale would lie. That was the only point actually decided by the case. The court expressly refused to decide whether a suit could be maintained on a note secured by a deed of trust before a valid sale. In so doing, however, the court used the following language:

> "Respondent contends that this action can be maintained on the promissory note independent of the deed of trust, and whether or not the security under that deed had been exhausted, and that, therefore, it is immaterial whether there was a valid sale to plaintiff, or any sale at all; but under the views above expressed, it is not necessary to here determine this question. It may be said, however, that the question is not concluded by the fact that section 726, Code Civ. Proc., merely provides that there shall be only one action for a debt secured by mortgage, and that a trust deed is not a mortgage. Assuming that a trust deed is not within that section, still there are other considerations to be weighed in determining whether a creditor who has accepted such a deed as security has not contracted to pursue the terms of the deed when he attempts to forcibly collect the debt. In Savings & Loan Society v. Burnett [106 Cal. 514, 39 P. 922], supra, it is said (though perhaps not decided) that the grantor retains the right to a conveyance on payment, 'and to a sale as provided in case of default'; and this right seems to be indicated in other cases. Powell v. Patison, 100 Cal. 236, 34 P. 677, can hardly be considered authority on the point. When in that case the court said that 'It is well settled on authority in this state that a personal judgment on a secured debt before the security has been legally exhaust-

ed, is erroneous,' it must have had in mind security by mortgage, for in all cases cited as authority on the point—Barbieri v. Ramelli, 84 Cal. 154, 23 P. 1086, Crim v. Kessing, 89 Cal. 478, 26 P. 1074, 23 Am. St. Rep. 491, and Biddel v. Brizzolara, 64 Cal. 354, 30 P. 609—a mortgage only was involved. We have been referred to no other case where it has been directly held that an action cannot be maintained on a secured indebtedness without first exhausting the security, where the security was not a mortgage. * * * We have noticed the subject to this extent because it has been elaborately discussed, and because what has been said may possibly be of some aid in examining the question hereafter, if it should ever necessarily arise in some future case." See, also, the same case in department, Herbert Craft Co. v. Brian, 6 Cal. Unrep. 923, 68 P. 1020. What was said by the court in the bank opinion was clearly designated as mere dicta, and cannot, for that reason, be held to have modified or overruled Powell v. Patison.

Plaintiff also refers us to Commercial National Bank v. Catron, 50 F.(2d) 1023, recently decided by the Circuit Court of Appeals of the Tenth Circuit. This was an action by the bank against the maker of two promissory notes executed and payable in this state. The notes were secured by deeds of trust on California real property. The only point decided by the court was that the prohibitory provisions of section 726 of the Code of Civil Procedure were procedural in nature, and that the provisions of that section are binding only on the state courts and are not binding in cases in the federal courts. The federal courts have long applied this rule to mortgages (Maxwell v. Ricks (C. C. A.) 294 F. 255) and so, of course, applied the same rule to deeds of trust. Although it is true that the court declared that even in California the provisions of section 726, supra, did not apply to deeds of trust, and that a personal action could be maintained on a note secured by a deed of trust without exhausting the security, a reading of the opinion clearly indicates that what was there said was not necessary for the decision. Even if this were not so, in such a case, the holding of the federal court, although entitled to respect and careful consideration, would not be binding or conclusive on the courts of this state. Crocker v. Scott, 149 Cal. 575, 87 P. 102; Scott v. Austin, 58 Cal. App. 643, 209 P. 251; 15 Cor. Jur. p. 928, § 317. We are not convinced of the error of our former decisions by the reasoning in the Catron Case.

Although the question here involved has been mentioned or hinted at in other cases, we have found no cases other than those mentioned where the point was presented or discussed. It is our opinion that Powell v. Patison and United Bank & Trust Company v. Brown, supra, the only two cases in this state where the point was directly presented, have settled this question in this state and are decisive on this appeal.

Even if the question were an open one, which, as has been pointed out, it is not, it must be held that, when deeds of trust are interpreted in connection with their history in this state, there is an implied contract between the parties thereto that the land shall constitute the primary fund to secure the debt and that a valid sale under a deed of trust must be had before an action may be maintained on the note. Plaintiff argues that the only statute requiring that the security be exhausted before suing on the note is section 726 of the Code of Civil Procedure, which refers only to "mortgages," and contends that a deed of trust is not a mortgage. Plaintiff points out that in other security transactions, such as pledge (Ehrlich v. Ewald, 66 Cal. 97, 4 P. 1062), mechanic's lien (Bates v. Santa Barbara County, 90 Cal. 543, 27 P. 438), and vendor's lien (Brown v. Kahn, 176 Cal. 159, 167 P. 869) cases, there is no such restriction placed on the creditor, and he may sue on the personal obligation before or without exhausting the security. It is contended that the same rule should be applied to deeds of trust in the absence of a prohibitory statute such as section 726, supra. The problem is not so easily solved. Such reasoning entirely disregards the historical development of deeds of trust in this state, a development peculiar to this state.

At early common law the usual method of hypothecating real property as security for a debt was by means of a deed absolute with an oral agreement of defeasance when and if the debt was paid. Under this doctrine "title" passed to the mortgagee. If the debtor did not pay the obligation when due, a forfeiture took place. The equity courts, however, at an early date worked out the theory of equity of redemption which permitted the mortgagor to redeem at any time after default and before foreclosure, and which required the mortgagee to foreclose to cut off this right to redeem. Under this doctrine, it is obvious that the "title" of the mortgagee before foreclosure is a limited one. The common-law courts held, however, that "title" to the property was in the mortgagee, and this "title" theory of mortgages still prevails in many states. 1 Jones, Mortgages (8th Ed.) cc. 1, 2, 3. Early in the history of this state, however, our courts and the Legislature, in an attempt to express the real essence of the transaction, adopted the so-called "lien" theory of mortgages, under which the mortgagee does not get title, but simply obtains a lien. Civ. Code, §§ 2920, 2927; Dutton v. Warschauer, 21 Cal. 609, 82 Am. Dec. 765, McMillan v. Richards, 9 Cal. 365, 70 Am. Dec. 655.

At common law, and in most states in the absence of statute, upon default by the mortgagor, the mortgagee may sue on the note, or foreclose, or may pursue both remedies at once. The obvious injustice of this rule caused the passage of section 246 of the Practice Act (St. 1851, p. 91) the forerunner of section 726 of the Code of Civil Procedure, which requires, in the case of a mortgage, a resort to the security before any personal liability of the mortgagor can be enforced.

At common law and, in fact, in nearly every state in the United States, a deed of trust, both in legal effect and in theory, is deemed to be a mortgage with a power of sale, and differs not at all from a mortgage with a power of sale. 1 Jones, Mortgages (8th Ed.) cc. 1, 2, 3. In Idaho, a state that has adopted nearly all of our Code sections on security transactions, it has been held that a deed of trust is a mortgage with power of sale. Brown v. Bryan, 6 Idaho, 1, 51 P. 995. If California had followed this common-law rule, there would be no dispute over the question now involved. It would necessarily follow that a deed of trust is a mortgage with a power of sale, and therefore within the purview of section 726, supra. The real difficulty is caused by the fact that the courts of this state have not followed the common-law rule. Although, as already pointed out, this state, at an early date, adopted the "lien" theory of mortgages, it adopted the "title" theory in reference to deeds of trust. In the early case of Koch v. Briggs, 14 Cal. 256, 73 Am. Dec. 651, it was held that mortgages and deeds of trust were fundamentally different, in that in a mortgage only a "lien" was created, while in a deed of trust "title" actually passed to the trustee. This distinction, although frequently attacked by counsel and often criticized by the courts, has become well settled in our law and cannot now be disturbed. Hodgkins v. Wright, 127 Cal. 688, 60 P. 431; Sacramento Bank v. Alcorn, 121 Cal. 379, 53 P. 813; Kinard v. Kaelin, 22 Cal. App. 383, 134 P. 370. Thus we have in this state a type of instrument partaking of many of the characteristics of a mortgage, but for other purposes treated as a separate type of security. Two lines of authority have developed as a result, one group of cases emphasizing the distinctions between the two types of security, the other group emphasizing the similarity between the two. Thus it has been held that a deed of trust differs from a mortgage in that title passes to the trustee in case of a deed of trust, while, in the case of a mortgage, the mortgagor retains title; that the statute of limitations never runs against the power of sale in a deed of trust, while it does run against a mortgage; and that a mortgagor has a statutory right of redemption after foreclosure (Code Civ. Proc. 702), while no such right exists under a deed of trust. See, generally, Kidd, Trust Deeds & Mortgages in California, 3 Cal. L. Rev. 381. See, also, 12 Cal. L. Rev. 307; 20 Cal. L. Rev. 31; 5 Sou. Cal. L. Rev. 227.

As opposed to these cases, there have been an increasing number of cases which, although recognizing that "title" passes in the case of a deed of trust, emphasize the fact that the function and purpose of the two types of security are identical, and, for that reason, apply the same rules to deeds of trust that are applied to mortgages. These cases hold that in legal effect, although perhaps not in theory, deeds of trust, are similar to mortgages with a power of sale. Thus, in MacLeod v. Moran, 153 Cal. 97, 94 P. 604, the owner of property declared a homestead thereon, and subsequently executed a deed of trust to said property to secure his promissory note. The question presented was whether the execution of the deed of trust passing title to the trustees constituted an abandonment of the homestead within the meaning of section 1243 of the Civil Code, providing that the "grant" of land subject to a homestead constitutes an abandonment thereof. This court, relying on the cases holding a deed absolute intended as a mortgage did not constitute a "grant" within the meaning of that section, held that the execution of a deed of trust did not constitute an abandonment. At page 99 of 153 Cal., 94 P. 604, 605, it is stated:

"These decisions are based upon the fact that such a deed, though in form a grant, is really only a mortgage, and does not convey the fee. A trust deed of the kind here involved differs from such a deed only in that it conveys the legal title to the trustees so far as may be necessary to the execution of the trust. It carries none of the incidents of ownership of the property other than the right to convey upon default on the part of the debtor in the payment of his debt. The nature of such an instrument has been extensively discussed by this court, and the sum and substance of such discussion is that while the legal title passes thereunder, and the trustees cannot be held to hold a mere 'lien' on the property, it is practically and substantially only a mortgage with power of sale. See Sacramento Bank v. Alcorn, 121 Cal. 379, 383, 53 P. 813; Tyler v. Currier, 147 Cal. 31, 36, 81 P. 319; Weber v. McCleverty, 149 Cal. 316, 320, 86 P. 706. The legal title is conveyed solely for the purpose of security, leaving in the trustor or his successors a legal estate in the property, as against all persons except the trustees and those lawfully claiming under them. Sections 865, 866, Civ. Code. Except as to the trustees and those holding under them, the trustor or his successor is treated by our law as the holder of the legal title. King v. Gotz, 70 Cal. 236, 11 P. 656. The legal estate thus left in the trustor or his successors entitles them to the possession of the property until their rights have been fully divested by a conveyance made by the trustees in the lawful execution of their trust, and entitles them to exercise all the ordinary incidents of ownership, in regard to the property, subject always, of course, to the execution of the trust. This estate is a sufficient basis for a valid claim of homestead. It was expressly held in King v. Gotz [70 Cal. 236, 11 P. 656], supra, that the trustor may select as a homestead property covered by such a trust deed. The estate of the trustees absolutely ceases upon the payment of the debt (Civ. Code, § 871), leaving the whole title in the grantor in whom it was vested at the execution of the trust deed, or his successors, and leaving nothing in the trustees except the bare legal title of record, which they can be compelled to reconvey to the owner simply to make the record title clear. Tyler v. Currier [147 Cal. 31, 36, 81 P. 319], supra. We think it is apparent that the 'grant' referred to in section 1243 of the Civil Code does not include a deed given solely as security for the payment of money."

This view, that deeds of trust, except for the passage of title for the purpose of the trust, are practically and substantially only mortgages with a power of sale, in addition to the cases cited in the above opinion, has many times been recognized in other decisions. See Hodgkins v. Wright, supra, and Bayer v. Hoagland, supra, and cases cited therein.

It has also been held that a deed of trust is an incumbrance within the meaning of the mechanics' lien laws. Thus, although "title" passes to the trustee, he has not such an interest as to require him to give notice of nonresponsibility under those laws. Hollywood Lumber Co. v. Love, 155 Cal. 270, 100 P. 698.

Sufficient has been said to indicate the anomalous nature of deeds of trust in this state. Considering all these cases, we do not feel justified in holding, merely because "title" passes by a deed of trust, while only a "lien" is created by a mortgage, that, in reference to the necessity of exhausting the security before enforcing the obligation secured, deeds of trust and mortgages are so different that in one case the security must be exhausted before suit on the personal obligation, while, in the other, no such necessity exists. Fundamentally, it cannot be doubted that in both situations the security for an indebtedness is the important and essential thing in the whole transaction. The economic function of the two instruments would seem to be identical. Where there is one and the same object to be accomplished, important rights and duties of the parties should not be made to depend on the more or less accidental form of the security. The very fact that in the seventy-four years since the decision in Koch v. Briggs, supra, was rendered, holding that "title" passed to the trustees in case of a deed of trust, it has never been held that a personal action may be brought on a note so secured, without exhausting the security, is persuasive that no such liability existed. 15 Cor. Jur. 916, § 303. It should also be mentioned that, although in many states, in the absence of a statutory prohibition such as section 726 of the Code of Civil Procedure, an action may be brought on a note secured by a mortgage without exhausting the security, that rule, as a matter of policy, is strictly limited. Thus it is well settled, when a mortgagor sells the mortgaged premises to a third person who assumes the debt, that, before the mortgagee can enforce the personal liability on the note, he must first exhaust the security. This result is usually predicated upon the theory that, in such event, the parties have impliedly agreed that the land itself is the primary fund to satisfy the mortgagee. See Farmers' & Merchants' State Bank v. Cameron (Tex. Com. App.) 231 S. W. 738; Sanderson v. Turner, 73 Okl. 105, 174 P. 763, 2 A. L. R. 347, and cases cited.

Considering all these factors, and particularly the anomalous nature of deeds of trust in this state, it must be held that, either by reason of implied agreement or by reason of public policy, the holder of a note secured by a deed of trust must first exhaust the security before resorting to the personal liability of the trustor.

Plaintiff contends that under the circumstances this action must be deemed one to "keep the obligation of the note alive" until it could sell under the deed of trust. As already indicated, neither the complaint nor the amended complaint pleaded any such theory. Moreover, it is elementary that under our system there is no such thing as filing an action to keep an obligation alive, unless at the time of filing the complaint a cause of action existed. Every complaint is predicated upon the theory that the plaintiff therein is entitled to judgment at the time of its filing. The plaintiff likewise contends that to hold that the security must first be exhausted before suit can be had on the note necessarily results in diminishing the four-year period of the statute of limitations by the time it takes to sell under the deed of trust, approximately four months. It is not certain that this result necessarily follows. It is possible that, if plaintiff herein had pursued the proper remedy, it could have secured relief. It may be that in a proper case a court, upon proper application in equity, would take complete jurisdiction of the entire dispute, order the trustee to sell under the power, and, if the security were inadequate, grant a deficiency judgment. Likewise, as already intimated, the same result might be reached by an action to judicially foreclose the deed of trust. Plaintiff has not seen fit to pursue either of these courses, so that neither of the two possibilities above suggested is involved on this appeal. Even if it be ultimately decided that neither of the above remedies is available to a trustee or beneficiary, and, as a result, the action must be commenced within three years and eight months instead of four years, the trustee and beneficiary have no just cause for complaint. By consenting to the contract, they must be deemed to have contracted with the reduced time in mind. Hunt v. Ward, 99 Cal. 612, 34 P. 335, 37 Am. St. Rep. 87.

For the foregoing reasons, the judgment appealed from is affirmed.

We concur: WASTE, C. J.; PRESTON, J.; CURTIS, J.; TYLER, Justice pro tem.

LANGDON, J., deeming himself disqualified, does not participate herein.

217 Cal. 631

ENGLISH et al. v. OLYMPIC AUDITORIUM, Inc., et al.

L. A. 11653.

Supreme Court of California.

March 31, 1933.

Rehearing Denied April 29, 1933.

1. **Mechanics' liens** 🔑**288(2).**

Whether notice of nonresponsibility has been posted within ten days after owner has notice of commencement of construction work is fact question for court (Code Civ. Proc. § 1192).

2. **Mechanics' liens** 🔑**281(2).**

Finding that digging of test hole and hauling of lumber on premises constituted "commencement of work" within statute sufficient to sustain landowner's subsequent posting of notice of nonresponsibility *held* authorized (Code Civ. Proc. § 1192).

[Ed. Note.—For other definitions of "Commencement of Work," see Words and Phrases.]

3. **Appeal and error** 🔑**1010(1).**

Appellate court could not interfere with trial court's finding sustained by evidence.

4. **Mechanics' liens** 🔑**161(1).**

Constitution gives direct lien on property for value of labor or material expended thereon (Const. art. 20, § 15).

5. **Mechanics' liens** 🔑**191.**

Where landowner duly posts notice of nonresponsibility, lien claimants are not thereby deprived of liens on building erected by lessee, but lien claims exist separately from land (Const. art. 20, § 15; Code Civ. Proc. §§ 1183, 1192).

6. **Mechanics' liens** 🔑**233.**

Unlawful detainer action wherein landowners had lease declared forfeited did not destroy mechanics' liens on building only (Const. art. 20, § 15; Code Civ. Proc. §§ 1183, 1192).

This was particularly true since the lease itself provided that lessee could erect a building and that any improvements erected could not be removed by lessee, and thus lessors by their own voluntary act made the building a part of their land, and therefore took the building burdened with the mechanics' liens which did not depend on leasehold interest of lessee.

7. **Mechanics' liens** 🔑**230.**

Federal court receiver's application to be relieved from forfeiture of lease, and denial thereof, *held* not binding on mechanics' lienors of building (Code Civ. Proc. §§ 1179, 1183; Const. art. 20, § 15).

That federal court receiver applied under Code Civ. Proc. § 1179, to be relieved from effect of forfeiture of the lease, and denial of such application by court, was not binding on mechanics' lienors, even though application was made in creditor's action authorized by federal court, and was made on behalf of receiver and all creditors of lessee, liens sought to be foreclosed not being dependent on unlawful detainer action brought by lessor wherein forfeiture of lease was obtained, but being liens on building itself, not dependent on existence of lease.

8. **Mechanics' liens** 🔑**233.**

Lien claimants who furnished labor and material for construction of building erected by lessee had equities in their favor, as respects landowner's contention that forfeiture of lease freed property from liens.

9. **Mechanics' liens** 🔑**191.**

"Property," within constitutional provision giving mechanic's lien on property on which they have bestowed labor or furnished material, refers to building or other structure for which materials have been furnished or labor bestowed, not simply, in case of tenant, to his leasehold estate (Const. art. 20, § 15).

The theory of mechanic's liens in California under Const. art. 20, § 15, is that the lien attaches primarily to the structure for which the materials have been furnished or labor bestowed, and lien on land is merely incidental to lien on structure.

[Ed. Note.—For other definitions of "Property," see Words and Phrases.]

10. **Mechanics' liens** 🔑**185.**

Under lease providing authorizing lessee to construct on leased premises permanent structures which at termination of lease shall become lessor's property, such a structure does not become fixture until all mechanic's lien claimants are paid, notwithstanding posting and filing of notice of nonresponsibility (Const. art. 20, § 15; Code Civ. Proc. §§ 1183, 1192).

11. Mechanics' liens ⟹78.

Where building of improvement is optional with lessee, posting and filing of notice of nonresponsibility by lessor relieves land from lien (Const. art. 20, § 15; Code Civ. Proc. §§ 1183, 1192).

In Bank.

Appeal from Superior Court, Los Angeles County; J. Walter Hanby and Guy E. Bush, Judges.

Actions by James G. English and others against the Olympic Auditorium, Inc., the Los Angeles Athletic Club, a corporation, and others, which actions were consolidated. From the judgment plaintiffs and defendant last named and certain other defendants appeal.

Reversed and remanded, with directions.

For prior opinion, see 13 P.(2d) 740.

Rehearing denied; SHENK, CURTIS, and LANGDON, JJ., dissenting.

Dryer, Castle, McConlogue & Richards, Horton, Anderson, Horton & Armstrong, Rufus L. Horton, Jos. K. Horton, Dryer, Castle & Richards, and Dryer, Castle & Hartke, all of Los Angeles, for appellants.

Lawler & Degnan, Hunsaker & Cosgrove, and Hunsaker, Britt & Cosgrove, all of Los Angeles, for respondents.

PER CURIAM.

A hearing was granted in this case after decision by the District Court of Appeal, First Appellate District, Division 2, in order to give further consideration to several of the contentions of respondents. Upon such further consideration we are of the opinion that the contentions of the respondents are not sustainable and that the District Court of Appeal has properly disposed of the questions involved. For that reason, we adopt, as part of the opinion of this court, the following portions of the opinion prepared by Justice pro tem. Burroughs and concurred in by Presiding Justice Nourse and Justice Sturtevant:

Four actions were brought to foreclose mechanics' liens. They were consolidated and became the above-entitled action.

The appeals are by the plaintiffs from so much of the judgment entered August 16, 1928, as fails to give them liens upon the interest of the defendant Los Angeles Athletic Club, a corporation, hereinafter referred to as the Athletic Club; and the interest of the defendant Title Insurance & Trust Company, hereinafter referred to as the Trust Company, in and to the land upon which the building in controversy is situated. The appeals are also from that portion of the said judgment which fails to give the plaintiffs any judgment against the Athletic Club or the Trust Company. The plaintiffs also appeal from the order of the court made on September 27, 1928, amending the conclusions of law and the judgment entered on August 16, 1928, and on October 6, 1928, entering different conclusions, and judgment, whereby the plaintiffs are deprived of liens given by the judgment of August 16, 1928, upon the building erected on the land above referred to, and they also appeal from that portion of the last-named judgment which fails to grant plaintiffs any relief against either the Athletic Club or Trust Company, and also that portion which vacates and sets aside the judgment of August 16, 1928.

The uncontradicted facts of the case found by the court are as follows: On November 1, 1924, the Athletic Club and Trust Company were the owners and reputed owners of a certain tract of land situated in the city of Los Angeles. On that day they leased said property to the defendant J. M. Danziger for the term of twenty-five years at the annual rental of $25,000. Thereafter Danziger and wife assigned said lease to the defendant Olympic Auditorium, Inc., a Delaware corporation, hereinafter referred to as the Auditorium Company, and the latter also assumed all of the obligations of said lease. Said lease, assignment, and covenant of assumption were in writing, and were duly recorded in the office of the county recorder. By the terms of the lease, the lessee was authorized to construct an auditorium building on the leased premises at the sole cost and expense of the lessee. It was further provided in said lease that mechanics and other persons performing work on said building, or furnishing material therefor, were thereby given notice that any liens filed by them upon said premises should not in any manner affect the rights of the lessors in said building, and that the lessee should have no right to remove any improvements constructed upon the leased premises. On January 9, 1925, the Athletic Club and Trust Company, as owners, posted upon said premises a notice of nonresponsibility in the form required by section 1192 of the Code of Civil Procedure, and on said day recorded a copy thereof in the office of the county recorder of Los Angeles county, as required by said section; that said notice remained posted and the recorded copy thereof remained of record during the entire period of construction of the auditorium building. At the time the notice was posted as aforesaid, there had been delivered upon the premises six hundred board feet of lumber which was used to build a temporary platform in connection with ceremonies of ground breaking held on January 10, 1925. Also there was dug, before the said notice was posted, a test hole not over six feet by ten feet by six feet deep, for the purpose of testing the character and weight-bearing qualities of the soil, which information was necessary in preparing the plans and specifications for the building. The test hole was thereafter used as a part of the excavation for the building. On the same day, and shortly after the posting of said notice, the Auditorium Company also caused a large steam shovel to be moved onto the premises, near the test hole. The shovel was operated the next day, January 10, 1925, as a part of the ground breaking ceremonies, and actually dug in on January 12, 1925. Thereafter, from day to day, work progressed on said building until its completion on or about September 10, 1925. Within due time after the completion of the building, these plaintiffs, not having been paid, filed their liens, and in due time commenced these actions to foreclose them. Thereafter the Auditorium Company defaulted in the payment of rent, and on August 17, 1926, the Athletic Club and Trust Company commenced an action in unlawful detainer against the Auditorium Company, to recover possession of said premises. On August 24, 1926, one James R. Masten was appointed a receiver by the District Court of the United States for said Auditorium Company, and he made application to the Superior Court for relief from the judgment of forfeiture of said lease, as provided by section 1179 of the Code of Civil Procedure. The court made an order granting the relief prayed for, but, plaintiffs failing to comply with the terms of the order, the judgment of forfeiture has now become final. Thereafter the Athletic Club and Trust Company entered into possession of the Olympic Auditorium building and premises, and have ever since remained in possession.

The plaintiffs did not apply to the court in the last-named action for relief from the judgment therein. nor were any of them parties to said action. At all times during the pendency of the unlawful detainer action, the actions of these plaintiffs on the mechanics' liens were all pending in the Superior Court.

Upon these findings, the trial court adjudged that the relief to which the plaintiffs were entitled was the sale of the Olympic Auditorium building, unless within a specified time respondents paid the amount of their lien claims to plaintiffs. The court also concluded that, as to plaintiffs, the lease had never been forfeited. After the entry of the judgment aforesaid, the Athletic Club and Trust Company made a motion to vacate the judgment and to amend the conclusions of law to the effect that plaintiffs were entitled to a lien upon the building and to enter its judgment denying said lien. Upon a hearing of the motion, the court granted the same, and on October 6, 1928, judgment was entered accordingly.

[1-3] Appellants contend that the court erred in adjudging that the land upon which the building was erected was not subject to the plaintiffs' lien, because the Athletic Club and Trust Company, the owners of the land, had protected their title thereto against the liens by giving proper notice of nonresponsibility to lien claimants, as provided in section 1192 of the Code of Civil Procedure. Appellants claim that the notice was posted before the commencement of work on the building, and was therefore ineffective for any purpose. Section 1192, supra, among other things, provides that the land upon which a building is erected by persons other than the owner or persons claiming an estate therein is subject to mechanics' and other designated liens, unless the owner or person having or claiming an estate therein shall, within ten days after he shall have obtained knowledge that construction of a building is in progress on his land, among other requirements, give notice that he will not be responsible for the same, by posting a notice in writing to that effect in some conspicuous place on the land. The facts upon which the court based its findings of proper posting by the owners are above set forth and are undisputed, and are sufficient to sustain the judgment that the construction was actually begun before the notice was posted. It was a matter for the trial court to determine. In Simons Brick Co. v. Hetzel, 72 Cal. App. 1, 236 P. 357, 358, the holder of an unrecorded mortgage testified that, when he went upon the premises for the purpose of ascertaining if any construction was being done, or if there was any evidence of a building being erected, there were no tools or materials of any description on the premises nor any evidence of a building being constructed. But it developed from other evidence that a trench about sixty feet long and four feet deep had been excavated along the front of the lot, and it was held by the court that this alone was sufficient to put the holder of the mortgage on notice of a building being under construction on the premises, and the mortgage, although recorded before any other work was done, was held to be subsequent to lien claimants under the Mechanics' Lien Law (Code Civ. Proc. § 1183 et seq.). The court said on page 5 of the opinion in 72 Cal. App., 236 P. 357, 358: "As to just what is meant by the term 'commencement of work' and as to the amount and character of work necessary to be done upon a building in order to say that work has been begun thereon, we think the true rule is stated in Phillips on Mechanics' Liens (3d Ed.) p. 387, where it is said: 'What this law means is some work and labor on the ground, the effects of which are apparent—easily seen by everybody; such as beginning to dig the foundation, or work of like description, which every one can readily see and recognize as the commencement of a building.'" We think this rule should be applied in the case at bar. The object of such a notice is to bring home to those who are expending labor or materials upon a building the fact that the owner of the land will not be responsible for such labor or materials. The notice must be posted on the ground within ten days after the owner has notice of the commencement of construction. Whether this has been done or not is, under

Simons Brick Co. v. Hetzel, supra, a question of fact for the court to determine from the evidence before it. Here the court has found in effect that the digging of the test hole of considerable size, afterwards used as a part of the excavation and the hauling of lumber on the premises, was a commencement of the work, sufficient to sustain the posting of the notice in accordance with the requirements of section 1192 of the Code of Civil Procedure, and it was within the province of the trial court to so decide, and we are not allowed to interfere with such finding. Hickman v. Freiermuth, 21 Cal. App. 629, 132 P. 772.

The judgment of August 16, 1928, gave plaintiffs a lien upon the building itself down to the surface of the ground, and directed that, unless the owners paid the several amounts found due by the judgment within ninety days from the date thereof, the building would be sold to satisfy the lien claims. This portion of the judgment was set aside by the motion above referred to and the conclusions of law so altered as to deny a lien upon the building. And, on October 6, 1928, the judgment entered deprived plaintiffs of their liens upon the building. It is contended that this was error. As we read the record, the above action of the court was based upon the fact that, by the judgment in the unlawful detainer action, evicting the Auditorium Company from the premises and nullifying the lease, the plaintiffs were deprived of their lien upon the building. It is further contended by respondents that, the plaintiff not being entitled to a lien upon the land, it necessarily follows that the building, being a part of the real estate, was also relieved of the liens.

[4, 5] The Constitution of the state of California (article 20, § 15) is the basis of the Mechanics' Lien Law, and is as follows: "Mechanics, materialmen, artisans, and laborers of every class shall have a lien upon the property upon which they have bestowed labor or furnished material, for the value of such labor done and material furnished; and the legislature shall provide, by law, for the speedy and efficient enforcement of such liens." The language of the foregoing provision of our Constitution is clear and positive, and gives a direct lien on the property upon which the classes named therein have bestowed labor or furnished material to the extent of the value thereof. In carrying out the above constitutional mandate, the Legislature has provided by section 1183 of the Code of Civil Procedure that mechanics and materialmen shall have a lien upon the property on which they have bestowed labor and material, thus following the constitutional provision. The Legislature has distinguished between the ownership of the improvements made on the land and the land itself, in so far as the mechanics' and materialmen's liens are concerned. This is manifest by the enactment of section 1192 of the Code of Civil Procedure wherein it is provided that the landowner may protect his interest in the land from the lien by giving the notice of nonresponsibility as provided for in that section.

Mazzera v. Ramsey, 72 Cal. App. 601, at page 606, 238 P. 101, 103, quotes with approval from People v. Moxley, 17 Cal. App. 466, 468, 120 P. 43, as follows: "The lien of a mechanic or materialman is a constitutional right and attaches to the structure as the material is furnished or labor performed. The statutory procedure enacted for the enforcement of such right has reference only to the remedy." See, also, Siegel v. Hechler, 181 Cal. 187, 183 P. 664.

In Western Electric Co., Inc., v. Colley, 79 Cal. App. 770, 778, 251 P. 331, 335, it is said: "Lien claimants are given a lien 'upon the property upon which they have bestowed labor or furnished materials,' as well as upon the land upon which any building, improvement, well, or structure is constructed, or so much as may be required for the convenient use and occupation thereof, to be determined by the court on rendering judgment, if at the commencement of the work or the furnishing of materials the land belonged to the person causing the improvement to be undertaken; if he owned less than a fee, only his interest is subject to the lien, except as the owner of the fee may have failed to give notice of nonliability, as provided in section 1192 of the Code of Civil Procedure. Under these statutory provisions, the lien on the building, or other structure, is the primary thing, and the lien on the land is merely an incident to it. No lien can be acquired on the land, if none is acquired on the building, but a lien may exist on the building without attaching to the land. Hence it is not essential to the existence of a mechanic's lien on a building that the person causing its erection should have owned or had any interest in the real property on which it is located. This distinction between land and superstructure, the lien attaching primarily to the latter, and to the former only as it was embraced in a common ownership with the building, has existed in California from the very earliest times."

Humboldt Lumber Mill Company v. Crisp, 146 Cal. 686, 688, 81 P. 30, 31, 106 Am. St. Rep. 75, 2 Ann. Cas. 811, is a case where it was sought to enforce mechanics' liens against the land. The structure being built thereon was burned before completion or any lien had been filed. Under this state of facts the court held there was no right of lien, and, in commenting upon the distinction between the lien on the land and the lien on the building, says: "A further reason why the lien should not apply to the land in this case is found in a consideration and comparison of sections 1183 and 1185 of the Code of Civil Procedure. The first of these sections gives a lien 'upon the property upon which they have bestowed labor or furnished materials.' The second section cited says that certain land 'is also subject to the lien.' In these provisions we see an intention of the Legislature to make the lien on the building the principal thing, and the lien upon the land on which it is situated an incident of the completion of the building, and that when the building is destroyed before completion, there can be no lien against the land on which it was being erected."

Linck v. Meikeljohn, 2 Cal. App. 506, 508, 84 P. 309, is in point. The building against which a materialman's lien was enforced was erected by a trespasser who had no interest in the title to the land upon which it was erected. The owner of the land raised one of the questions here presented that the building had become and was a part of the realty and therefore not subject to the lien. In answer to this claim, the court says: "It is true that where a building is constructed in a permanent manner upon land it becomes a part thereof, but if it is constructed with a lien thereon it becomes a part of such land subject to such lien. It would be grossly inequitable to say that one who may elect to treat a structure as a trespass and remove it, may elect to retain it, with knowledge that it is burdened with a lien, and yet hold it free from such burden."

Harmon Lumber Co. v. Brown, 165 Cal. 193, 200, 131 P. 368, 370, says: "But the primary thing is the lien upon the building. The lien upon the land is incident thereto." 17 California Jurisprudence, § 15, p. 28, is authority for the rule that the lien upon the building upon which labor or material has been furnished is the primary thing and the lien on the land an incident to it, and that this rule has existed in California from the earliest times.

[6] Having reached the conclusion that the lien upon the building exists separately from the land, the unlawful detainer action by which the respondents herein had the lease declared forfeited as to the Auditorium Company, and thus obtained possession of the property, becomes immaterial. However, the lease itself provides that the lessee may erect a building, and, further, that any improvements erected could not be removed by the lessee. Thus respondents have by their own voluntary act made the building a part of their land, and therefore have taken the same, burdened with the liens of plaintiffs, and which liens do not depend upon the leasehold interest of the Auditorium Company.

Should the lien laws be so interpreted as to destroy the liens because the leasehold interest has ceased to exist, such interpretation would render such laws unconstitutional. Section 15, art. 20, Cal. Const.

[7] It is claimed by the respondents that the action of the receiver appointed by the federal court, in applying under the provisions of section 1179 of the Code of Civil Procedure to be relieved from the effect of the forfeiture of the lease and the denial of the application by the court, is binding upon appellants in this action because such application was made in a creditor's action authorized by the federal court, and was made "on behalf of himself and all other creditors of said Olympic Auditorium, Inc." However, the liens here sought to be foreclosed are not in any manner dependent upon the unlawful detainer action, but are liens upon the building itself, and, as heretofore said, do not depend upon the existence of the lease. Section 15, art. 20, Const. Cal.; section 1183, Code Civ. Proc.

[8] It is also contended by the appellants that the equities of the case are in their favor, and, as this is an action in equity, they should have been awarded a judgment of foreclosure of their liens. To this respondents answer that equity follows the law.

There can be no doubt that the equities are with the plaintiffs. They have put into the building, in labor and material, many thousands of dollars for which they have not been paid, and the building has cost the respondents nothing whatever. To turn it over to the defendants freed from the liens of plaintiffs would be grossly inequitable. While equity follows the law, we do not believe that it is necessary to give a strained construction to the law so that this costly structure may be given to the defendants without any return to the men who created it.

As said in Stimson Mill Co. v. Nolan, 5 Cal. App. 754, 760, 91 P. 262, 265, in speaking of mechanic's liens: "The right to declare such lien is based upon the theory that the materialman and laborer produce the thing upon which the lien is declared." In Jones v. Great Southern Fireproof Hotel Co. (C. C. A.) 86 F. 370, 385, it is said by the court, in relation to statutes creating similar rights of lien: "But the validity of such statutes need not be rested upon mere authority. They find sanction in the dictates of natural justice, and most often administer an equity which has recognition under every system of law. That principle is that every one who, by his labor or materials, has contributed to the preservation or enhancement of the property of another, thereby acquires a right to compensation." Similar expressions are found in many cases and are applicable to the facts of this case.

[9] In addition to what has already been said, in reference to respondents' contention that a mechanics' lien cannot properly be imposed on a structure independent of the land upon which it is constructed, the following comments are pertinent: We are of the opinion that under the constitutional and statutory provisions applicable to mechanics' liens,

as interpreted by the courts of this state in the cases above mentioned, it must be held that the mechanics' liens involved herein are a lien on the building independent of the land. The theory of mechanics' liens in this state is that the lien attaches primarily to the structure for which the materials have been furnished or labor bestowed, and the lien on the land is merely incidental to the lien on the structure. This distinction between land and superstructure, the lien attaching primarily to the latter, and to the former only as it is embraced in a common ownership with the building, has existed in California from an early date. McGreary v. Osborne, 9 Cal. 119; 17 Cal. Jur. p. 29, § 15. Any other interpretation would necessarily render unconstitutional those sections of the Code purporting to relieve the owner from liability upon filing and posting a notice of nonresponsibility. The Constitution provides (article 20, § 15) that mechanics "shall have a lien *upon the property* upon which they have bestowed labor or furnished material." The word "property" as therein used obviously refers to the building or other structure for which the materials have been furnished or labor bestowed, and not simply in the case of a tenant, to his leasehold estate. If the Legislature attempted to limit this lien by the nonresponsibility statute, such statute would necessarily be unconstitutional as an unauthorized limitation of the right granted by the Constitution.

[10, 11] The contention that because the building is a more or less permanent structure, attached to the realty, it must be held as against the mechanics to be a part of the realty, is not tenable. It is true that as between the landlord and tenant it was agreed that the building when erected should become part of the realty, but that agreement could not affect the lien given by the Constitution to the mechanics. It is our opinion, when a lease provides that the lessee may construct permanent structures on the leased premises, which structures at the termination of the lease shall become the property of the lessor, that it must be held by reason of the constitutional and statutory provisions above discussed that as far as mechanics are concerned the structure does not become a fixture until all mechanic lien claimants are paid. We think that this rule works substantial justice between the parties. In many jurisdictions mechanics' liens have been held to attach, not only to the building but also the estate or property of the lessor for improvements made by the lessee, which improvements, by the terms of the lease, are to belong or revert to the lessor, or are permanent in nature, becoming part of the realty and of benefit to the lessor. Myers v. Joseph A. Strowbridge Est. Co., 82 Or. 29, 160 P. 135; Oregon Lumber, etc., Co. v. Nolan, 75 Or. 69, 143 P. 935, 146 P. 474; Denniston, etc., Co. v. Brown, 183 Iowa, 398, 167 N. W. 190; Loeff v. Meyer, 284 Ill. 114, 119 N. E. 908; Long-Bell Lumber Co. v. McCray Band Co., 89 Kan. 788, 132 P. 992; 40 Cor. Jur. p. 106, §§ 97 and 98, and cases cited. These cases are based on the theory that since the lease contemplates the construction of a building which will enhance the value of the fee to the benefit of the lessor, the lessee must be deemed the statutory agent of the lessor for the purpose of the construction. In view of the nonresponsibility statute in this state, we do not feel justified in going that far and holding that the lien attaches to the land as well as to the building. We are of the opinion that, at least where the building of the improvement is optional with the lessee, the posting and filing of the notice of nonresponsibility by the lessor relieved the land from the lien. But we are of the opinion that under our mechanics' lien laws under which, as already pointed out, a lien may exist on a structure independently of the land upon which it is erected, it must be held that the lessor has consented that as against mechanics the building shall not become a fixture so as to cut off mechanics' liens. It is true that to remove the building will interfere, temporarily, with the owners' right of possession, but the owner must be deemed to have consented to this interference by entering into the lease knowing such a building would probably be constructed on the leased premises.

For the foregoing reasons it follows that the conclusions of law drawn from the findings that the appellants were entitled to a lien upon the building down to the surface of the ground were correct, and the judgment of August 16, 1928, was the proper judgment. The conclusions of law that the plaintiffs were not entitled to a lien on said building and the judgment of October 6, 1928, based on such conclusions are erroneous.

It is therefore ordered that as to these appellants the order of the trial court of September 27, 1928, and the judgment entered October 6, 1928, be and each one of them is hereby reversed. It is further ordered that this cause be and it is hereby remanded, with directions to the trial court to enter its conclusions of law granting appellants a lien upon the Auditorium Building down to the surface of the ground, and to enter its judgment in accordance with the findings of fact and the conclusions of law thus amended, granting the lien as aforesaid.

130 Cal.App. 754

PEOPLE v. REYNOLDS.

Cr. No. 2299.

District Court of Appeal, Second District, Division 1, California.

April 3, 1933.

Rehearing Denied April 17, 1933.

Hearing Denied by Supreme Court May 1, 1933.

1. Burglary 🔑41(1, 2).

Circumstantial evidence *held* sufficient to justify conviction of burglary and establish corpus delicti.

2. Burglary 🔑46(8).

Instruction, in burglary trial, that defendant's failure to account for his possession of recently stolen property was circumstance tending to show his guilt, *held* not prejudicial error, though information also charged receipt of stolen property.

3. Criminal law 🔑656(7).

Instruction, in burglary trial, that defendant's failure to account for his possession of recently stolen property was circumstance tending to show his guilt, *held* not erroneous as telling jury that defendant must take stand in his own defense.

4. Criminal law 🔑814(11).

Refusal of alibi instruction was not error, where defendant offered no evidence to prove alibi.

Appeal from Superior Court, Los Angeles County; Wilber F. Downs, Judge.

Carl R. Reynolds was convicted of burglary, and he appeals.

Affirmed.

Paonessa, Sayre & Oster, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John D. Richer, Deputy Atty. Gen., for the People.

YORK, Justice.

By information the appellant was charged with the crimes of burglary and receiving stolen property, and also with two prior convictions of felonies. Appellant admitted the prior convictions and was found guilty of burglary and not guilty of receiving stolen property.

The errors of which appellant complains are these:

1. Insufficiency of the evidence to justify the verdict for the reason that the corpus delicti was not established.

2. Error committed by the trial court in matters of law in the reception of certain evidence.

3. Error of the trial court in giving certain instructions to the jury, and in refusing to give certain instructions tendered by the defendant and not covered by the instructions given.

4. Misconduct of the deputy district attorney in his argument to the jury.

[1] It is shown by the record that on June 19, 1932, William J. Steinmetz was living in room 411 of the Hotel Rose at Long Beach, and that he returned to his room at about 12:30 a. m. of June 20th, retired about forty-five minutes later, having first locked the door of his room. Before retiring he took off his wrist watch and laid it upon a table near the telephone, and hung his trousers on a chair. Upon arising at 9 o'clock the next morning, he found the wrist watch missing and also that the sum of $4.85 had been taken from his trousers pocket. He testified that he did not give any one permission to enter his room that night, and that the watch which he lost was a 17-jewel Hamilton wrist watch with the date of his birthday engraved on the inside of the case. He also testified that the door of his room was still locked in the morning and that the room had not been disturbed.

A 17-jewel Hamilton wrist watch with the date above noted engraved upon the inside of the case was found in appellant's possession at the time of his arrest on July 7, 1932, and was identified by the witness Steinmetz as the watch he had lost. There was introduced in evidence a sheet from the Hotel Rose register purported to have been signed by "C. D. Nolen" upon the date that the burglary took place. An identification sheet which was prepared immediately after the arrest of appellant, and which the witness Slaight testified he saw appellant sign, was also introduced in evidence. A handwriting expert testified that, in his opinion, both documents were signed by one and the same person.

Appellant made conflicting statements to police officers as to how he came into possession of the watch. At one time he said he had bought the watch and would add nothing more to his statement as to where or when he purchased it; at another time he claimed his wife had given it to him for his birthday. Two witnesses testified in behalf of appellant to the effect that they and appellant were standing in front of a garage engaged in conversation when another man approached them to ask directions and the distance to Santa Barbara, and while they were talking, this fourth man asked if any one wanted to buy a good watch. After some further conversation, the appellant bought the watch—a 17-jewel Hamilton wrist watch—for $5. While circumstantial, we are of the opinion that the evidence adduced was sufficient to justify the verdict and to establish the corpus delicti.

In support of his second specification of error, appellant maintains that the hotel register was inadmissible for the reason that no proper foundation for its reception was made, in that the record does not disclose the date of same. The sheet from the register is before us and shows that one C. D. Nolen registered at the Rose Hotel at 9:15 p. m. of Sunday, June 19, 1932.

[2] The appellant contends that the giving of the instruction of which the closing paragraph reads as follows: "If the jury believe from the evidence, the property mentioned in evidence, was stolen from the premises described in evidence, and was seen in the possession of the defendant shortly after being stolen, the failure of the defendant to account for such possession, or to show that such possession was honestly obtained, is a circumstance tending to show his guilt, and accused is bound to explain the possession in order to remove the effect of the possession as a cirstance to be considered in connection with other suspicious facts, if the evidence disclose any such," constituted prejudicial error. In the case of People v. Boxer, 137 Cal. 562, 70 P. 671, wherein the defendants were convicted of burglary, an instruction was given in the same language as that given here, except that in the Boxer Case instead of the phrase "was seen in the possession of the defendant shortly after being stolen," the language used was, "*received* into possession of either of the defendants shortly after being stolen." Appellant here relies upon that decision to sustain his claim that the instruction was erroneous. It should be kept in mind, however, that the Supreme Court in its discussion of the subject directed its criticism particularly to the fact that the instruction specified as one of its conditions a finding that the property was not received by the defendants until after it had been stolen. In People v. Boxer, supra, the court stated (page 563 of 137 Cal., 70 P. 671): "As already stated, the defendants were upon trial charged with burglary, and, that being the case, the mere fact, if it be a fact, that subsequent to the burglary they received the fruits of the crime into their possession, cannot be said to be a circumstance tending to show their guilt of the crime of burglary. In cases of larceny, the recent unexplained possession of the stolen property is a circumstance tending to show guilt. Probably the same may be said as to the recent unexplained possession of stolen property, the fruits of a burglary, but this instruction assumes that the defendants may have received the stolen property into their possession after the burglary was committed by other parties. It is very evident that nothing which these defendants could do in the way of accepting or holding the possession of the stolen property after the burglary had been committed would tend to prove their guilt of the crime of burglary. Indeed, the instruction assumes the commission of the burglary by another prior to the possession of the property by these defendants. Under the statement of facts as presented by the instruction, the defendants would not be called upon to show how and by what means they came into possession of the property taken from the building, and the circumstance of possession in them could in no way tend to show their guilt of the crime of burglary." In the instant case we do not believe that there was any prejudicial error committed in the giving of the instruction complained of. However, it is not to be recommended as an instruction to be given in an information charging the two offenses as set out in the information in this case.

[3] In People v. Alba, 52 Cal. App. 603, 199 P. 894, there is a discussion of the instruction as given in the same language as in the case at bar. In affirming the correctness of the instruction the court stated that instructions in almost identical language and containing a statement of the same legal principle have been approved in many California cases, and the citations of some of them are given. No reference is made to People v. Boxer, supra. The same instruction was again before the Third District Court of Appeal in People v. Plummer, 100 Cal. App. 300, 279 P. 836, 837, and was there disposed of as follows: "Appellant complains of an instruction given by the court, substantially in the language of the instruction set forth in People v. Alba, 52 Cal. App. 603, 605, 199 P. 894. It is urged that the instruction contains the same error as the one condemned in People v. Boxer, 137 Cal. 562, 563, 70 P. 671. The instruction in that case, however, was condemned because it 'assumes that the defendants may have received the stolen property into their possession after the burglary was committed by other parties.' No such error appears in the instruction complained of in this case." Our conclusion is that the court did not err in giving the instruction of which appellant complains, although we doubt the advisability of giving instructions of this character, which run perhaps too close to the line which limits the right of the trial judge to comment to the jury with respect to matters of fact. There is no merit in the suggestion that the instruction told the jury that the defendant must take the stand in his own defense. The explanation referred to might be made in other ways, and in fact the defendant in this case actually placed two witnesses on the stand in an attempt to make such explanation.

[4] Appellant also specifies as error the refusal of the court to give an instruction on the law pertaining to alibis. Appellant offered no evidence to prove the defense of an alibi, and therefore it was not error for the court to refuse to give the instruction referred to.

We have checked the record and are unable to see wherein the remarks of the deputy district attorney constituted prejudicial misconduct.

The judgment is affirmed. The order denying motion for a new trial is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

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131 Cal.App. 137

RANKIN v. BROWN et al.

Civ. 843.

District Court of Appeal, Fourth District, California.

April 8, 1933.

Rehearing Denied May 8, 1933.

Hearing Denied by Supreme Court June 5, 1933.

1. Mortgages ⚿578.

In mortgage foreclosure action, trial court's determination of fact questions *held* controlling on appeal.

2. Principal and agent ⚿123(3).

In mortgage foreclosure action, evidence *held* to sustain finding that mortgagors authorized bank director to receive money from mortgagees so that loss occasioned by director's embezzlement must fall upon mortgagors, not mortgagee, though mortgagors assumed that director was also representing bank.

3. Estoppel ⚿72.

Where one of two innocent persons must suffer from wrong of third, loss must fall upon the one whose negligence enabled it to happen.

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Action by George A. Rankin against H. H. Brown, also known as Henry H. Brown, and wife, and others. From a judgment in favor of plaintiff, defendants appeal.

Affirmed.

Hearing denied by Supreme Court; CURTIS AND LANGDON, JJ., dissenting.

Siemon & Garber and Alfred Siemon, all of Bakersfield, Paul F. Garber, of Monrovia, and Jackson Mahon, of Bakersfield, for appellants.

Borton & Petrini, of Bakersfield, for respondent.

BARNARD, Presiding Justice.

This is an appeal from a judgment in favor of the plaintiff in an action brought to foreclose a mortgage in which the defense is based upon the fact that the makers of the mortgage never received the money represented thereby.

In the fall of 1928, the appellants, for the purpose of completing a building they were erecting, applied to the First National Bank in Bakersfield for a loan of $25,000, proposing to draw the money from time to time as they needed it, and to pay interest thereon only as the money was used. The application was referred by the bank to its discount committee, one member of which was a man named Fitzgerald, a director in the bank, who was also the manager of a building and loan association in the same city. The bank desired to accommodate the appellant but felt unable to do so, and Fitzgerald stated that he thought he could get them a private loan. Shortly thereafter, Fitzgerald called upon the appellants, who knew he was connected with the bank, and "seemed to know all about the loan and what the terms were." Fitzgerald then called upon the respondent who had $25,000 to loan and, at his suggestion, the respondent went to see the appellants. The respondent refused to make the loan on the terms desired, since he wanted interest paid on the full amount from the beginning, and the parties separated with the understanding that the transaction was terminated. Soon thereafter Fitzgerald again went to the respondent telling him that the money could be paid "to us and we will use it until Mr. Brown is ready for it and then we will pay the interest on it until then and he will pay it from then on." The respondent stated that he did not wish to make the loan that way, that he wanted to loan it to and have it secured by one or the other of them, but that he did not want to look first to one and then the other. Fitzgerald replied that this was the proposition and that the respondent was to pay them the money and they would use it until the appellants were ready for it, and they would settle the interest between them. Shortly thereafter Fitzgerald went to the appellants and told them he could get the money from the respondent and that "you just give me the papers and I will fix it all up and you won't have to pay any interest until you draw the money out of the Bank, and it will be in the bank when you want it." Either then or soon after that the appellants signed the note and mortgage and delivered them to Fitzgerald.

The respondent went to Fitzgerald's office and paid him $25,000 in currency. Fitzgerald told him that he had the papers all ready and would give him the note and mortgage as soon as the mortgage was recorded, and gave him a receipt for the money. As soon as the mortgage was recorded he delivered it to the respondent. The mortgage was recorded on October 8, 1928, and shortly thereafter the respondent told the appellants that he had paid the money in currency to Fitzgerald. Early in November the appellants wanted to use some of the money and called upon Fitzgerald for the same. Thereupon, Fitzgerald brought to them a note for $10,000 payable to the First National Bank in Bakersfield, explaining that they were not paying interest on the $25,000 until they began to draw on it, that they could use this $10,000 before drawing on the other money, and that, when they began drawing the other money they could repay this $10,000 out of the first money drawn. The appellants signed this note and received that amount from the bank. At the time of signing this note they knew that it was payable to the bank, that the bank was loaning them that amount, that they were paying interest on it, and that the respondent had theretofore handed the original $25,000 to Fitzgerald. When the appellants received the $10,000, they told Fitzgerald they would probably want another payment in about a month, to which Fitzgerald replied: "Call me up three or four days before you want it." About the first of December the appellants wanted more money and called upon Fitzgerald. They were told he was out of town. They called again and "could not get any satisfaction." The appellant husband testified: "I could not see him at all, and the next thing I knew he was in bed with the flu, so I was told, for two weeks, and I called—in the meantime I called him over the phone and I said, 'I need this money to meet these payments.' 'Well,' he says, 'You won't have to pay interest, it will be all right.' He kept setting time, time and time again when it would be available, and he disappointed me every time, until it ran along way up in January and then I went after him, and I went after him good. I went out to his house and saw him, and he says, 'Well that money will be there day after tomorrow, it will be there.'" Shortly thereafter, Fitzgerald disappeared, and it is conceded that he embezzled the money and that the same was never paid by him to the appellants.

[1] While this is a hard case in the sense that a large loss must fall upon one of two innocent parties, and while it has been most ably argued by counsel on both sides, we feel that the decision of the trial court on a question of fact is controlling here. As conceded by appellants, the principal question to be decided is whether or not Fitzgerald had been authorized by the appellants to receive from the respondent the money in question. The trial court found that the respondent paid over and delivered $25,000 in cash to a person authorized and empowered by the appellants to receive said sum, and that this was done in consideration of the execution and delivery of the note and mortgage. While the appellants attack this finding as being no more than a conclusion of law, it must be held sufficient in view of the language used in the pleadings and the form in which the issues were presented. The principal question before us then is whether or not the evidence sustains the finding and conclusion that Fitzgerald had been authorized by the appellants to receive the money.

[2] The appellant E. H. Brown testified that Fitzgerald told them he could get "that money" from the respondent; that he said "we can get that money and you make out the mortgage and let me have the papers and I will fix it all up and you make the mortgage to Rankin and the money will be in the Bank and there will be no other expenses. He says 'You just give me the papers and I will fix it all up and you won't have to pay any interest until you draw the money out of the Bank, and it will be in the Bank when you want it'"; and that they gave him the papers. The appellant H. H. Brown testified as follows:

"Q. In other words you understood when you gave Fitzgerald your note and mortgage, that Fitzgerald, in whatever capacity he was acting, to go and get that money from Rankin? A. I did not know he was going to get it. I supposed that money was to be placed in the bank because he said that was where I would find it when I wanted to use it.

"Q. That is what Mr. Fitzgerald said? A. Yes.

"Q. And you gave Mr. Fitzgerald the note and mortgage? A. Why certainly, we had to secure somebody for the money.

"Q. And you noticed, did you not, that the note and mortgage was made out to Mr. Rankin when you signed it? A. Well, I know it reads that way, but I don't remember that note at all. I have racked my brain lots and I don't remember that we ever signed that note, but it looks like our signatures and we probably did.

"Q. But you do remember signing the mortgage? A. Yes.

"Q. You noted the mortgage was made out to Rankin? A. Yes.

"Q. Yet you gave it to Fitzgerald? A. Well as a representative of the bank I would have to give it to somebody when I borrowed the money.

"Q. But you gave it to Fitzgerald assuming he was a representative of the bank? A. Certainly.

"Q. And you intended, did you not, that Fitzgerald, if you please, as a representative of the bank, should deliver the note and mortgage to Rankin and get the money? A. Well he told me to have it made out to him and they would have the money in the bank.

"Q. As I understand you, Mr. Brown, while you intended that note and mortgage to go to the bank, yet you delivered them to Fitzgerald as a representative of the bank—that was your understanding and your purpose? A. Sure, I did not dream the bank was not back of it.

"Q. While you intended the money to come to the bank, you intended it should be obtained by Fitzgerald as a representative of the bank, did you not? A. Why, yes, he is the one that was sent out to do the business."

He further testified:

"When I signed the mortgage and turned it over to Fitzgerald he said, 'You don't want this money'—I had told him that I did not want it for a while, that I was not ready for it, and he says, 'Well, when you want it, you tell me,' and I says, 'will I go to the Bank or will I tell you,' and he says, 'You call me.'

"Q. He said that, at that time—you asked him whether you should go to the bank to get the money, and he says, 'No, you come to me.' A. He says, 'No you call me,' and when I did want it, he brought the ten thousand dollar note over."

The subsequent acts of the appellants also throw some light upon the situation. It appears that when they wanted to use the first part of the money they not only went to Fitzgerald instead of to the bank, but accepted his suggestion that they borrow $10,000 from the bank and leave this money untouched until the next installment was desired. At the same time they told Fitzgerald they would want more money in about a month and he told them to call him up several days before they wanted it, which, in connection with the $10,000 loan transaction, is strongly suggestive of a situation inconsistent with appellants' present position that Fitzgerald had no authority to receive or hold the money, and that he was only authorized to have the respondent place it in the bank where it would be available to them at any time. It further appears that when next they desired to use the money they not only went to Fitzgerald but waited several weeks for him to make the money available.

Conceding that the evidence would have sustained a finding to the effect that the appellants did not authorize Fitzgerald to receive the money, but only authorized him to have the respondent place the money in the bank, it fully sustains the finding made and justifies the inference drawn by the trial court that the appellants not only authorized Fitzgerald to receive the money from the respondent, but depended upon him to have it available for them when they wanted to use it. In fact, portions of the evidence indicate not only that the appellants realized that Fitzgerald was not going to place the money in the bank at once but that they acquiesced in and virtually assented to such a course. While their confidence in Fitzgerald was misplaced, they were in no way injured by anything the respondent did and everything was done in accordance with both their expectation and their authorization until some time after the respondent had completed his part in the transaction. The respondent made Fitzgerald his agent for the purpose of obtaining the note and mortgage and recording the same. At the same time the appellants made Fitzgerald their agent for the purpose of taking the note and mortgage and obtaining the money from the respondent, and at some later date placing the same in the bank. Having authorized their agent to receive the money, the loss occasioned by his subsequent act must fall upon the appellants and not upon the respondent.

Appellants rely upon certain authorities wherein it has been held that the presence of unusual conditions places upon one dealing with an agent the burden of investigating as to whether these conditions are within the authority of the agent. It is argued that such a duty to inquire of the appellants, as to the extent of the authority given by them to Fitzgerald, was imposed upon the respondent by the unusual circumstances here present, and especially since it appeared that either Fitzgerald or some party unnamed was to use the money, and benefit thereby, during the interim before it was wanted by the appellants. Any notice of lack of authority could only be material where such authority does not, in fact, exist. The evidence here is sufficient to show that authority to receive the money had been given. It neither appears that any further investigation on the part of the respondent was required nor that the same would have availed anything had it been made, as the appellants intended that the respondent should pay the money to Fitzgerald. Whether or not the appellants assumed that Fitzgerald was also representing the bank makes no difference as far as the respondent is concerned, and in any event they authorized him to receive the money. The subsequent fraud of Fitzgerald was made possible by the appellants' misplaced confidence in him rather than by anything done by the respondent.

[3] While we think that this case is determined upon appeal by the finding, supported by the evidence, that the appellants authorized Fitzgerald to deliver the note and mortgage and to receive the proceeds thereof, it would seem that the same result would follow if the familiar rule were applied that where one of two innocent persons must suffer, the loss must fall upon the one whose negligence enabled it to happen. The appellants delivered the note and mortgage to Fitzgerald with the expectation that he would use them to obtain the money from the respondent; they left the matter open as to just when it should be placed in the bank; they acquiesced in Fitzgerald's statement that they should go to him and not to the bank when they desired the money; they were early told that the money had been paid to Fitzgerald; they accepted his subterfuge when they first wanted part of the money in December, even to the extent of giving a new note for $10,000; and even after that, they continued, until some time in January, to expect him to make the money available to

them. Any negligence leading to the loss disclosed by these unusual circumstances appears to have been that of the appellants rather than that of the respondent.

Certain rulings of the court on the admission of evidence are also attacked. While we have examined these, we find no prejudicial error therein.

The judgment is affirmed.

We concur: MARKS, J.; JENNINGS, J.

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130 Cal.App. 262

KERSCHNER v. FISK TIRE & RUBBER COMPANY, Inc.

Civ. 7565.

District Court of Appeal, Second District, Division 1, California.

April 4, 1933.

Appeal and error ⚷**1001(1).**

In action for malicious prosecution in attaching plaintiff's automobile to satisfy judgment against plaintiff's husband, trial court's finding with reference to ownership and possession of automobile on conflicting evidence *held* conclusive.

Appeal from Superior Court, Los Angeles County; Samuel R. Blake, Judge.

On rehearing.

Rehearing denied.

For former opinion, see 19 P.(2d) 819.

Hubert F. Laugharn and Francis B. Cobb, both of Los Angeles, for appellants.

Clarence Hansen, of Los Angeles, for respondent.

PER CURIAM.

Appellants in their petition suggest that this court in its decision failed to take into consideration the contentions of appellants, first, that the evidence is not sufficient to support the finding "that P. E. Kerschner did not have possession, nor was he the owner of the said Studebaker automobile on the said October 2, 1928"; second, the contention of appellants to the effect that respondent in her action against Charles R. Thomas recovered as damages the value of the automobile "with interest from the date of the alleged conversion."

The first of the foregoing contentions is accompanied by a discussion of section 3440 of the Civil Code and its provisions concerning fraudulent transfers. The trial court, in making its finding with reference to ownership and possession of the automobile at and prior to October 2, 1928, made such finding upon conflicting evidence, which, however, was sufficient to authorize the inference which the court drew from the evidentiary facts. For that reason it did not seem to us necessary to enter into an extended discussion of the law covering that branch of the controversy.

The second point above mentioned is without support in the record. The judgment in the Thomas case allowed as damages the value of the automobile at the time of its seizure, but was silent on the subject of interest; and, in fact, the only interest allowed or paid in satisfaction of that judgment was the statutory interest on the judgment as entered. Therefore, the point urged by appellants, viz., that respondent having recovered interest on the value of the automobile during the period of detention, should not be permitted to recover the same element of damages a second time, is without merit.

The petition for rehearing is denied.

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131 Cal.App. 254

GARDINER et al. v. HOGUE.

Civ. 8674.

District Court of Appeal, First District, Division 1, California.

April 17, 1933.

Hearing Denied by Supreme Court June 15, 1933.

1. Negligence ⚷**136(14).**

Degree of care necessary to relieve party from implication of "gross negligence," or what amount will sustain charge, depends on circumstances of particular case, and is generally question for jury.

"Gross negligence" is defined as a want of slight diligence.

[Ed. Note.—For other definitions of "Gross Negligence," see Words and Phrases.]

2. Automobiles ⚷**245(24).**

Whether host, who lost control of automobile while descending grade with knowledge that foot brakes were defective, was guilty of "gross negligence," *held* for jury under evidence which sustained finding for guests.

3. Negligence ⚷**72.**

One invoking rule which excuses failure to exercise care in emergency must have been without negligence.

4. Trial ⚷**295(1).**

Instructions must be considered as whole.

5. Automobiles ⚷**6.**

Statutory amendment limiting automobile guest's right to recover for personal inju-

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⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

ries from host *held* not to affect cause of action existing when amendment took effect (St. 1923, p. 517, § 141¾, as added by St. 1929, p. 1580, and amended by St. 1931, p. 1693).

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Action by William M. and June T. Gardiner against Charles L. Hogue. Judgment for plaintiffs, and defendant appeals.

Affirmed.

John F. O'Sullivan, John J. Taheny, John A. Sullivan, Daniel W. Burbank, and Pembroke Gochnauer, all of San Francisco, for appellant.

Ford & Johnson, of San Francisco, for respondents.

PER CURIAM.

Plaintiffs are husband and wife. The above action was brought to recover damages for injuries received by plaintiff last named which were alleged to have been caused by defendant's negligence. A jury returned a verdict against defendant, who has appealed from the judgment entered thereon. He was the owner and operator of an automobile in which plaintiff was riding as a guest. While descending a grade on Hampton road in Piedmont, defendant lost control of the car, which collided with a metal electrolier, causing the injuries. The grade was about 13 per cent.; the foot brakes were defective and inadequate to control the car on the grade, and their condition was known to defendant. The car was started down the grade in second gear, but this was insufficient to hold the car in control, and the foot brakes were then applied, without effect. Defendant then attempted to shift into low gear, but failed to effect the change, with the result that control was completely lost and the car was left running free in neutral. No attempt was made to apply the emergency brakes. Defendant admitted that the application of these brakes would probably have stopped the car, but claims that being suddenly confronted with an imminent danger he became frightened and failed to apply them. He contends that the evidence was insufficient to sustain a finding of gross negligence, and that in view of the peril in which he was suddenly placed he was required to exercise only that degree of care which a reasonably prudent person would have used under similar circumstances.

[1, 2] "Gross negligence" has been defined as a want of slight diligence. Kastel v. Stieber, 215 Cal. 37, 8 P.(2d) 474; Taylor v. Cockrell, 116 Cal. App. 596, 3 P.(2d) 16. The degree of care necessary to relieve a party from the implication of gross negligence, or what amount will sustain the charge, is necessarily a question of fact dependent upon the circumstances of the particular case, and is generally a question for the jury. Meighan v. Baker, 119 Cal. App. 582, 6 P.(2d) 1015; Malone v. Clemow, 111 Cal. App. 13, 295 P. 70. In view of defendant's knowledge of the defective condition of the brakes, the danger of attempting to descend the grade under the circumstances, and his failure to apply the emergency brakes, a question for the jury was presented (Phillips v. Pickwick Stages, 85 Cal. App. 571, 259 P. 968); and the jury having found that the defendant was grossly negligent, we cannot say that the finding is unsupported (Merrill v. Pacific Transfer Co., 131 Cal. 582, 63 P. 915, Krause v. Rarity, 210 Cal. 644, 293 P. 62, 77 A. L. R. 1327).

[3] One invoking the rule which excuses the failure to exercise care in an emergency or sudden peril must have been without negligence on his part. 19 Cal. Jur., Negligence, § 36, p. 598. Here it appears that the position of peril in which defendant found himself was due to his own neglect, which under the circumstances justified the conclusion that he was wanting in slight diligence.

[4] He complains of a certain instruction as to violations of the Motor Vehicle Act (St. 1923, p. 517, as amended) with respect to brake equipment. It is claimed that this instruction charged that the jury might find that any violation of the act in any of these respects would constitute gross negligence regardless of the circumstances of the particular case. We do not so understand the instruction. However, the instructions must be considered as a whole, and the jury was fully and fairly charged as to what would constitute gross negligence; that the question of negligence was not absolute but relative to some circumstance of time, place, or person, and that to warrant a recovery it must have been a proximate cause of plaintiff's damage; further, in order to determine whether defendant exercised slight care, the jury must take into consideration all the facts and circumstances as revealed by the evidence in the case.

It is claimed that the court, by assuming the existence of negligence, erroneously charged on matters of fact. There is no merit in this contention as the charge does not reasonably bear this construction.

[5] Lastly, it is urged that plaintiff's cause of action fell with the amendment to section 141¾ of the Vehicle Act adopted in 1931 (St. 1931, p. 1693). Previous to the amendment a guest might recover from the owner, driver, or person responsible for the operation of a vehicle for injuries proximately resulting from the intoxication, willful misconduct, or gross negligence of such owner, driver, or person responsible for its operation. The amendment, which took effect on August 14, 1931, omitted the words "gross negligence" from the statute. As stated, the action was for personal injuries. The damage was sus-

tained on November 3, 1930, and the suit was commenced on July 15, 1931. In cases of this character a right of recovery existed at common law; and, in accordance with the following decisions dealing with a similar act, the amendment in no way affected causes of action existing when it took effect. Callet v. Alioto, 210 Cal. 65, 290 P. 438; Krause v. Rarity, supra; Edwards v. Gullick, 213 Cal. 86, 1 P.(2d) 11.

The evidence was amply sufficient to prove gross negligence, and nothing appears to support the conclusion that anything complained of by defendant resulted in a miscarriage of justice.

The judgment is affirmed.

131 Cal.App. 159

DOUGLAS et al. v. LEWIN.

Civ. 8728.

District Court of Appeal, First District, Division 2, California.

April 12, 1933.

Hearing Denied by Supreme Court June 7, 1933.

1. Easements 🔑12(1).

After payment of purchase price, vendor could not repudiate oral agreement, constituting part of consideration, that purchasers could use trail over vendor's land.

2. Easements 🔑61(9½).

In action to establish easement, findings *held* sufficiently to describe trail over land.

Findings described trail in question by reference to certain recorded map and also by reference to unrecorded map which showed location of trail and was attached to complaint as exhibit, and findings fixed point of commencement and point of termination of trail with great particularity, and described trail as being 3 feet wide, and at various curves about 4 feet wide. It appeared that trail was irregular and that it would be practically impossible to describe it with any great particularity.

3. Easements 🔑61(9).

In purchasers' action to establish right of way over trail on vendor's land, findings concerning description and width of trail *held* supported.

4. Appeal and error 🔑1051(2).

Uncontradicted evidence showing that vendor promised purchasers use of trail over vendor's land, error, if any, in admitting vendor's statement to another that trail was for purchasers' use, *held* harmless.

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Action by Ann G. Douglas and others against T. K. Lewin. Judgment for plaintiffs, and defendant appeals.

Affirmed.

Thornton & Watt and Herbert Chamberlin, all of San Francisco, for appellant.

John H. Crabbe, of San Francisco, for respondents.

SPENCE, Acting Presiding Justice.

This is an appeal by defendant from a judgment decreeing that plaintiffs are entitled to a right of way over a trail on the land of defendant and enjoining defendant from interfering with plaintiffs' use and enjoyment thereof.

In 1902 defendant acquired a tract of land in Marin county, said tract fronting on Miller avenue in or near Mill Valley. This tract consisted of about five acres and extended up over steep and precipitous ground from Miller avenue to La Verne avenue. In 1903 defendant constructed a cabin in about the center of this tract and built a trail leading up the hill from Miller avenue. This was a well-defined trial which was built upon bedrock in some places and excavated through bedrock in others and which wound back and forth according to the contour of the land. The tract remained in single ownership until 1924, at which time defendant planned to dispose of portions thereof. No map showing a subdivision of defendant's land was recorded, but a map showing certain lots and lot numbers was made by defendant. The cabin lot was designated as lot 1. Immediately above lot 1 and adjoining it was a lot designated as lot 5. Neither lot 1 nor lot 5 abutted on any public road, but on defendant's map a ten-foot roadway was shown running down to said lots from La Verne avenue. This roadway was "just land like the rest of the field," according to defendant, and was not even designated on the map "until the Cowderys estimated what they wanted." This roadway was never graded at any time and, according to plaintiffs, it was "a continuation of the trail." On the opposite side of said roadway was a larger lot designated as lot 4 which did extend up to and have a frontage on La Verne avenue. It appears that Miller avenue is the main thoroughfare leading to the railroad station and that the post office boxes of the various parties mentioned herein were located at the lower end of defendant's tract on said Miller avenue.

In 1924 defendant sold lot 4 to a Mrs. Cowdery. At about the same time plaintiffs rented from defendant the cabin on lot 1 and remained there as tenants until October, 1925. During the tenancy plaintiffs freely used the trail to Miller avenue. In the early part of 1925, plaintiffs commenced negotiations with defendant for the purchase of lot 5. There was no building on lot 5 at the time and the negotiations ultimately resulted in an oral agreement whereby defendant was to build a dwelling house upon said lot and sell the lot and dwelling house to plaintiffs for a sum slightly in excess of $3,000. During the negotiations plaintiffs asked defendant whether they would have the use of the trail in the event that they purchased the property and he answered "most certainly, of course." Pursuant to the oral agreement between the parties the house was built and plaintiffs received their deed in December, 1925. The deed made no mention of any right of way, but defendant did not deny his agreement to permit plaintiffs to use the trail. On the trial he stated, "I do not deny or affirm it, Judge." After plaintiffs purchased lot 5, plaintiffs, together with Mrs. Cowdery and the friends of these parties, used said trail without interference until November, 1929, when defendant blocked off the trail and prevented plaintiffs from having access thereto. Thereafter plaintiffs commenced this action.

[1] Appellant contends that the evidence is insufficient to support a finding that respondents "are the owners of an easement of right of way over the Lewin Trail." We find no merit in this contention. The evidence shows without conflict that during the negotiations for the sale of lot 5 and as part of the consideration of said sale appellant agreed that respondents would have the use of said trail. Appellant seems to take the position that as the deed contained no express grant of a right of way over said trail respondents "had a mere license by parol to use the trail, that it rested merely on neighborly accommodation, and that it was revocable at any time." We believe this position untenable. Respondents were not mere neighbors whom appellant had generously permitted to use said trail. They were the purchasers of a portion of appellant's property and were assured of the right to use the established trail over another portion of defendant's property at the time of their negotiations with appellant. After the payment of the purchase price appellant cannot be heard to repudiate his agreement for "even an oral agreement, if executed and based upon a valuable consideration, will convey an equitable title to the easement agreed upon." 9 Cal. Jur. 949. See, also, Rubio Canon, etc., Assoc. v. Everett, 154 Cal. 29, 96 P. 811; Fogarty v. Fogarty, 129 Cal. 46, 61 P. 570; Flickinger v. Shaw, 87 Cal. 126, 25 P. 268, 11 L. R. A. 134, 22 Am. St. Rep. 234. Appellant is in no better position than one selling a portion of a tract with reference to a map showing roads or ways in said tract or with reference to stakes on the ground marking out such roads or ways. In such cases it has been held that the purchaser has an easement over the portions of the land so designated by the seller. Danielson v. Sykes, 157 Cal. 686, 109 P. 87, 28 L. R. A. (N. S.) 1024; Prescott v. Edwards, 117 Cal. 298, 49 P. 178, 59 Am. St. Rep. 186; Syers v. Dodd, 120 Cal. App. 444, 8 P. (2d) 157; Smith v. Smith, 21 Cal. App. 378, 131 P. 890.

[2, 3] Appellant further contends that "the evidence is insufficient to support the finding as to the width or description of the trail and the description contained in the findings is insufficient to locate the alleged easement upon the land." Considering first the description of the trail in the findings, we cannot say that said description is insufficient. Respondents' property and the trail in question were described in the complaint and findings by reference to Tamalpais Land & Water Company, Map No. 6, a recorded map, and also by reference to an unrecorded map of appellant's property which showed the location of the trail and was attached to the complaint as an exhibit. Neither of said maps is to be found in the record on appeal, but the findings appear to fix the point of commencement and the point of termination of said trail with great particularity and to show the course of the trail between the said points by referring to the exhibit mentioned above. The trial is further described in the findings as being "three feet wide and at the various curves is of a width of about four feet." So far as we can ascertain from the record before us, it would be practically impossible to describe this winding trail with any greater particularity. Turning to the evidence there appears to have been no real dispute in the trial court over the description or width of the trail. The trail was described in the complaint and findings as above indicated. By his answer appellant made formal denial of most of the allegations of the complaint, but conceded in the answer "that there is a trail of various widths and running in various directions, which is well defined, and which runs from a point. * * *" The unrecorded map with the trail shown thereon was identified on the trial as "correctly showing the location and meanderings of the trail." Counsel for appellant then asked, "Do you want to put it in evidence?" Counsel for respondents answered in the affirmative and counsel for appellant replied, "All right," whereupon the map was introduced. It appears from the record that the map introduced was a duplicate of the map attached to the complaint and referred to in the findings. As to the width of the trail, there was evidence to show that the average width was three or three and one-half feet and that it was "wide where it turns." Appellant himself testified that it was "an irregular trail. There is no special average dimensions on it, or width of it. Probably at the beginning, probably only a foot wide. Now it is quite a little wider, gradually, as I grubbed it from time to time."

We believe there was sufficient evidence to sustain the findings relating to the description and width of the trail.

[4] One further point is urged by appellant. He claims that the trial court erred in admitting evidence of appellant's conversation with Mrs. Cowdery regarding the use of the trial, which conversation was had at the time he was negotiating with Mrs. Cowdery for the sale of lot 4. In this conversation the witness stated that she asked appellant about the use of the trail and he said "that trail was for the use of those who bought the property." It is unnecessary to discuss the propriety of the trial court's ruling admitting this evidence or the theory upon which respondents offered it. The uncontradicted evidence shows that appellant agreed that respondents should have the use of the trail and assuming without deciding that the admission of said testimony of Mrs. Cowdery was erroneous, it could not have been prejudicial.

The judgment is affirmed.

We concur: STURTEVANT, J.; GOODELL, Justice pro tem.

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131 Cal.App. 191

RAMACCIOTTI v. RAMACCIOTTI.

Civ. 400.

District Court of Appeal, Fourth District, California.

April 13, 1933.

1. Divorce ⚷152.

Interlocutory divorce decree *held* not void for failure to show grounds or for whom decree was rendered, where such matters appeared from findings and conclusions (Civ. Code, §§ 131, 146; Code Civ. Proc. §§ 632, 633).

2. Judgment ⚷527.

Sufficiency of judgment is determined by matters contained therein and in findings and conclusions (Code Civ. Proc. §§ 632, 633).

3. Appeal and error ⚷882(5).

Plaintiff who first adopted in complaint description of real property used in interlocutory decree, could not, on appeal, complain that description was uncertain.

4. Divorce ⚷285.

Trial court's award of all community property to husband on granting wife interlocutory divorce decree, could not be disturbed on appeal taken on judgment roll alone.

5. Appeal and error ⚷907(2).

In absence of testimony, all presumptions on appeal must be in favor of judgment, and insufficiency of evidence will not be reviewed.

Appeal from Superior Court, Fresno County; K. Van Zante, Judge.

Action for divorce by Maria Ramacciotti against Guesseppe Ramacciotti. From a judgment and order denying a motion to set aside and vacate an interlocutory decree of divorce, plaintiff appeals.

Affirmed.

John L. McVey and M. Martino, both of Oakland (David E. Peckinpah, of Fresno, of counsel), for appellant.

B. W. Gearhart and Lindsay & Gearhart, all of Fresno, for respondent.

CAMPBELL, Justice pro tem.

This is an appeal from a judgment and order denying a motion made by appellant to set aside and vacate an interlocutory decree of divorce made, rendered, and entered in the court below. This decree, together with the findings of fact and conclusions of law in the case were prepared by appellant through her attorneys at that time. The findings, conclusions, and decree were signed by the court at the request of appellant and were filed in the regular way. The appellant now, through substituted attorneys, complains that the decree, as entered, is absolutely void on its face, and is a mere nullity by reason of certain defects of form. The decree complained of is dated December 10, 1929, and on December 8, 1930, appellant served upon the attorneys for respondent a notice of motion to set aside the decree, which motion came on regularly for hearing on December 19, 1930, following which the motion was denied and this appeal follows.

No motion for new trial was ever made by either of the parties to the action, no appeal from the interlocutory decree of divorce was ever taken, and this appeal comes to us on the judgment roll alone. The portion of the interlocutory decree complained of by appellant is as follows: "* * * It is ordered, adjudged and decreed that an interlocutory judgment in the above entitled action is hereby entered, and that after the expiration of one year from the filing of this interlocutory decree a final decree be entered herein dissolving the marriage between plaintiff and defendant and relieving each of them from all of the obligations thereof." Examining the record on appeal we find that appellant filed a complaint wherein she alleged that she and respondent were the owners of certain real and personal property; also that respondent was guilty of extreme cruelty, setting out cer-

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⚷For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

tain specific acts. Respondent answered this complaint but did not file a cross-complaint. Thereafter the issues being joined, a trial was had, and from the findings of fact we may draw the conclusion that plaintiff was present in court, represented by counsel; that defendant was not present in court, but was represented by counsel and that appellant introduced evidence in support of her complaint. Thereafter the court found, among other things: "That the said defendant has been guilty of extreme cruelty toward plaintiff in that the defendant has on various occasions during the married life of plaintiff and defendant struck the said plaintiff. * * *" As a conclusion of law the court found: "That plaintiff is entitled to a decree of divorce dissolving the marriage between plaintiff and defendant and that upon the expiration of one year from the date of the entering of the interlocutory decree a final decree should be entered in this action." The court also found all of the real and personal property described in plaintiff's complaint to be the sole and separate property of the defendant save and except three promissory notes of the value of $1,100, which were found to be community property. In the conclusions of law the court awarded all of the property described in the complaint to the respondent.

Appellant contends that the purported interlocutory decree is void for the reason that it does not conform to the requirements of the Code in that it does not adjudge in whose favor a divorce, if any, was awarded, nor the grounds upon which the same was awarded. The grounds upon which the appellant sought to have the interlocutory decree vacated and set aside are not very clearly stated in the notice of motion, but as nearly as we can understand it, the notice attempted to set forth at least four such grounds which may be briefly summarized as follows: (1) That the decree does not show in favor of which party to the action it was rendered; (2) that it does not show upon what grounds the divorce was rendered; (3) that it does not sufficiently describe the real property set aside to the respondent; and (4) that the decree awarded all of the property involved in the action to respondent notwithstanding the court found that a portion of the personal property was the community property of the parties, and that appellant herein, being the innocent party and the divorce having been granted on the grounds of extreme cruelty, was entitled under the law to more than one-half of the community personal property. Section 131 of the Civil Code provides as follows: "In actions for divorce, the court must file its decision and conclusions of law as in other cases, and if it determines that no divorce shall be granted, final judgment must thereupon be entered accordingly. If it determines that the divorce ought to be granted, an interlocutory judgment must be entered, declaring that the party in whose favor the court decides is entitled to a divorce. After the entry of the interlocutory judgment, neither party shall have the right to dismiss the action without the consent of the other."

Section 146 of the Civil Code provides: "* * * If the decree be rendered on the ground of adultery, or extreme cruelty, the community property shall be assigned to the respective parties in such proportions as the court, from all the facts of the case, and the condition of the parties, may deem just."

[1, 2] Appellant contends that the decree is void. With this contention we do not agree. Section 632 of the Code of Civil Procedure provides that "upon the trial of a question of fact by the court, its decision must be given in writing and filed with the clerk within thirty days after the cause is submitted for decision." Section 633, immediately following, provides: "In giving the decision, the facts found and the conclusions of law must be separately stated. Judgment upon the decision must be entered accordingly."

It follows that the sufficiency of the judgment or decree in any case does not depend alone upon the matters which appear on the face of the formal judgment or decree, but upon the matters contained in the findings of fact and conclusions of law which are the basis of the decree or judgment. While the findings of fact and conclusions of law are not the judgment itself, they nevertheless, when signed and filed, constitute the rendition of decision on the part of the court. By reference to the findings of fact and conclusions of law in this case, as we have already pointed out, any doubt as to which of the parties was awarded the interlocutory decree is instantly removed. Reading together the findings of fact and conclusions of law and the decree the latter plainly provides that the interlocutory decree of divorce was rendered in favor of the plaintiff and against the defendant. The judgment is certainly not absolutely void because of uncertainty in this respect from all that appears on the face of the isolated decree. We know of no rule of law, nor are we cited to any by appellant, which requires the interlocutory decree in a divorce action to set forth the ground or grounds on which it was awarded. There is nothing in section 131 of the Civil Code which requires an interlocutory decree to state the ground or grounds of divorce.

[3] Appellant's next contention is that the description of the real property involved is insufficient. Appellant first adopted the description complained of in her complaint and respondent carried it through his answer and adopted the same general descriptions used by plaintiff. The descriptions are general and might prove insufficient for some purposes, but they are clear enough to indicate without doubt what parcels of real property

were awarded to the respondent. Any uncertainties that may exist in the descriptions were first asserted by appellant and she cannot now be heard to complain.

[4, 5] Appellant complains that respondent was awarded all of the community property and assigns this as error and declares that she should receive more than one-half of the community property. We are not unmindful of the fact that in certain of the cases cited by appellant, such as Thomsen v. Thomsen, 31 Cal. App. 185, 159 P. 1054, this court has held that it is the duty of the trial court to award the innocent party in divorce cases half or more than half of the community property when the divorce is for cruelty. Also, in the case of McKannay v. McKannay, 68 Cal. App. 701, 230 P. 214, it was held that in divorce cases based on the ground of cruelty, that a prevailing and innocent party should be awarded at least one-half of the community property.

We have examined the cases cited by appellant supporting this theory and find them all to be cases in which appeals have been taken and the evidence introduced at the trial sent up for review on appeal. In that line of decisions the higher courts have uniformly held in substance that, all other things being equal, the prevailing party should be awarded at least one-half the community property when the grounds of divorce are extreme cruelty or adultery.

The appeal in the instant case is taken on the judgment roll alone. There is no bill of exceptions or transcript showing what evidence was introduced at the trial of the action in the lower court. The record shows that appellant was present with her counsel and that respondent was absent, but was represented by counsel. From the scanty record on appeal we may conclude that this action was handled no differently from any number of other divorce actions. In this case, and throughout the entire proceedings, the respective parties were represented by highly reputable counsel. The reasons that caused respondent to absent himself from the trial are not before us. The stipulations, if any, between counsel, are not in the record. The agreement as to property rights, if any, is lacking. Section 146 of the Civil Code, supra, vests in the trial court in such cases a very broad discretion. The testimony in this case is not before us, but it no doubt revealed very persuasive reasons why the lower court should, in its discretion, have awarded all of the community property to the respondent, notwithstanding he apparently was the party at fault in the divorce action. The record is silent as to the evidence, stipulations, or agreements, if any, that actuated the trial court in its decision. Hence we are not in position to say that the trial court abused its discretion in awarding all of the community property to the respondent. In the absence of the testimony taken at the trial, all presumptions must be in favor of the validity of the judgment and it is conclusively presumed that the evidence warranted the decree setting aside all of the community personal property to the respondent.

The insufficiency of the evidence to support the judgment in any case will not be reviewed in the absence of a transcript or bill of exceptions. In re Estate of Shirey, 167 Cal. 193, 138 P. 994; In re Estate of Brown, 143 Cal. 450, 77 P. 160; O'Connell v. Behan, 19 Cal. App. 111, 124 P. 1038. The court, under section 146 of the Civil Code, supra, had jurisdiction and power to determine how the community property of the parties should be apportioned between them. Such jurisdiction and power is expressly given to the court by the Code section referred to. If it be shown in any case that the court abused its discretion in the exercise of its power of jurisdiction, then its decision will be subject to review upon appeal. However, such a review cannot be had in a proceeding of this character.

The judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

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131 Cal.App. 154

AYARS et al. v. FAUST et al.

Civ. 846.

District Court of Appeal, Fourth District, California.

April 10, 1933.

1. Taxation ⚷734(7).

Tax title *held* void where delinquent list stated amount of taxes and costs, but not penalties, and where amounts of tax, penalty, and costs were not separately stated.

2. Taxation ⚷734(9).

Tax title *held* void where sale notice did not separately state amounts of penalties and costs (Pol. Code, § 3897).

Appeal from Superior Court, Kings County; K. Van Zante, Judge.

Action by Frank C. Ayars and others against Frank Faust and others. Judgment for defendants, and plaintiffs appeal.

Affirmed.

McAdoo, Neblett & Clagett and Melvin E. MacKinnon, all of Los Angeles, and John G. Covert, of Hanford, for appellants.

Thomas C. Ridgway, of Los Angeles, and Herbert C. Kelly, of San Diego, for respondents.

MARKS, Justice.

This is an action to quiet title to real estate in the county of Kings, Cal. The complaint is in the usual form alleging title in appellants. The answer denies title in appellants, and alleges title in respondents. Judgment was entered in favor of respondents, and this appeal followed.

Appellants deraign their title through an assessment of the property made by the assessor of the county of Kings in the year 1911, and a sale to the state in 1912. The property was deeded to the state in 1917, and by the state to appellants' predecessor in interest in 1924. It is admitted that appellants have no title to the property unless they acquired it under the assessment and the proceedings following which culminated in the deed to their predecessor in interest. Respondents point out seventeen separate and distinct items which they claim to be defects, each one of which renders the tax title void. While some of them seem to be meritorious it will be necessary for us to consider but two.

[1, 2] The published delinquent tax list contains the following: "Public notice is hereby given that the figures appearing opposite, following and last after each description of property in the real estate portion, also the figures appearing opposite, following and last after each name in the personal property portion of this 'Delinquent Tax List for the Fiscal Year 1911–1912' of and for the County of Kings, were intended to, and do represent respectively, in dollars or cents, or in dollars and cents, as the case may be, the amount due for taxes and costs, in manner as follows, to-wit: When or where two figures thus appear therein, cents were intended to be and are represented; when or where more than two figures thus appear therein, cents were intended to be and are represented by the last two figures or the two figures occupying or appearing at the right hand, and the figures occupying and appearing at the left hand of the said last two figures, and separated therefrom by a period, were intended to and do represent dollars, so that the amount due for taxes and costs, in the respective cases aforesaid, are thus expressed in dollars and cents."

It should be observed that no reference is there made to penalties. A similar notice containing a like omission of reference to penalties has been held fatally defective in numerous cases (Bussenius v. Warden, 71 Cal. App. 717, 236 P. 371; Redman v. Newell, 114 Cal. App. 215, 299 P. 746), which renders the subsequent proceedings void. The same notice, in another sentence, combined taxes, penalties, and costs in one item of $2.19. In no place in this notice is the amount of the tax, the penalty, and the cost segregated and separately stated. The same cases have held this to be a fatal defect in the proceeding.

The notice of the sale of the property given pursuant to the provisions of section 3897 of the Political Code, by the tax collector of the county of Kings, combined in one item the penalties on delinquency and the cost. This notice set forth these items from the year 1911 to the year 1917, inclusive. It has been held that the amount of a penalty and the amount of the cost must be separately stated and not commingled in one item, and that if they are so commingled a fatal defect occurs in the proceeding. Cordano v. Kelsey, 28 Cal. App. 9, 151 P. 391, 398; Gottstein v. Kelly, 206 Cal. 742, 276 P. 347; Redman v. Newell, supra; Langstaff v. Jameson Petroleum Co., 119 Cal. App. 407, 6 P.(2d) 546.

Judgment affirmed.

We concur: BARNARD, P. J.; JENNINGS, J.

131 Cal.App. 81

CONNER v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY.

Civ. 8887.

District Court of Appeal, Second District, Division 2, California.

April 7, 1933.

Rehearing Denied May 2, 1933.

Hearing Denied by Supreme Court June 5, 1933.

1. Criminal law ⚿1081½.

Writ of review lies against a board or tribunal, but not against its members.

2. Criminal law ⚿1011.

Writ of review does not lie to review order revoking probation theretofore granted after conviction of penal offense, where revocation was followed by judgment and sentence, since accused had remedy by appeal.

3. Criminal law ⚿1011.

Writ of review does not lie where there is remedy by appeal.

Petition by W. J. Conner for writ of review of order by Superior Court of California in and for the County of Los Angeles revoking probation theretofore granted petitioner after conviction of penal offense.

Writ discharged.

M. G. Phillips, of Venice (Caesar A. Roberts, of Los Angeles, of counsel), for petitioner.

Everett W. Mattoon, Co. Counsel, and S. V. O. Prichard, Deputy Co. Counsel, both of Los Angeles, for respondent.

WORKS, Presiding Justice.

[1] One of the judges of respondent court was made a party respondent by petitioner, but his name has been omitted from the title of the proceeding at the head of this opinion for the reason that he is not a proper party. The writ of review lies against a board or tribunal and not against its members. This rule has been announced by the courts with discouraging frequency.

The writ was asked for on the ground that respondent court had exceeded its jurisdiction in revoking the probation which had theretofore been granted petitioner after his conviction of a penal offense. It is said that there was no evidence whatever taken by respondent which afforded support for the order of revocation, and it is in this way that the question of jurisdiction is claimed to arise.

[2, 3] The order of revocation was immediately followed by judgment and sentence. Because of this fact the writ does not lie. It would be as proper to issue the writ of review after an order sustaining a demurrer to a complaint without leave to amend, judgment for defendant following, as to issue it after an order revoking probation, judgment thereupon following, for in either case the order claimed to be wrongful could be assailed as error upon appeal from the judgment. It is well understood that the writ of review does not lie where there is a remedy by appeal.

Writ of review discharged.

We concur: STEPHENS, J.; ARCHBALD, Justice pro tem.

130 Cal.App. 449

In re MARMADUKE'S GUARDIANSHIP.

MARMADUKE v. HILYARD.

Civ. 8631.

District Court of Appeal, Second District, Division 2, California.

April 13, 1933.

Hearing Denied by Supreme Court May 15, 1933.

1. Judgment ⚿818(1).

California court was not required to give full faith and credence to decree of sister state's court that father was entitled to be appointed guardian of person and estate of minor in such state, where such court never had jurisdiction of person of minor.

2. Judgment ⚿818(1).

Finding by sister state's court upon evidence submitted to it was not binding upon California court in any proceeding of which it had jurisdiction.

Appeal from Superior Court, Los Angeles County; Charles S. Crail, Judge.

On petition for rehearing.

Petition denied.

Former opinion, 20 P.(2d) 69.

Paul C. Hill, of Los Angeles, and McCaffrey & Scanland and J. Morgan Marmaduke, all of Oklahoma City, Okl., for petitioner.

Joseph Scott and Benno M. Brink, both of Los Angeles, for respondent.

STEPHENS, Justice.

In denying petition for rehearing in this proceeding we think it proper to respond briefly to points raised by petitioner.

Petitioner resides in Oklahoma, and very shortly before the hearing on his petition to revoke the appointment of the guardian he secured an Oklahoma decree in accordance with finding II of that court, which is as follows: "That Morgan Marmaduke, the petitioner herein, is a fit and competent person, and therefore as the sole parent of said minor is entitled to be appointed the guardian of the person and estate of said minor in this state."

[1, 2] There is no question here of giving full faith and credence to a sister state's court decree. The Oklahoma court never had jurisdiction of the person of the minor, and the very words of the finding show that it recognized this. A finding by the Oklahoma court upon the evidence submitted to it is not binding upon a California court in any proceeding of which it has jurisdiction.

Our opinion plainly states the dates when the acts occurred that influenced the court in its determination that the father was not a fit and proper person to be appointed guardian of the minor. We understood the stipulation made in the proceedings to revoke Mrs. Hilyard's appointment. Petitioner was to be allowed to show evidence of his fitness from September 20, 1929, the date of Mrs. Hilyard's petition, but the fact remains that the court determined petitioner's fitness as of March 17, 1931.

Petitioner thinks that we illegally looked into the findings of unfitness as found by our superior court. But they were introduced as evidence, and were before the trial court and were of course in the court's mind when it passed upon the issues presented to it.

The petition for rehearing claims that the minor was brought to California from its father through fraud and misrepresentation. That matter was before the court in the proceeding which resulted in the appointment of Mrs. Hilyard as guardian, and there determined adversely to petitioner's contentions. We appreciate the earnestness with which petitioner's attorney presents his case, and it is a pleasure to say that we know him too well to require the assurance he gives us in his petition that "We are not trying to hide anything from any court."

Petition for rehearing denied.

We concur: CRAIG, Acting P. J.; ARCHBALD, Justice pro tem.

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131 Cal.App. 188

McNARY v. HANLEY.

Civ. 4862.

District Court of Appeal, Third District, California.

April 13, 1933.

1. Damages 🔑62(1).

Plaintiff must minimize his damage in any way he reasonably can, and cannot recover for damage he might have prevented.

2. Damages 🔑163(2).

Burden is on defendant to establish matters asserted in mitigation or reduction of plaintiff's damage.

3. Damages 🔑132(7).

Verdict awarding $3,000 damages to 56 year old man, living with wife and minor daughter, for loss of four teeth, crushed kneecap, injury to nose, impaired hearing, and loss of nine weeks' wages, amounting to $315, *held* not excessive.

4. New trial 🔑90.

Witnesses' testimony contrary to their prior written statements, shown them and considered by jury at trial, *held* not to warrant new trial, in absence of showing that they would testify differently thereon.

5. New trial 🔑108(1).

To warrant new trial, applicant must show provable facts which would produce different result on retrial.

Appeal from Superior Court, Sacramento County; Martin I. Welsh, Judge.

Action by Jack McNary against Henry Hanley. Judgment for plaintiff, and defendant appeals.

Affirmed.

Charles L. Gilmore, of Sacramento, for appellant.

A. B. Reynolds, of Sacramento, for respondent.

Mr. Presiding Justice PULLEN delivered the opinion of the court.

This is an appeal from a judgment in the sum of $3,000 awarded plaintiff by a jury, for personal injuries sustained by him.

The injuries to plaintiff were sustained when defendant, losing control of his automobile, crashed into a building in which plaintiff was employed, causing the timbers thereof to fall, which struck plaintiff, inflicting the injuries complained of. Defendant admits liability by reason of his negligence, but claims there is no evidence to support a verdict in the sum of $3,000, and that the same is excessive.

The record discloses that plaintiff is fifty-six years of age, married, and living with his wife and minor daughter, and prior to the accident was in good health. The plaintiff established that by reason of the accident he suffered the loss of four teeth, a crushed kneecap, which will cause a permanent limitation of motion, injury to the nose, which interferes with breathing, causes headaches and impairment of hearing, as well as temporary pain and suffering; he also lost nine weeks' wages, which to the date of trial amounted to $315.

[1, 2] Appellant points out that plaintiff sought no medical aid other than a treatment of his mouth where his teeth were knocked out, and an X-ray to ascertain the injury to his kneecap, and contends plaintiff did nothing to prevent or minimize the damage sustained. It is true that plaintiff is in duty bound to minimize his damage in any way that he reasonably can, and if he negligently refuses to do so he cannot recover for that which he might have prevented. It is for appellant to establish that the steps taken by plaintiff to so minimize his loss or damage falls short of the obligation so fixed. In other words, the burden is on defendant to establish matters asserted by him in mitigation or reduction of the amount of plaintiff's damage, and defendant here has not met that burden.

[3] The amount awarded plaintiff was set by a jury of appellant's selection, who heard all of the testimony and had an opportunity to observe the witnesses upon the stand. The trial judge also had the same opportunity, and on the motion for a new trial on the ground of the excessive amount of the verdict he held against defendant, and, by his refusal to grant a new trial, placed his stamp of approval upon the amount so set. The verdict is not so grossly disproportionate as to shock the sense of justice or raise the presumption that it was based upon prejudice or passion.

[4, 5] Appellant also urges a new trial upon the ground of accident and surprise which ordinary prudence could not have guarded against. He has by affidavit shown that cer-

tain witnesses testified at the trial contrary to their written statements made prior thereto. They, while on the witness stand, were confronted with these statements, which the jury received and considered in weighing the worth of their testimony; also there is no showing that their testimony would be any different on a new trial from that already given on the stand. Appellant must show facts which he can produce on a retrial that would establish a different result from the present judgment. That he has not done.

The judgment appealed from is therefore affirmed.

We concur: PLUMMER, J.; R. L. THOMPSON, J.

130 Cal.App. 708

PEOPLE v. LA VERS.

Cr. 1687.

District Court of Appeal, First District, Division 1, California.
March 30, 1933.

1. Homicide ⇨254.

Evidence *held* sufficient to support conviction of murder in second degree.

2. Criminal law ⇨371(12).

Where commission of collateral crime has logical bearing on motive for crime charged, evidence disclosing commission of collateral crime is admissible.

3. Criminal law ⇨371(12).

Mere fact that admission of evidence showing commission of collateral crime is prejudicial does not warrant exclusion, if relevant to issue of motive.

4. Homicide ⇨166(10).

In homicide prosecution, testimony disclosing holdup and hijacking of automobile carrying liquor shortly before homicide *held* admissible on issue of motive.

5. Criminal law ⇨673(2).

In homicide prosecution, admitting testimony that deceased and another officer were directed to intercept kidnappers *held* not error, in view of instruction limiting purpose.

Admission of testimony disclosing purpose for which deceased and another officer went to named town, where they attempted to intercept kidnappers, was offered and received for the limited purpose of showing the reason for their activities in the case, and the trial court instructed the jury that it was to consider the testimony only for such limited purpose. Furthermore, the entire story of the kidnapping was revealed to the jury by the victim thereof.

6. Homicide ⇨29.

Fact that defendant did not actually fire shot which killed deceased, if true, *held* not to negative criminal liability, where defendant and person alleged to have fired shot were engaged in criminal enterprise.

Fact that defendant did not actually fire shot which killed deceased, if true, did not absolve him from criminal liability for homicide under general rule that, where two or more persons jointly engage in an expedition of crime, and prepare to kill any police officers or others who may interfere with their plans, all are equally guilty of any crime that is committed as the natural and probable consequence of such enterprise, whether one of them personally commits the act or whether its commission was the act of any one or more of the associates in carrying out the common purpose.

7. Witnesses ⇨305(2).

Accused, after waiving constitutional right by testifying as witness, is subject to cross-examination.

8. Witnesses ⇨277(7).

Permitting prosecution to recall defendant for further cross-examination after defense had rested *held* not abuse of discretion.

9. Criminal law ⇨1122(5).

Alleged error in refusing to give certain instructions *held* not reviewable, where record on appeal did not set out court's charge.

10. Homicide ⇨300(7), 309(6).

Refusing instructions relating to manslaughter based on theory of sudden quarrel or heat of passion, and law of self-defense, *held* not error, where elements of manslaughter and self-defense were not involved.

Appeal from Superior Court, Santa Clara County; Robert R. Syer, Judge.

Jacob La Vers, true name Jack La Vers, alias Spencer Griffith, and another, were convicted of murder in the second degree, and the defendant named appeals.

Judgment affirmed.

Eugene B. Grattan, of San Jose, for appellant.

U. S. Webb, Atty. Gen., and Seibert L. Sefton, of San Francisco, for the People.

KNIGHT, Justice.

The appellant, Jack La Vers, and a companion named Joe Teresi were indicted jointly by the grand jury of Santa Clara county for the murder of Herbert McAuley, a deputy sheriff, and upon trial were found guilty of murder in the second degree. From the judgment of conviction La Vers has appealed.

The circumstances leading up to the homicide as shown by the evidence adduced on the part of the prosecution were as follows: On the night of November 11, 1931, one Fred Hopkins was transporting 200 gallons of alcohol from Oakland to Los Angeles in a Packard coupé. He was accompanied by a man named Edwards. They stopped temporarily at a gasoline service station in San Leandro, Alameda county, and Edwards went to the lavatory. During his absence, La Vers, Teresi, and a man named Kelly drove up in a Chevrolet sedan. They had followed the Packard from Oakland. Teresi alighted, went over to the Packard, where Hopkins was seated at the wheel, and pointing a pistol at him said with an oath: "Get out of there * * * or I'll plug you." Hopkins complied, and was then ordered by Teresi to enter the Chevrolet; whereupon La Vers got in the Packard and drove away swiftly toward San Jose. Teresi then jumped in the Chevrolet with Hopkins and Kelly, and followed. After proceeding down the highway some distance, both automobiles were brought to a stop, and, after some conversation between La Vers, Teresi, and Kelly, Hopkins was ordered to get back in the Packard. Teresi got in also. Kelly then drove away alone with the Chevrolet, and La Vers and Teresi proceeded on toward San Jose in the Packard with Hopkins sitting between them. Hopkins asked where they were going, and La Vers replied: "We're going south." Hopkins said: "No, you can't go south, you will be stopped"; and Teresi replied: "We won't be stopped; I'll bump off the first guy that stops us." Hopkins then said: "Will you bump off someone for a four or five hundred dollar gain?" and Teresi replied: "Yes, it is all in the racket." The sheriff's office at San Jose was notified of the holdup, and McAuley and another deputy sheriff named Saporito were directed to proceed up the highway to Milpitas, in Santa Clara county, and intercept the Packard; but on account of the excessive rate of speed it was traveling they were unable to stop it at that point, so they took up the chase toward San Jose. As the Packard passed through Milpitas, La Vers observed one of the officers as he stood under a light in front of the sheriff's automobile, and he said to Teresi: "There is a Dick." The officers overtook the Packard in San Jose, and, crowding it toward the curb, called out, "Sheriff's Office, pull over." Teresi was driving the Packard, and La Vers said to him: "It is the cops, turn here." As soon as the Packard stopped, the officers alighted, and, approaching the Packard on each side, ordered the occupants to get out. Teresi alighted from one side and La Vers from the other side, followed by Hopkins. As soon as Teresi and La Vers alighted, they opened fire on the officers. Teresi, according to the evidence adduced by the prosecution, shot McAuley twice, killing him almost instantly. One shot pierced his heart, and the other passed through his body and lodged in his spine. La Vers, using an automatic pistol, fired at Saporito, the bullet striking him in the stomach, and, although critically wounded, he grappled with La Vers for the possession of La Vers' pistol. During the struggle, the pistol was discharged several times, two more bullets striking Saporito in the leg. In the meantime Saporito's pistol fell to the ground, and, picking it up, he struck La Vers over the head with it, after which he was able to wrench La Vers' pistol from him. About this time Teresi called out to La Vers to "come on," and they jumped into the Packard and fled. During the fusillade Hopkins was shot in the leg and La Vers was wounded also.

[1] At the trial La Vers and Teresi claimed that the "hijacking" of the Packard at San Leandro was a prearranged affair with Hopkins; that after leaving San Leandro they proceeded south to dispose of the alcohol. and that Hopkins was to receive a portion of the proceeds; that they did not see the officers at all in Milpitas; and that, when they were overhauled at San Jose, McAuley and Saporito did not inform them they were officers, but ordered them out of the Packard, and without any provocation opened fire on them. Teresi denied having shot McAuley. He and La Vers both indicated that Hopkins must have shot him. Teresi asserted that he fired no shots at all that night—that he was not even armed. The falseness of the entire stories told by La Vers and Teresi was clearly demonstrated, however, by the testimony given by Saporito and Hopkins, and by many independent circumstances which we do not find it necessary to relate here in detail. Suffice it to say the evidence shows beyond doubt that the killing of McAuley by Teresi was wanton, premeditated, and unattended by any mitigating circumstances whatever.

[2-4] As one of the grounds for reversal appellant contends that it was error for the trial court to allow testimony to be introduced as to what occurred at the service station in Alameda county. There is no merit in the point. It is doubtless the general rule that upon trial for one crime evidence to show a distinct crime is inadmissible; but such rule is subject to the well-established exception that where, as here, the commission of such other crime has a logical bearing upon the element of motive for the crime charged, evidence of the commission of such other crime is admissible. People v. Argentos, 156 Cal. 720, 106 P. 65. In the present case, the evidence is sufficient to establish beyond question that appellant and Teresi ful-

ly realized that the crimes they had committed in Alameda county would subject them to severe punishment, and that consequently, as declared by Teresi, they were ready, without hesitation, to take life before they would suffer themselves to be arrested. People v. Wheaton, 64 Cal. App. 58, 220 P. 451. And the mere fact that the admission of the evidence relating to such other crimes may have operated to their prejudice did not serve as legal grounds for its exclusion, since it was relevant to the material issue of motive. People v. Argentos, supra.

[5] In answer to a preliminary question asked by the prosecution as to why he and McAuley went to Milpitas that night, Saporito testified that they were instructed to do so by the deputy sheriff in charge of the office at night, the latter stating to them that a young man had been kidnapped, and that Milpitas was the best place for them to intercept the parties. There was no error in admitting the testimony. As shown by the record, the testimony was offered and received for the limited purpose of showing the reason for their activities in the case; and the court instructed the jury that it was to consider the testimony only for such limited purpose. Moreover, following Saporito's testimony in this regard, the entire story of the kidnapping was revealed to the jury by the victim thereof; and, as already pointed out, such evidence was clearly admissible.

[6] Appellant contends also that under the facts established by the prosecution he was guilty of nothing more than conspiracy because admittedly he did not actually fire the shot that killed McAuley. The contention is frivolous. As already shown, the evidence proves that Teresi killed McAuley while Teresi was engaged in a criminal enterprise with appellant, and it has long since been declared the law of this state that, where two or more persons jointly engaged in an expedition of crime, and as here, are prepared to kill any police officers or others who may interfere with their plans, all are equally guilty of any crime that is committed as the natural and probable consequence of such enterprise, whether one of them personally commits the act or whether its commission was the act of any one or more of the associates in carrying out the common purpose. People v. Bringhurst, 192 Cal. 748, 221 P. 897; People v. Wheaton, supra; People v. Kauffman, 152 Cal. 331, 92 P. 861; People v. Woods, 147 Cal. 265, 81 P. 652, 109 Am. St. Rep. 151; People v. Lawrence, 143 Cal. 148, 76 P. 893, 68 L. R. A. 193; People v. Vasquez, 49 Cal. 560.

[7, 8] Nor was there any abuse of discretion on the part of the court in permitting the prosecution to recall appellant for further cross-examination after the defense had rested its case. It was appellant's constitutional right, of course, to refrain from testifying at all in the case; but, having waived such right by testifying as a witness in his own behalf, he was, like any other witness, subject to cross-examination; and he has failed to point out wherein his rights were at all prejudiced by the mere fact that, after having rested his case, he was recalled to answer a few additional questions concerning a conversation about which he concedes the prosecution had the right to interrogate him on cross-examination.

[9, 10] Appellant further complains of the refusal of the trial court to give some eleven instructions proposed by the defense. Two of them related to the crime of manslaughter, based on the theory of "a sudden quarrel or heat of passion." The others purported to deal with the law of self-defense. Nowhere in the record on appeal, however, is the court's charge to the jury set out; and consequently, for aught we know, the jury may have been instructed on all matters to which appellant's proposed instructions related; and upon that ground alone we might properly hold that no error has been shown. People v. Bourke, 66 Cal. 455, 6 P. 89. However, aside from the defective state of the record described, it is evident that, so far as the killing of McAuley is concerned, the elements of manslaughter and self-defense were nowhere involved in the case, for the reason that Teresi, for whose acts appellant too was held criminally responsible, made no claim at any time that he shot McAuley upon a sudden quarrel or heat of passion, or in self-defense. He positively denied having shot him at all; in fact, he said that he was not even armed. The instructions upon those two subjects were therefore properly refused.

After reviewing the entire record, it is our conclusion that, if the verdict in this case has resulted in any miscarriage of justice, it is because the jury failed to find Teresi and appellant guilty of a higher degree of murder.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

131 Cal.App. 63

KLEIN BROS. v. SUPERIOR COURT OF SUTTER COUNTY.

Civ. 4900.

District Court of Appeal, Third District, California.
April 6, 1933.

1. Appeal and error 🔑**854(6).**

Where trial court had jurisdiction to entertain motion for new trial, erroneous reason for granting it is immaterial on petition for review (Code Civ. Proc. § 657).

2. New trial 🔑**113.**

Where successor of trial judge had before him transcript of justice's docket, complaint, answer, findings, and conclusions of superior court at first trial and judgment based thereon, jurisdiction to pass on correctness of legal conclusions, against which motion for new trial was directed, existed (Code Civ. Proc. § 657).

3. Appeal and error 🔑**854(6).**

Appellate court cannot interfere on petition for writ of review with granting of new trial where court had jurisdiction, since writ is not substitute for appeal but goes only to jurisdiction of trial court (Code Civ. Proc. § 657).

Petition by Klein Bros. directed to the Superior Court of Sutter County to review an order granting a new trial in an action wherein the Standard Oil Company was plaintiff, and Klein Bros. and others were defendants.

Writ denied and order affirmed.

Ray Manwell, of Marysville, for petitioner.

Rich, Weis & Carlin, of Marysville, for respondent.

Mr. Justice PLUMMER delivered the opinion of the court.

In this proceeding the petitioners seek a writ of review of a certain order made and entered in the superior court of Sutter county granting a new trial in an action pending in said court, wherein the Standard Oil Company of California, a corporation, is plaintiff, and Klein Bros., R. W. Jones et al., are defendants.

The record before us shows that Klein Bros. is a copartnership composed of Sol D. Klein and Jack Klein; that on or about the 17th day of February, 1932, the Standard Oil Company commenced an action in the justice's court of Yuba township, against the above-named defendants, and obtained judgment against Klein Bros. and R. W. Jones for the sum of $287 principal, $30.25 interest, and $20 costs. From this judgment the defendants Klein Bros. alone took an appeal to the superior court of Sutter county. After the entry of the judgment in the justice's court, execution was issued against the defendant R. W. Jones, and returned unsatisfied. The appeal by Klein Bros. was taken as to both questions of law and fact, and the action was thereafter tried in the superior court of Sutter county and judgment entered in favor of the defendants Klein Bros. A motion for new trial was made by the plaintiff Standard Oil Company, which motion was granted. The petition in this action alleges that the superior court of Sutter county had no jurisdiction to enter such order.

The notice of motion for a new trial specified the following grounds upon which it would be asked, to wit: (1) Insufficiency of the evidence to justify the decision; (2) that the decision is against law; (3) errors in law occurring at the trial and excepted to by the plaintiff.

It was further set forth that the motion would be made upon the minutes of the court.

The complaint in the action begun by the Standard Oil Company does not disclose the relationship existing between Klein Bros. and R. W. Jones, it being alleged therein only that the defendants executed and delivered to the plaintiff a certain undertaking and agreement in writing whereby said defendants, for value received, guaranteed and agreed to pay for gasoline up to the value of $200, that should be delivered by the plaintiff to one Walter Ronelsbacher, a farmer raising beans, upon which crop the defendants Klein Bros. held a chattel mortgage.

The findings of the trial court are to the effect that Klein Bros., as principals, by and through their agent R. W. Jones, executed and delivered to the plaintiff the written guarantee herein mentioned. Upon the trial of the action in the superior court it would appear from the findings that testimony was introduced showing the prosecution of the action against the defendant R. W. Jones, in the justice's court, the entry of judgment against him, the issuance of an execution, and the return of the execution unsatisfied, upon which basis the trial court held that the plaintiff had elected to proceed against agent, R. W. Jones, and therefore was not entitled to judgment against his principals, Klein Bros. Judgment was therefore entered in favor of the defendants Klein Bros. for their costs. The motion for a new trial was directed against this judgment on the grounds which we have stated, and was granted by the superior court.

The petition for a writ of review sets forth that there was no reporter present upon the trial of the action; that no bill of exceptions was ever prepared, and nothing presented to the trial court upon which to base this action, other than as specified in the notice of motion.

[1] The record further shows that after the entry of judgment in the superior court, the judge presiding at the trial had been succeeded in office, and the motion for a new trial was heard by a judge other than the one presiding at the trial of the action. The order of the superior court granting a new trial appears to have been based upon the cases having to do with an election of remedies. For example, where one has a cause of action against another, upon which he may sue either in contract or in tort, and an action is begun upon one of the grounds, which fails, the party instituting the action cannot retrace his steps and proceed upon the other ground instead of upon the rule of law which prevents a plaintiff relying upon a contract executed by an agent for his principal, from maintaining an action against both the agent and the principal. The fact, however, that the trial court apparently based its ruling upon the law relating to an election of remedies, rather than upon the law relating to the right of a plaintiff to sue either the agent or the agent's principal, does not warrant the issuance of a writ of review. If the trial court had jurisdiction to entertain the motion for a new trial and enter an order granting the same, the fact that the order sets forth an erroneous reason therefor, is immaterial.

[2, 3] As we have stated, the grounds set forth in plaintiff's motion for new trial herein specifies that the decision is against law, and also errors in law occurring during the course of the trial.

The record before us shows that the trial court, on the hearing of the motion, had before it a transcript of the docket of the justice's court, the complaint in the action, the answer of the defendants thereto, the findings and conclusions of law of the trial court, and the judgment based thereon. This gave the trial court upon motion for new trial, jurisdiction to pass upon the correctness of the conclusions of law drawn by the court upon which the judgment is based and against which the motion for new trial was directed. Irrespective of the reasons set forth in the order granting the motion, the trial court had jurisdiction to pass thereon. It is not for us to determine whether the conclusions of law drawn by the court in the first instance or the conclusions arrived at by the court in the second instance, are correct. The trial court, upon motion for new trial, had jurisdiction to determine whether the decision was or was not against the law, and whether the record before it showed errors in law upon which the judgment was predicated. A writ of review cannot be made to serve the purposes of an appeal. It goes only to the question of the jurisdiction of the trial court to act.

The notice of motion for new trial herein set forth grounds included within section 657 of the Code of Civil Procedure.

Being of the opinion that the trial court had jurisdiction to entertain the motion, the writ must be, and the same is hereby denied, and the order is affirmed.

We concur: R. L. THOMPSON, J.; PULLEN, P. J.

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131 Cal.App. 202

Grace STEFFEY and V. R. Steffey (her Husband), Plaintiffs and Appellants, v. STANDARD STATIONS, Inc. (a Corporation), W. R. Grieve, Oliver Clark, Irving Olsen, and John Doe, Defendants and Respondents.

Civ. 1253.

District Court of Appeal, Fourth District, California.
April 13, 1933.

Motion to dismiss appeal by plaintiff from a judgment of the Superior Court of Fresno County; T. R. Thomson, Judge.

Karl F. Kennedy, of Coalinga, for appellants.

Conley, Conley & Conley, of Fresno, for respondents.

BARNARD, Presiding Justice.

From the certificate of the county clerk on file herein it appears that notice of appeal was filed on January 21, 1933; that no bill of exceptions has been filed under section 650 of the Code of Civil Procedure; that no transcript has been filed under section 953a of the Code of Civil Procedure; that no request for a transcript under the provisions of section 953a of the Code of Civil Procedure has been filed; that no additional time in which to prepare and serve a bill of exceptions has been allowed; that no proceeding for a bill of exceptions or a transcript is pending in the trial court; and that the time within which a record might be prepared under either method has expired. Respondents' motion to dismiss should, therefore, be granted. General Motors, etc., Corp. v. Holman, 63 Cal. App. 17, 217 P. 1086; People v. Berkeley Chiropractic College, 103 Cal. App. 139, 283 P. 981; Union Trust Company of San Diego v. Novotny (Cal. App.) 13 P.(2d) 974.

The appeal is dismissed.

We concur: MARKS, J.; JENNINGS, J.

131 Cal.App. 211

PORTER v. GRANICH.

Civ. 7646.

District Court of Appeal, Second District, Division 2, California.

April 14, 1933.

1. Appeal and error ⚷901.

Appellant must show error on appeal.

2. Appeal and error ⚷767(1).

Respondent's brief not complying with court rules *held* stricken from files with leave to file proper brief (Rule 8 of District Courts of Appeal).

Appeal from Superior Court, Los Angeles County; H. S. Gans, Judge.

Action by George T. Porter against Fred Granich. From an adverse judgment, defendant appeals.

Submission vacated; respondent's brief stricken from files, with leave to file proper brief.

Aaron Elmore, of Los Angeles, for appellant.

Davis & Thorne, of Los Angeles, for respondent.

WORKS, Presiding Justice.

The typewritten transcript on appeal in this action consists of more than 350 pages. Appellant's printed opening brief is 145 pages in length and is admirable in form under the rules of this court; the argument contained in it being presented and properly divided under nine separate and clearly stated headings, each setting forth a question of law. Respondent's printed brief is in length 70 pages. It contains no heading presenting a question of law. It shows no headings responsive in form to any of those set forth in appellant's brief. Indeed, respondent's brief contains no headings but these: "Statement of Facts," which appears on page 3 and "Conclusion," which appears on page 70. Between pages 3 and 70 many authorities are cited and many quotations are taken from them. Appellant's opening brief was filed in December, 1930. Respondent's brief was filed in January, 1933, he thus having more than two years within which to prepare and file a proper presentation of his argument against the appeal. Appellant filed a reply brief on the last day of February.

[1, 2] It is provided by rule VIII of the rules of this court that every printed brief or petition for rehearing in civil actions "must present each point separately under an appropriate heading, showing the nature of the question to be presented or the point to be made." Respondent's brief shows a flagrant violation of this rule. It is incumbent upon an appellant to show error on appeal, and it is our reciprocal duty to affirm a judgment unless the appellant convinces us that it was erroneously rendered; but we are entitled to the intelligent assistance of a respondent in discharging this duty. The circumstances of the present case, that is, the size of the record and the length of appellant's opening brief, would make the discharge of this duty a most onerous burden without the aid of respondent. He is interested in procuring an affirmance of the judgment, but he must exhibit his interest to the extent of presenting a brief which complies with the rules of court.

We think we have the power to impose the conditions made part of the order which here follows.

The order submitting the cause for decision is vacated. Respondent's brief is stricken from the files. Respondent is allowed thirty days after the date of the filing of this opinion within which to serve and file a proper respondent's brief. Appellant shall have thirty days after the filing of respondent's brief within which to serve and file, if he be so advised, an additional appellant's reply brief. This latter brief shall not be filed by the clerk until a receipted bill shall have been exhibited to the presiding justice showing the payment by respondent of the cost of the reply brief. Respondent, however, may present to the presiding justice the question whether the reply brief is of unnecessary length, whereupon he will either require respondent to pay the entire cost of printing it or apportion the cost between respondent and appellant.

We concur: STEPHENS, J.; ARCHBALD, Justice pro tem.

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130 Cal.App. 683

HERSHEY et al. v. COLE, County Treasurer.

Civ. 4817.

District Court of Appeal, Third District, California.

March 29, 1933.

As Modified April 17, 1933.

Rehearing Denied April 28, 1933.

Hearing Denied by Supreme Court May 25, 1933.

1. Constitutional law ⚷121(2).

Constitutional provision giving Legislature plenary power as to regulation of affairs of irrigation, reclamation, or drainage districts *held* limited by constitutional provisions against impairing obligation of contracts (Const. Cal. art. 1, § 16; art. 11, § 13; Const. U. S. art. 1, § 10).

Const. Cal. art. 11, § 13, providing that the Legislature shall have power to provide for the supervision and regulation of the affairs of irrigation districts, reclamation districts, or drainage districts, must be read in connection with article 1, § 16, and Const. U. S. art. 1, § 10, prohibiting impairment of the obligation of contracts, since the plenary power given by Const. Cal. art. 11, § 13, does not extend to and include the right of the Legislature to trench on private rights arising out of or based on contracts.

2. Constitutional law 🔑143.

Contract not subject to impairment *held* to exist between owners of reclamation district lands on which assessment had been levied and holders of bonds purchased on faith of security afforded by portion of assessment unpaid at date of issuance of bonds, although no contract existed between landowners and state or bondholders and state (Pol. Code, § 3480, as amended by St. 1923, p. 598; Const. Cal. art. 1, § 16; Const. U. S. art. 1, § 10).

3. Constitutional law 🔑143.

Existing laws governing issue of reclamation district bonds became part of contract between landowners and bondholders (Pol. Code, § 3480, as amended by St. 1923, p. 598; Const. Cal. art. 1, § 16; Const. U. S. art. 1, § 10).

4. Constitutional law 🔑143.

Amendment authorizing reclamation district landowners to pay assessment with previously issued bonds payable out of assessment in 10 equal annual installments *held* unconstitutional as impairing obligation of contract between landowners and bondholders, since payment by later maturing bonds subjected landowners paying assessment in cash to call for more than 10 per cent. of debt in one year (Pol. Code, § 3463 and § 3480, as amended by St. 1923, p. 598; Const. Cal. art. 1, § 16; Const. U. S. art. 1, § 10).

5. Mandamus 🔑151(1).

Ordinarily, mandamus will not issue when rights of individuals or corporations who have special interest in subject-matter will be collaterally determined by judgment awarding writ, unless they are made parties to action.

6. Mandamus 🔑16(1).

Usually writ of mandate will not issue to compel performance of official act if, when writ is applied for, time limited for action has expired.

7. Taxation 🔑494(1).

Where assessing officers proceed on fundamentally erroneous theory in making assessment, courts will grant relief against overvaluation of realty, regardless of action of board of equalization in the premises.

8. Taxation 🔑608(5).

That statutes afford no remedy against excessive tax assessment by allowing payment under protest and recovery of excess warrants interposition of equity to prevent collection of excess.

9. Mandamus 🔑117.

Mandamus *held* not to lie to compel county treasurer to estimate installment of reclamation district assessment in certain fashion, since landowners could tender proper amount due and enjoin collection of any additional sum (Pol. Code, § 3480, as amended by St. 1923, p. 598).

Petition by Cornelia A. Hershey and others for a writ of mandate to be directed to Roy E. Cole, as County Treasurer of Yolo County, California.

Writ denied.

Clark, Nichols & Eltse, of Berkeley, for petitioners.

Neal Chalmers, Dist. Atty., Percy Napton, Deputy Dist. Atty., and A. C. Huston, all of Woodland, Downey, Brand & Seymour and Devlin, Devlin & Diepenbrock, all of Sacramento (Wright L. Callender, of Willows, of counsel), for respondent.

C. E. McLaughlin, of Sacramento, and Duard F. Geis, of Willows, amici curiæ.

Mr. Justice PLUMMER delivered the opinion of the court.

This is an original proceeding based upon a petition filed in this court on the 10th day of October, 1932, wherein the petitioners prayed for a writ of mandate to be directed against Roy E. Cole, as county treasurer of Yolo county, and as such, treasurer of reclamation district No. 1600, commanding him to estimate the amount of money necessary to pay the interest and principal maturing on January 1, 1933, on bonds of reclamation district No. 1600, secured by what is known as "Assessment No. 1" of said district, in such a manner as not to allow as credits or payments on said assessment, either as principal or interest, of any bonds of said district maturing after January 1, 1933, which may have been surrendered for cancellation or as payment of assessments by any of the landowners of said district. Based upon this petition, what are the rights of petitioners, and what is their remedy, if any? The respondent appeared only by demurrer.

Reclamation district No. 1600 is entirely within the exterior boundaries of Yolo county, and was created by an act of the Legislature in 1913. In 1914 there was regularly levied upon the lands within said district an assessment in the sum of $550,200. Of said assessment there was levied upon lands belonging to the petitioners within said district the sum of $115,109.26.

The record shows that thereafter, and prior to the 17th day of November, 1917, approximately 50 per cent. of said assessment had been paid by the various landowners of said district, and on said date there remained unpaid the sum of $275,000. After regular proceedings had been taken and had therefor, on December 12, 1917, the unpaid portion of said assessment, in accordance with an election held therefor, bonds were authorized to be issued according to the provisions of section 3480 of the Political Code (as amended by St. 1917, p. 1181), and on January 1, 1918, said district issued and sold bonds, secured by said assessment, in the amount of $275,000, bearing interest at the rate of 6 per cent. per annum, interest payable semiannually on January 1st and July 1st of each year. The bonds issued by said district were made payable in ten equal installments as to principal, to wit, in the sum of $27,500, payable annually beginning with the 1st day of January, 1928, and on the 1st day of January each year thereafter for ten succeeding years. The bonds and interest secured by the assessment herein referred to, payable by calls issued against said assessment by the county treasurer of Yolo county. The bonds recite that they are based upon and secured by the assessment levied upon the lands of said district.

At the time of the issuance of the bonds of said district there was no provision of the law whereby any landowner could pay in full the remaining portion of the assessment chargeable against his lands which remained unpaid at the date of the issuance of the bonds, other than by way of payment of the installments as they might be called for from time to time by the county treasurer to meet the interest and principal falling due as specified in the bonds. Thereafter, by an act of the Legislature (Stats. 1923, p. 598), section 3480 of the Political Code was amended, so far as this proceeding is concerned, by inserting therein the following paragraph: "Any land owner of the district who shall desire at any time to lessen or remove the lien upon his land of any assessment on which bonds have been or hereafter may be issued may deliver to the county treasurer for cancellation any bonds payable out of said assessment, and the treasurer shall credit against the assessment on his land the principal and accrued interest of said bonds."

It is further set forth in the petition that in pursuance of this amendment to section 3480, supra, the treasurer of Yolo county has received and credited upon assessment No. 1 of said district, bonds of the face value of approximately $26,000; bonds so received, canceled, and credited upon the assessment of different landowners being bonds maturing later than January 1, 1933; that except for six months' interest on bonds so received, the amount that it is necessary for the county treasurer to call upon said assessment to meet principal and interest, the bonds due January 1, 1933, is the same as if said bonds had not been so received, canceled, and credited as payment of the assessment charged against landowners presenting late maturing bonds for cancellation; that as a result of the receiving and canceling of late maturing bonds, the amount of the call will be spread over fewer tracts of land and increased upon the lands still subject to assessment proportionately to the amount otherwise chargeable against the lands so relieved from the assessment; that in following this method of assessment, the petitioners will have imposed upon their lands and made subject to call of an additional sum of about $2,000, which would not be the case had late maturing bonds not been received, canceled, and assessments marked "paid" under the provisions of the amendment made to section 3480, supra, in 1923.

The contention made by the petitioners is that the law as it stood at the time of the election authorizing the issuance of bonds. and the issuance of bonds, is controlling so far as the calling of installment payments are concerned, and that upon the voting of the bonds, the issuance of the bonds and the sale thereof, a contract was entered into between the landowners and the purchasers of the bonds whereby the landowners were given the contractual right to discharge the assessment upon their lands in ten equal annual payments as to the principal, and semiannual interest payments beginning on the 1st day of January, 1928, and yearly thereafter for the full period of ten years, and that the amendment which we have set forth made to section 3480, supra, in 1923, cannot be given any retroactive effect so as to increase the annual installments which the respective landowners may be required to pay.

[1] Respondent's contention in support of the applicability of the amendment to section 3480, supra, to prior issue of bonds, is based upon the following excerpt found in section 13 of article 11 of the state Constitution, to wit: "Except that the legislature shall have power to provide for the supervision, regulation and conduct in such manner as it may determine, of the affairs of irrigation districts, reclamation districts or drainage districts, organized or existing under any law of this state"; and that no contract between the landowners or bondholders and the state existed. The plenary powers given to the Legislature by the quoted portion of section 13 of article 11 of the Constitution, supra, must be read, however, in connection with section 16 of article 1 of the Constitution and section 10 of article 1 of the United States Constitution prohibiting impairing of the obligation of contracts. The supervision, the regulation, and the controlling of the conduct of the

affairs of irrigation, reclamation, and drainage districts is plenary as to all governmental affairs, including procedure and administration, limited only where it tends to impair the obligation of a contract or to increase the obligation of a contract. In other words, the plenary power does not extend to and include the right of the Legislature to trench upon private rights arising out of or based upon contracts.

[2] The premises laid down by the respondent that there is no contract between the landowners of reclamation district No. 1600 and the state, and also that there is no contract between the purchasers of the bonds issued by said district and the state, we think absolutely correct, but the conclusions drawn therefrom that there is no contract or quasi contract in legal effect between the landowners of the district and the purchasers of bonds of the district does not appear to be supported either in principle or by the authorities.

That reclamation assessments on the faith of which bonds are issued and sold, are to be held intact as a basis for the security and payment of the bonds as they fall due, appears to be evidenced by the respective acts of the Legislature up to and until the amendment to section 3480, supra, in 1923, as no provision was made for the premature discharge of assessments after the issuance of bonds. Even the presentation for cancellation or payment of assessments by warrants of the district was not allowed in discharge of assessments. Section 3457 of the Political Code, as it read in 1911, contained the following: "Any owner of land in the district may at any time pay any assessment thereon (excepting an assessment upon which bonds have been issued), or any part thereof, with warrants of the district." This provision was in force at the time of the organization of reclamation district No. 1600.

The intent of the law, as we construe it, has been and was, prior to the challenged amendment, to give the entire unpaid assessment as security, to which each and every bondholder might look for payment. This presents the important question: Does there exist in legal effect, a contract between the owners of lands upon which an assessment has been levied, and the holders of bonds purchased upon the faith of the security afforded by the unpaid portion of the assessment at the date of the issuance of the bonds?

In Rorick et al. v. Board of Commissioners of Everglades Drainage District et al. (D. C.) 57 F.(2d) 1048, 1055, tried before Circuit Judge Bryan, and District Judges Sheppard and Strum, a case involving the rights of bondholders of a drainage district, the law is laid down as follows: "Legislation by authority of which bonds are issued, and their payment provided for becomes a constituent part of the contract with the bondholders. Such a contract is within the protection of the Constitution, art. 1, § 10. The obligation of the bond contract, of which such legislation is a part, cannot be impaired, nor its fulfillment hampered or obstructed, by subsequent legislation to the prejudice of the vested rights of bondholders. This rule has reference to subsequent legislation which affects the contract directly, and not incidentally, or only by consequence. [Citing a number of cases.] 'A different result would leave nothing of the contract, but an abstract right—of no practical value—and render the protection of the Constitution a shadow and a delusion.' * * * An impairment occurs when the value of the contract has been diminished by subsequent legislation. The question of impairment is not one of degree, but of encroaching in any respect upon the obligation —dispensing with any part of its force. [Citing a number of cases.] * * * Though the state cannot by contract surrender its sovereign prerogatives in the performance of essential governmental duties [citing authority], nevertheless, when the state authorizes a taxing subdivision to contract by issuing bonds and to exercise the power of local taxation to the extent necessary to meet such obligations, the power thus given cannot be withdrawn so long as its exercise is necessary to satisfy the vested rights of bondholders. In such cases, the state and the subordinate taxing unit are equally bound. 'The power given becomes a trust which the donor cannot annul, and which the donee is bound to execute.' [Citing a number of authorities.] * * *" After considering other questions not material here, the court went on to say: "We hold, therefore, that the provisions of chapter 6456, Acts 1913, and its several amendments pursuant to which plaintiffs' bonds were issued and acreage taxes to pay the same were levied, constitute a contract between plaintiffs and the district; that the legislation imposing acreage taxes to pay those bonds and interest, which was in effect when the bonds were issued, cannot be withdrawn, nor can the proceeds of such taxes be diverted to other purposes, so long as such proceeds are necessary to pay interest and create a sinking fund as prescribed by section 24" of the Act. Changes in the law relative to the sale of delinquent lands are likewise held inoperative as to contracts made prior to the changes, the changes being held violative of section 10 of article 1 of the United States Constitution. In the case of St. Louis Union Trust Company v. Franklin American Trust Company (C. C. A.) 52 F.(2d) 431, it is held that bonds issued as a first lien upon lands of a drainage district cannot be impaired by a later enactment which purports to give to a second issue of bonds a lien of the same standing. A writ of certiorari was granted in this case to the United States Supreme Court, and subsequently dismissed, thus affirming the decision of the trial court. 284 U. S. 611, 52 S. Ct. 129, 76 L. Ed. 522. Every statement of the law in the two cases just cited is supported by numerous authorities, so many, indeed, that we can only make reference thereto.

In Re Cranberry Creek Drainage District, 202 Wis. 64, 231 N. W. 588, 589, the Supreme Court of Wisconsin had before it a change in the law relative to the surrendering of bonds by landowners in a drainage district, and, among other things, held that the bonds constituted a contract, and that an act of the Legislature which purported to give holders of bond-owning land a right which was not extended to bondholders not owning land in the district, violative of the state Constitution relating to contracts, and also violative of section 10 of article 1 of the United States Constitution. It was there further stated that "an act which in any degree, no matter how slightly, modifies the obligation of the contract by attempting to relieve the one party from any duty by the contract assumed, is repugnant to the constitutional prohibition."

In Palo Verde Irrigation District v. Seeley, 198 Cal. 477, 245 P. 1092, the Supreme Court, without discussion, assumed the bonds of an irrigation district constituted a contract, and then considered whether the challenged act effected a violation thereof, and held as follows: "The obligation of the contract entered into by the taxpayers of the Palo Verde Joint Levee District at the time of the issuance of the Levee District bonds will not be impaired by the issuance of refunding bonds by the Palo Verde Irrigation District for the purpose of paying the former bonds, by reason of the fact that the personal property within the levee district will be released from the obligation to pay taxes for the repayment of the levee district bonds." The court went on to hold that lands which were not in the old district, but were included in the new, and having received benefits, should have imposed upon them burdens commensurate therewith. The opinion also holds that if there was in fact a change in the contract, the property owners had consented thereto, using the following language: "It may also be said, we think, that the property owners within the area not originally included in the levee district, by electing to become a part of the irrigation district, consented to become subjected to the obligations authorized to be imposed by the provisions of the Irrigation District Act for the issuance of the refunding bonds. * * * The question of whether the new district should be organized was submitted to a vote of the property owners of the district and carried. Moreover, it will be remembered that the proposal to issue the bonds was carried by an overwhelming vote at the special election called for that purpose. It may be that the owners of property in the added territory voted in the negative, but their properties formed a component part of the new district, and the voice of the majority under the provisions of the statute under which they had elected to become a part of the new district was binding upon them." The court then went on to distinguish the questions involved in the Palo Verde Irrigation District from those involved in Reclamation District No. 70 v. Birks, 159 Cal. 233, 113 P. 170, where the question of an attempt to impose additional burdens was considered. No mention is made in the Palo Verde Irrigation District of the opinion in the case of La Mesa, Lemon Grove, etc., Irrigation District v. Halley, 197 Cal. 50, 239 P. 719, 723, in which case the holding of the court in Merchants' National Bank of San Diego v. Escondido Irrigation District, 144 Cal. 329, 77 P. 937, was distinguished. The La Mesa Case does hold, in substance, that there is no contract between the landowner and the state, but a careful reading of the opinion in the La Mesa Case shows that the court did not limit in any degree the principle enunciated in former decisions that a contract in legal effect existed between the property owner and the bondholder. After quoting from the case of Wisconsin & M. R. Co. v. Powers, 191 U. S. 379, 24 S. Ct. 107, 48 L. Ed. 229, where the court was considering procedure and regulatory matters, it is stated that the Legislature did not address the landowners, and therefore made no promises to them, and consequently no contract could arise between the landowner and the state. The opinion in the La Mesa Case does carefully distinguish and point out as to when a contract does exist. We quote from the opinion the following: " 'The formation of irrigation districts is accomplished by proceedings so closely analogous to those prescribed for the formation of swamp-land reclamation districts that the decisions with respect to the latter are authority as to the former.' The close similarity between those public or state agencies, which are denominated irrigation districts, and those other, and to a larger degree similarly empowered and conducted, public or state agencies, which are denominated municipal corporations, being thus established and declared, the general principles which are applicable to the one should also be susceptible of application to the other; and these general principles, in so far as they have relation to the legislative control over the organization, management, conduct, and manner and method of creating and of liquidating their obligations, have so frequently been expounded as to render any extended comment upon the many cases defining and applying the same unnecessary in relation to the instant case. These general principles have been thus broadly and tersely stated in 6 Ruling Case Law, at section 337 thereof, under the title Constitutional Law, as follows: 'In determining whether a statute affecting a municipal corporation operates as an impairment of the obligation of a contract, regard must be had to the distinction between the rights of such a corporation in its public or governmental capacity and its private rights. So far as a municipality is an agency of government, it has no rights or powers which, as between it and the state, the legislature may not modify or abrogate at pleasure. Neither the charter of a municipal corporation, nor any legislative act regulating the use of property held by it for governmental or public purposes, is a contract within the meaning of the federal constitution.' "

A close reading of the opinion in the La Mesa Case discloses that the court very carefully distinguished between contractual rights and governmental powers of supervision, regulation, and conduct of irrigation, and reclamation districts, drawing the line just as we have heretofore set forth where the constitutional provisions limit encroachment upon contracts. No question of the violation of a contract between a property owner and a bondholder was involved in the case of Spurrier v. Neumiller, 37 Cal. App. 683, 174 P. 338. Following the decision in the case of Reclamation District No. 17 v. Bonbini, 158 Cal. 197, 110 P. 577, a reassessment was made in which credit was allowed pro tanto for the amount which had been paid by the prior owner of the lands subsequently acquired by Mr. Spurrier. The court held that the Legislature, in amending section 3466½ of the Political Code changing the policy of levying assessments in reclamation districts, did not thereby deprive any landowner of any contractual right, and that the application of such amended section was not violative of section 10 of article 1 of the Federal Constitution, nor of section 16, article 1, of the state Constitution. The court did not hold, nor was it held at any stage in that case, that where bonds are issued, a contractual relation is not created between the landowner and the bond purchaser.

As stated in the opinion in the La Mesa Case, supra, the close similarity between public or state agencies and public or state agencies denominated municipal corporations, is so close that the general principles relating to the one are applicable to the other. This being true, the decisions declaring the status between property owners and bondholders must be considered as controlling here.

In Chapman v. Jocelyn, 182 Cal. 294, 187 P. 962, 963, the Supreme Court squarely decides that a street improvement bond issued upon an assessment by reason of failure of the owner to pay the same within the time prescribed constitutes a contract, and that the law in force at the time becomes a part thereof. This clearly appears from the excerpt which we take from the opinion, to wit: "The case must be determined upon the provisions of the bond act as it existed in 1912 when the bond was issued. The act then in force was enacted in 1899. Stats. 1899, p. 40. The amendments of the act in 1913 made some material changes in the requirements concerning a sale. Stats. 1913, p. 849. A street assessment is a contract, and the provisions of the statute in force at the time prescribing the manner of its enforcement are a part of such contract. Creighton v. Pragg, 21 Cal. 115; Houston v. McKenna, 22 Cal. 553. The bond issued upon such assessment, by reason of the failure of the owner to pay the same within the 30 days allowed to the contractor for the work to collect the same, must therefore also constitute a contract. In effect, the bond creates a power of sale whereby the contractor may enforce the lien of the assessment against the property described in the bond. The city treasurer is thereby made a special agent of the parties concerned, with authority to execute the power according to its terms, as found in the statute under which the bond is issued. The Constitution forbids the passage of a law impairing the obligation of a contract. Article 1, § 16."

In Security Trust & Savings Bank v. City of Los Angeles, 120 Cal. App. 518, 7 P.(2d) 1061, 1064, this court had before it the relationship existing between property owners and bondholders of an improvement district organized under the provisions of the act of 1915 (Stats. 1915, p. 99), where the property owners had voted to create a district and to issue bonds. We there said: "The bonds constitute a contract between the bondholder and the taxpayers of the district. Among other things, the contract (bond) contains the provision that 'the principal and interest of this bond are payable exclusively out of taxes levied upon the taxable property in said Municipal Improvement District No. 27,' and to substitute any other method for the payment of the bond would be to change the express terms of the contract, which is not permissible. Merchants' National Bank of San Diego v. Escondido Irr. District, 144 Cal. 329, 77 P. 937; Jeffreys v. Point Richmond Canal & Land Co., 202 Cal. 290, 260 P. 548; H. Crummey, Inc., v. Howe, 48 Cal. App. 542, 192 P. 112; McBean v. San Bernardino, 96 Cal. 183, 31 P. 49."

In the recent case of San Diego County v. Childs, 17 P.(2d) 734, the Supreme Court had before it the questions which we are here considering, and there said (we quote from the syllabus): "When valid proceedings for improvements by special assessment have been completed, and bonds have been issued to represent assessments, contractual relation between property owner and bondholder exists within constitutional provision prohibiting laws impairing obligation of contracts." The court in the Childs Case cites with approval the holding of this court in the Security Trust & Savings Bank Case, supra, besides citing a number of other cases supporting the same doctrine.

In Mulcahy et al. v. Baldwin (Cal. Sup.) 15 P.(2d) 738, the court had before it the question of whether the provision for issuing refunding bonds constituted a violation of the contract in relation to a prior issue of bonds. The court took up and considered the plenary power of the Legislature referring to the opinion in the Palo Verde Irrigation District v. Seeley, supra, but there is nothing in the opinion which limits the former declarations of the court that a contractual relation exists between the property owner and the bondholder. It was pointed out that the bondholders were given the election of surrendering their old bonds and accepting refunding bonds in lieu thereof.

Attention is also called to the fact that the landowners in the district, at an election, had consented to the issuance of the refunding bonds in exchange for the old issues. The existence of the contract, though not stated in so many words, is irresistibly inferred from the language used. (We quote from the syllabus, epitomizing the language of the court): "A statute authorizing irrigation districts to issue refunding bonds on a vote of a majority of the electors, held not to impair contract rights of landowners." And further: "That there can be no impairment of a contract by a change thereof effected without the consent of the contracting parties."

We find nothing in the case of El Dorado Irr. District v. Browne (Cal. Sup.) 13 P.(2d) 921, modifying or changing in any way the relationship existing between property owners in a reclamation district and purchasers of bonds. The court in its opinion in the El Dorado Case, supra, does state that there is no constitutional right of residents of an irrigation district to vote upon bond issues (citing In re Bonds of San Joaquin Irr. District, 161 Cal. 345, 119 P. 198; Los Angeles County Flood Control District v. Hamilton, 177 Cal. 119, 169 P. 1028). The court does not hold, however, that when the bonds have been issued, a contractual relationship would not exist. The real point decided in the El Dorado Irr. District Case is that the plans were sufficiently broad to warrant the change in the work proposed to be made by the trustees thereof.

[3] It also appears to be well settled that the law in force under which bonds are issued, enters into and becomes a part of the contract. This is clearly set forth in the well-considered case of Oklahoma Cotton Growers' Association v. Salyer, 114 Okl. 77, 243 P. 232, 235. We quote therefrom as follows: "'The existing statutes and the settled law of the land at the time a contract is made become a part of it, and must be read into it. All contracts are therefore to be construed in the light of the rules and principles of law applicable to the subject-matter of the transaction, and those rules and principles control the rights of the parties, except where the contract discloses an intention to depart therefrom. However, from the fact that every contract, not expressly providing to the contrary, is presumed to have been made with reference to the then existing state of the law, it follows that if a subsequent change is made therein which in any degree affects such contract, such change is presumed to be excepted therefrom.' 6 R. C. L. p. 855; 13 C. J. p. 247; Deweese v. Smith, 106 F. 438, 45 C. C. A. 408, 66 L. R. A. 971; cases in note to Union Central Ins. Co. v. Pollard, 36 L. R. A. 271. 'The laws upon the subject of a contract are read into and become a part thereof to the same extent as though they were written into its terms.' Armour Packing Co. v. United States, 153 F. 1, 82 C. C. A. 135, 14 L. R. A. (N. S.) 400."

To the same effect is the case of Runnells v. City of Oklahoma City, 150 Cal. 292, 1 P. (2d) 740. It is there held that existing laws under which street improvement bonds are issued become a part of the contract, so that obligations thereof cannot be impaired by subsequent changes in the law.

In the case of Colby v. City of Medford, 85 Or. 485, 167 P. 487, 499, the Supreme Court of Oregon had before it the same questions which we are here considering, and in an elaborate and exhaustive opinion held that the law at the time a contract is entered into becomes a part of it, using the following language: "The established rule is that every contract embraces and includes all those laws which exist at the time and place where the contract is executed." And further, in holding that a contract could not be changed without consent, though beneficial to one obligated thereunder, held that a city cannot, "by amendment to its charter, change the terms of the contract without the consent of the owner. The Hanson plan attempts to change the contract made between the city and owner by changing the number and amount of the unpaid installments and extending the time over a period of 13 years. The right of the city to change the very substance of its contract does not depend upon whether the change is advantageous to the owner, but it is dependent upon the consent of the owner; and hence it is beside the mark to say that the change is for the benefit of the owner." It is further held in that case that "if the duty to perform is lessened and either party is deprived of the benefit of his contract, the obligation of the contract is impaired. The obligation of a contract is impaired by the repeal of a law which constitutes a contract, or by a statute which alters the terms of the contract by imposing a new condition or which adds new duties."

By appearing only by demurrer it is confessed that a new burden is immediately cast upon the petitioners to the extent of about $2,000. Were it not admitted, a mathematical calculation would establish the same fact. This case disposes of the respondent's contention that the petitioners will be remotely benefited by a lessened interest charge, even though the ten-year period within which their part of the obligation calls for the payment of installments may be lessened.

That the law in existence at the time that bonds are issued becomes a part of the contract and cannot thereafter be changed without violating the constitutional prohibitions is held in the case of Nelson v. Pitts, Treasurer of Muskogee County, 126 Okl. 191, 259 P. 533, 53 A. L. R. 1137. A somewhat similar principle is involved by an act which purports to extend the time before a deed can be secured by a purchaser under a tax sale. The authorities are numerous to the effect that such an act cannot be given retroactive effect. See Rott v. Steffens, as City Controller, etc., 229 Mich. 241, 201 N. W. 227, 38 A. L. R. 224.

In Peery v. City of Los Angeles, 187 Cal. 753, 203 P. 992, 19 A. L. R. 1044, the court held that where an attempt was made to allow bonds to be sold for less than par, where the voters had approved the issue, conditioned upon the bonds being sold for not less than par, constituted a violation of the contract within the terms of section 16 of article 1 of the state Constitution.

In Jeffreys v. Point Richmond Canal & Land Co., 202 Cal. 290, 260 P. 548, the Supreme Court reaffirmed the decision of Chapman v. Jocelyn, supra, and again held that a street assessment is a contract and that the provisions of the statute in force at the time prescribing the manner of its enforcement, are a part of the contract. The decision of the court is well summarized in the second paragraph of the syllabus, to wit: "The rights of property owners against whose property assessments were levied and bonds issued under the Improvement Act of 1911 prior to the amendment of 1921 became vested under a statute which did not render them subject to any suit whatever in any court at the hands of the bondholders; and while the legislature had power to make retroactive a law relating purely to a remedy, it could not alter the substantive rights of the property owners or their successors in interest." It is further held that while the law aimed only at providing a remedy, it in fact changed substantive rights and could not be held to apply to bonds previously issued. Likewise, it is held that a change in the law limiting the amount of assessment installments that may be called after the assessment has been levied is not retroactive and cannot be allowed to apply where the rights and obligations have already been established. H. Crummey, Inc., v. Howe, 48 Cal. App. 542, 192 P. 112.

In line with the cases just cited it is held "that where a contract has been entered into with a municipal corporation on the faith that taxes will be levied, etc., legislation repealing or modifying the taxing power so as to deprive the holder of the contract of all adequate and efficacious remedy is within the constitutional inhibition as an impairment of an obligation of contracts." 6 R. C. L. 345.

[4] By the provisions of section 3463 of the Political Code the assessment levied upon any tract of land within a reclamation district constitutes a lien thereon, and a like lien was extended to the bondholders under the provisions of section 3480 of the Political Code as it read at the time of the issuance of the bonds involved in this action. Stats. 1917, p. 1181. The lien there provided for is to continue and inure to the benefit of the bonds which have been issued to any reclamation district until the bonds are fully paid. It is further provided in the section as it then read that where bonds of the district have been authorized to be issued on assessments, all unpaid assessments shall bear interest at the rate of 7 per cent. per annum until all of the bonds shall have been fully paid and discharged.

As evidencing the intent of the Legislature to avoid any impairment of the contract existing between the landowner and the bondholder, the section further referred to provides that upon the sale of any land on account of the nonpayment of any installment, payment may be made not only in cash but in bonds or coupons which have already matured. This provision avoids the acceleration of any installment payment, and likewise avoids the increase of any installment payment during the lifetime of unmatured bonds. The form of the bond to be issued, set forth in the section of the Code, supra, recites that it is based upon and secured by an assessment levied on the lands in said district, etc.

The respondent's contention that the assessment is the primary obligation, and that the issuance of bonds is only an extension of credit, does not militate against the fact that when the bonds are issued, a contract exists between the holder of land in the reclamation district where the assessment has been levied, and the purchaser of the bonds, based thereon. As we have seen, the lien of the assessment continues and the lien of the bond, based upon the assessment, continues until fully paid and discharged.

The contention of the petitioners is to the effect that when a landowner goes to the polls and votes for the issuance of bonds providing that they shall be payable in ten annual payments, beginning with the first principal payment ten years after date, that he agrees on his part to make those ten annual payments as well as the interest payments which are provided to be made semiannually, and that the assessment shall stand as security for the payment of the bonds. The landowner's part of the agreement is that by virtue of the issuance of bonds he obligates himself to pay the assessment in ten equal annual payments, with such additional percentage as may be necessary to cover delinquencies; that his part of the obligation is thereby fixed, and that it can neither be limited nor increased during the lifetime of the bonds for the issuance of which he has voted. On the other hand, that the purchaser of the bonds, based upon the assessment, accepts the bond based upon the premises which we have stated, and his right is to have collected from each landowner the annual percentage of the assessment as specified in the bond—no more and no less. In other words, that the bondholder can call for the payment of only 10 per cent., in this case as specified to be paid by the petitioners in this proceeding.

As we have seen by the cases cited, the rights and obligations of the bondholder are based upon the law as it stood at the time of the issuance of the bonds, and cannot be changed so as to alter the obligations specified in the bond. It necessarily follows that the rights and obligations of the property owner are reciprocal. His obligations cannot be increased nor lessened. The portion of the assessment, or rather, the amount of the installment that is to be paid by the landowner at each annual period is fixed when the contract is completed, by the sale of the bonds. We find no negative answer to this contention of the appellants.

At the date of the issuance of the bonds of reclamation district No. 1600, there was unpaid on the assessment levied upon the lands belonging to the petitioners herein, situate in said district, the sum of $115,109.26. Their obligation was to pay that sum, together with interest, in ten annual payments, augmented only by such percentage as might be necessary to cover delinquencies. If late maturing bonds may, under the amendment to section 3480 of the Political Code made in 1923, by giving it a retrospective effect, be so presented by certain landowners, and accepted by the respondent, as to augment any of the ten annual installments agreed to be paid at the time the bonds were issued, then and in that case late maturing bonds might be so presented and canceled as to give the petitioners a number of years less than the ten years specified in the contract within which to meet their obligations.

The contention of the petitioners that time within which to meet their obligations is a vested right, appears to us to be well taken.

[5-9] Based upon the foregoing, is the remedy by mandamus applicable in this case?

As heretofore stated, the petition was filed in this proceeding on the 10th day of October, 1932. One of the annual installments of principal fell due on the 1st day of January, 1933, together with the semiannual interest provided for in the bonds. Section 3480, supra, requires that at least ninety days before any interest date of the bonds, including refunding bonds, etc., the treasurer shall estimate the amount of money necessary to pay interest and principal maturing on such interest date, etc., and thereupon cause to be published in some newspaper of general circulation, in the county in which the district may be situate, the notice setting forth that an installment of assessment (describing it, giving the percentage), is payable within thirty days from date, by all assessed landowners of the district, etc. It further provides that all or any part of said installment which shall remain unpaid on the day fixed will become delinquent. The section then sets forth the procedure to be followed by the treasurer in making collections of the assessment on lands where the assessment has been allowed to go delinquent, and upon sale thereof may accept in payment, cash or bonds and coupons already matured. The accepting of maturing bonds and coupons necessarily lessens the money requirements to make payment upon the bonds and coupons due on the named interest date. Such a notice cannot now be given. Such a notice could not be given, according to the specified time, on the date of the filing of the petition for a writ of mandate herein.

Again, the assessments upon the respective parcels of land were fixed and determined long prior to the issuance of bonds. A remedy existed at that time involving the question of whether the assessment was so adjusted as to equalize the burden, and require each landowner to pay according to the benefits received by the proposed improvements for which the assessment was levied. Further than that, no landowner has any interest in the assessment levied upon the lands in the district owned by any other person. Each landowner's obligation is distinctly set forth.

As we have seen herein, the petitioners are obligated to pay only 10 per cent. annually of the remaining portion of the assessment remaining unpaid upon their lands at the date of the issuance of the bonds. That fixes both their right and their duty. Whether any other landowner pays is not material. If the bondholders were here contesting the installment call, then in that case a different issue would be presented.

In the case of Rohwer v. Gibson, 14 P.(2d) 1051, we had occasion to examine the law relative to assessments according to benefits, and there cited cases showing that additional assessments cannot be levied so as to increase the amount thereof, to a sum in excess of the value of the benefits conferred. Ordinarily, mandamus will not issue when the rights of individuals or corporations who have a special interest in the subject-matter, and whose rights will be collaterally determined by a judgment awarding the writ, unless they are made parties to the action. 38 C. J. 853; California Cotton Credit Corp. v. Superior Court of California in and for Madera County, 122 Cal. App. 404, 10 P.(2d) 176. Usually a writ of mandate will not issue to compel the performance of an official act if, when the writ is applied for, the time limited for action has expired. Conn v. City Council, 17 Cal. App. 705, 121 P. 714, 719. This rule, however, we think would not apply here if other conditions did not prevent the issuance of the writ.

We think the principle enunciated in the case of Samish Gun Club v. Skagit County et al., 118 Wash. 578, 204 P. 181, 182, is applicable here, and defines the procedure and remedy open to the petitioners. It is there said: "It is well settled in this state as said in Weyerhaeuser Timber Co. v. Pierce County, 97 Wash. 534, 167 P. 35, that, where the assessing officer in making an assessment 'proceeded upon a fundamentally wrong basis or theory in making the assessment, the courts will grant relief against an overvaluation of real property, and this regardless of the action of the board of equalization in the premises.' "

The appellant, before bringing that action, tendered to the county treasurer the full amount of the taxes which it claimed was due upon the property, and its tender was based upon the value of the property as it was assessed for the year 1915, etc. In other words, upon a tender of the amount due, to wit, the amount of the installment which can be, or could have been legally called by the treasurer of Yolo county to be paid on the assessment against the lands owned by the petitioners within the district, a court of equity will restrain the collection of any additional sum. See, also, 61 C. J., pp. 1077–1085, incl. The statutes afford no remedy against an excessive call by allowing payment under protest and recovery of the excess. This warrants the interposition of a court of equity. See, also, 9 Cal. Jur. 910. A like rule and procedure was followed in Pacific Postal, etc., Cable Co. v. Dalton, 119 Cal. 604, 51 P. 1072. That case involved a grossly excessive assessment, and also the question that the valuation was fraudulently increased. We perceive no difference in principle between that case and instances where an assessment has been levied upon a fundamentally false basis, or an installment called on an assessment calculated on a false basis. The excessive amount in both instances is illegal, and the collecting officer has no right to demand payment of the illegal portion of either the installment or the assessment.

So far as the petition is concerned, we are not advised as to whether the treasurer of Yolo county has made any call for installment payments against the petitioners, or other landowners within reclamation district No. 1600, and if a call has been made upon an erroneous or false basis, and shown to be such by applying the principles set forth herein, then and in that case the plaintiffs have a remedy for the enforcement of their rights.

The respondent urges acquiescence in the constitutionality or rather retroactive effect of the amendment to section 3480, supra, as made by the Legislature in 1923, but there is nothing before the court showing any merit in such contention.

The authorities which we have cited show clearly that the law as it exists at the date of the holding therefor, and the issuance of bonds, enters into the contract. This answers all questions as to the constitutionality of the amendment, as applied to bonds issued subsequently to the amendment. All of the conditions contained in the section are read into the contract, whether those conditions be favorable or unfavorable.

As a guide to subsequent proceedings which may be had herein, and which may be had in relation to the bonds of said district, we have endeavored to answer every question presented, even though some of the answers may not be necessarily involved in the determination of this cause.

By reason of the existence of what we consider to be an appropriate remedy, other than the proceeding herein, the writ is denied.

We concur: PULLEN, P. J.; R. L. THOMPSON, J.

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DAVIS v. PEZEL.

Civ. 7713.

District Court of Appeal, Second District,
Division 2, California.
April 6, 1933.

1. Malicious prosecution 🔑64(1).
Evidence in action for malicious prosecution *held* sufficient to support verdict for plaintiff.

2. Malicious prosecution 🔑71(2).
Question of probable cause in action for malicious prosecution is for court, not jury, to determine.

3. Malicious prosecution 🔑71(2).
Conflicting testimony on question of probable cause in action for malicious prosecution may be submitted to jury by special questions or in hypothetical form.

4. Malicious prosecution 🔑59(1), 60(2).
Evidence of parties' altercation over automobile repair bill *held* pertinent to issues of probable cause and malice in action for malicious prosecution on charge of stealing automobile.

5. Malicious prosecution 🔑21(2).
Defense in action for malicious prosecution that defendant acted on attorney's advice is untenable, where part of claimed facts were not related to attorney.

6. Malicious prosecution 🔑20.
To constitute probable cause for alleged malicious prosecution, defendant in action therefor must have believed, at time of initiating prosecution, that crime charged was committed.

7. Malicious prosecution 🔑71(2).
Whether defendant in action for malicious prosecution believed, at time of initiating prosecution, that plaintiff committed crime charged, *held* for jury.

8. Appeal and error 🔑1002.
Jury's conclusions on substantially conflicting evidence in case submitted under general instructions without criticism cannot be disturbed on appeal.

9. Trial 🔑143.
Court properly denied defendant's motions for nonsuit and directed verdict, where there was substantial conflict in evidence.

10. Trial 🔑193(1).
Jury must have free rein under law to determine facts without intimation thereon from judge.

11. Trial 🔑193(2).
Trial court's statement that automobile ownership certificate, erroneously issued to plaintiff in action for malicious prosecution on charge of stealing automobile, threw no light on question of probable cause, *held* improper as intimating court's view of certain evidence on such question.

12. Appeal and error 🔑1064(2).
Court's statement during trial of action for malicious prosecution on charge of stealing automobile that fact that nobody knew that plaintiff lived at address given when he purchased automobile from defendant "doesn't make any difference" *held* prejudicial error.

13. Appeal and error 🔑1056(1).
Exclusion of evidence of parties' misunderstanding as to meaning of term "defective parts guarantee" in automobile sale contract *held* error prejudicial to seller in buyer's action for malicious prosecution on charge of stealing automobile after seller refused to make repairs.

14. Trial 🔑29(1).
Court's statement during trial of action for malicious prosecution on charge of stealing automobile that it was immaterial what somebody in state automobile department told defendant to do *held* improper as calculated to bring contempt and ridicule on defendant's counsel.

15. Appeal and error 🔑1046(5).
Wrangle between defendant's counsel and judge, who erroneously assumed that counsel contended it was improper for court to ask question, after counsel stated that court's question to defendant assumed dispute, which defendant denied, with plaintiff in action for malicious prosecution, *held* prejudicial to defendant.

16. Appeal and error 🔑1046(5).
Court's refusal to allow state motor vehicle department inspector, testifying for defendant in action for malicious prosecution on charge of stealing automobile, to explain his status, and repeated references to him as "speed cop," *held* prejudicial to defendant.

17. Appeal and error 🔑699(4).
Error in refusing instruction, not in record, cannot be considered by appellate court.

18. Malicious prosecution 🔑72(1).
Instruction in trial for malicious prosecution on charge of stealing automobile that "grand theft" is felonious stealing, taking, or driving away of another's automobile, with intent to dispossess owner permanently, *held* fatally deficient (Pen. Code §§ 484, 487, 490a, 504a).

[Ed. Note.—For other definitions of "Grand Theft," see Words and Phrases.]

Appeal from Superior Court, Los Angeles County; K. S. Mahon, Judge.

Action by Ray Davis against Oliver Pezel. Judgment for plaintiff, and defendant appeals.

Reversed.

Don S. Irwin, of Los Angeles, for appellant.

Libby & Sherwin, of Los Angeles, for respondent.

STEPHENS, Justice.

On July 1, 1930, a judgment was obtained in superior court by plaintiff against defendant for the sum of $1,000 for malicious prosecution. Motions for nonsuit and for a directed verdict were made by defendant and denied by the court. The defendant appeals, and treats his grounds of appeal under four divisions, which will hereinafter be treated separately as presented in his opening brief.

The facts upon which the action is based are as follows: On the 14th day of July, 1929, appellant, as an automobile merchant, sold respondent a secondhand automobile on the usual installment plan, appellant retaining title until full payment of purchase price. The purchaser represented that he resided at 1629¼ Acacia street, Los Angeles, was employed at the Terminal Garage, and had an income of $230 per month. Eight days thereafter he went to appellant's establishment to take up a postdated check and to request some repairs on the car under the guaranty. Appellant claimed the guaranty did not cover such repairs, and it would seem gave respondent little attention. Respondent left, but returned in a few days to request a credit of $14.65, the sum he had paid for such repairs. Appellant again disclaimed responsibility. Respondent testified that appellant became very angry with respondent, ordered him from his store, and that they almost came to blows. This appellant denies. At this meeting respondent told appellant he had the "pink" or ownership slip. It had been erroneously issued to him by the state motor vehicle department.

Respondent did not make the two semiweekly payments of $12.50 each following the purchase, and appellant sent an agent to locate respondent for the purpose of collecting the delinquent payments or to repossess the car. No trace of respondent was found at the given address, but the car was located a few days later on a vacant lot a few blocks distant therefrom. It was taken to appellant's repair shop across the street from the store. Thereafter respondent went to the man in charge and, exhibiting the "pink slip," took the car with him over the man's objection. Again an unsuccessful endeavor was made to locate respondent at the given address, and Inspector Crane of the division of motor vehicles and appellant went to the district attorney's office and there laid the case before a deputy. He also consulted an attorney at law. The matter was laid before the attorney and the deputy district attorney susbtantially as here outlined except for the altercation mentioned. This appellant claims never occurred. There is testimony that the attorney and the deputy district attorney advised him to sign and swear to the criminal complaint. At the time the complaint was issued charging grand theft and violation of section 146, California Vehicle Act (August 24, 1929), and to the knowledge of appellant, respondent was confined in the city jail under a fifty-day sentence for violation of the Wright Act, and he was arrested under the complaint when released from jail. While in jail, respondent refused to reveal the whereabouts of the automobile, and said to the insurance carrier's agent, "Try to get it." On October 23, 1929, appellant filed a claim and delivery action against respondent, which respondent answered and denied appellant's title and alleged that he (respondent) had the ownership slip. This is a fair generalization of the testimony in the case.

[1-4] *Point I. The Verdict is Contrary to and Unsupported by the Evidence.*—Upon the record of this case we cannot sustain appellant's contention. It is settled that the question of probable cause in malicious prosecution cases is for the court to determine and not the jury. Where there is conflicting evidence, the question may be treated by submitting the conflicting testimony to the jury by special questions, or by presenting the testimony to the jury in hypothetical form. Franzen v. Shenk, 192 Cal. 572, 221 P. 932. Neither of these methods was used in the instant case; instead it was treated as an ordinary damage action. No point is made of this, however, and we cannot raise it here except for its incidental effect. There is not the slightest doubt but that there is conflicting evidence affecting the issue of probable cause in this case. If the altercation over the repair bill took place as respondent claims, it would be pertinent evidence to the issue of probable cause and to the issue of malice as well. There is other evidence that could be referred to, to the same effect, and, in this connection, the jury had a right to decide whether or not appellant himself believed that the charged crimes had been committed. Franzen v. Shenk, supra.

[5-7] Under this subhead, point I, appellant urges the defense of having acted upon an attorney's advice, but this is untenable, as we have just seen that a part of the claimed facts were not related to either the private or public attorney. Indeed, under the main opinion in Franzen v. Shenk, supra, it would seem that not only this defense but practically every defense to a properly pleaded action in malicious prosecution must go to the jury in either one or the other of the methods above referred to. It is therein held that the defendant in a malicious prosecution suit

must himself have believed at the very time that he initiated the prosecution that the crime had been committed, else probable cause is lacking. It would not be enough for him to say, "I had no absolute knowledge about it and entertained no belief of my own in the matter but I heard this and that and it seemed to me as a reasonable man that it might well be that a crime had been committed so I took steps to prosecute." He must go further and say, "I *believed* that a crime had been committed." It follows that, if this *belief* is essential to probable cause, then the jury would have a right to weigh and decide the question of fact as to whether he actually did or did not have such *belief* at the time he acted to prosecute. See dissenting opinions in the cited case.

[8] Since the court itself did not assume the duty of deciding the question of probable cause, but, instead, submitted the whole case to the jury under general instructions, and since no criticism of this course is made by either party, we have nothing to do in the premises but follow the rule that, where there is substantial conflict, we cannot disturb the jury's conclusions.

[9] Point II. *Error of the Trial Court in Denying Appellant's Motion for Nonsuit and Appellant's Motion for Directed Verdict.*—As there is substantial conflict in the evidence, the court was right in denying both motions. Had a correct method of deciding the presence or absence of probable cause been adopted in the case, these motions would have been considered on a different basis.

[10] Point III. *Misconduct of the Trial Judge.*—We approach this matter with diffidence. We have long known of the excellence of the judge who presided in the court below, and we appreciate the difficulties and annoyances besetting any trial judge. But these considerations must yield to the principle that obtains in this state's courts that the jury must have free rein under the law to determine the facts of the case without intimation thereon from the judge. Whatever loose street criticism is current, it is nevertheless a very fortunate fact that citizens impaneled as jurors look up to and respect the person and opinions of judges presiding. They are quite apt to catch even a slight prejudicial act of the judge and enlarge it into a controlling feature of the case, the most careful and emphatic instructions to the contrary notwithstanding. Some of the comments and actions of the judge presiding in this case could well have impressed the jury with the idea that he had more than a slight leaning toward the plaintiff's side of the case. We shall examine some of the proceedings with this in mind.

[11] During the cross-examination of the plaintiff, the "pink slip" (owner's certificate), which had been erroneously issued to him, was about to be passed over to the jury for examination. It will be remembered that respondent had stated to appellant at the time of the dispute about the repairs that he had the "pink slip" and that he had exhibited it later to the man in charge when he retook possession of the car from appellant's repair shop. It would seem that appellant's knowledge of respondent's possession and use of this slip would have some evidentiary value upon the issue of probable cause. We quote from the transcript, page 54 et seq.: "The Court: I don't see how the pink slip throws any light on it (probable cause) except he had it. I suppose there is no controversy on that, that he did have it. * * * It was never said he claimed to own it (the automobile) and that answer and that complaint (referring to the pleadings in the claim and delivery action) you read didn't state that he owned it. It could have been stricken out on motion as a conclusion of law. He didn't state he owned it. He said the certificate of ownership had been issued to him. * * * It doesn't dispute his testimony here this morning. The certificate of ownership was granted to him which did show and is a fact the certificate of ownership showed him as the owner. This pink slip, the purpose of it, I can[t] see that has any weight or materiality to show the want of probable cause or probable cause." It does not seem to require analysis of these statements to see that the jury could have received intimation from the court as to its view of certain evidence upon the important issue of probable cause. Stinson Canal, etc., Co. v. Lemoore Canal, etc., Co. et al., 45 Cal. App. 241, 188 P. 77.

[12] It will be remembered that upon the purchase of the automobile respondent gave a certain number of a certain street as his residence and that defendant through an agent sought to find plaintiff there. On redirect examination plaintiff below was shown an envelope addressed to him at the address given and asked if he received it at such address through the mail. Upon objection that the showing was immaterial, plaintiff's counsel explained: "The reason for it is, if the court please, the endeavor was made to show that nobody knew he lived there." Whereupon the court stated: "That doesn't make any difference. Nobody knows where I live; I don't know where you live; still, I don't think you are criminals. No use of putting that in at this time." The prejudicial effect of this statement seems obvious. The court effectively advised the jury that he thought the failure to find respondent at the given address could be no step in creating the suspicion in appellant's mind that his automobile had been stolen.

[13] Appellant was being examined by his attorney as to the trade or custom meaning of the term "defective parts guarantee," as it was used in the purchase agreement. The

correct interpretation of this phrase, it would appear, would be in issue when the disagreement over the repairs had taken place. After objection, the attorney explained that the phrase covered the parts only and not cost of installation. If the dispute between the parties arose or did not arise through an honest misunderstanding, as evidence under this inquiry would have tended to show, it would have had its effect on the issue of malice, but the court would not go into the matter at all. This point is not appropriately grouped with actions of misconduct, but we think the court's ruling was prejudicial error.

[14] After the court had intimated its adverse ruling on a proposal to show that defendant below had consulted with and had obtained advice from officials of the state motor vehicle department, the following took place before the jury:

"Mr. Rollinson (attorney for defendant): 'I want to make an offer of proof.'

"The Court: 'Make it.'

"Mr. Rollinson: 'Probably the jury better be excused.'

"The Court: 'No, I don't ask the jury to go out. The jury have got sense.'

"Mr. Rollinson: 'I don't want to take advantage of the plaintiff.'

"The Court: 'You are not taking advantage of anybody. An offer of proof isn't evidence. If I permit you to prove it, they can consider it, and if I don't permit you to prove it they won't consider it.'

"Mr. Rollinson: 'Let the record show that the defendant offers to prove by this witness that the officials of the State Motor Vehicle Department, after an investigation, had consulted with him with reference to what action should be taken against the plaintiff, and that if this defendant was permitted to testify he would testify that the officials of the Motor Vehicle Department not only suggested, but requested that he immediately take this matter up with the district attorney of Los Angeles County and request that a warrant be issued for the plaintiff in this cause.'

"The Court: 'It is immaterial what somebody in the automobile department told him to do. Supposing they told him to go out and murder him, that wouldn't justify murder because somebody in the automobile department told him to.'

"Mr. Rollinson: 'Then the offer of proof is denied, is that correct?'

"The Court: 'Absolutely, yes.'"

Perhaps the court's ruling on the offer as a whole was correct in so far as the advice of an official in the motor vehicle department was concerned, yet, if the proof had been permitted upon it, a part of the offer might have shown the source of some of the information appellant acquired before he took action. The emphatic ruling of the court effectually cut off any inquiry along that line. The comparison used by the judge was extreme and not apt. It would not be ridiculous or ludicrous for a person faced with the problem that was appellant's to discuss the matter with the state motor vehicle department. The officials of such state department officially keep the registration of ownership of automobiles. This extreme language certainly was calculated to bring contempt and ridicule upon counsel and, by reflection, upon his client, the defendant in the case.

[15] Appellant was testifying as to his talk with the deputy district attorney when the court asked the following question: "You didn't tell him that there was a dispute between you as to the amount due?" Appellant had claimed that he had no such dispute, and appellant's attorney explained that the court's remarks, if allowed to stand, would be prejudicial, as they assumed that such dispute had taken place. The court replied: "Well, take an exception to it." Then followed quite a wrangle, in which the court assumed, erroneously, as we think, that appellant's attorney was advancing the idea that it was not proper for the court to ask a question. It seems to us that the incident was prejudicial to appellant's case.

[16] Appellant's counsel put Mr. Crane, an official from the state motor vehicle department, on the stand, and asked him when he went to the district attorney's office. It will be remembered that Mr. Crane was with appellant when he recited the case to the deputy district attorney. No objection was interposed, but the court interrupted the answer by saying, "It is immaterial. He is not sued here.

"Mr. Irwin (attorney for appellant): It all goes, if the court please, to establish—

"The Court: What does it amount to?

"Mr. Irwin: That the district attorney was advised of the fact fully I think it goes to the question of what facts the district attorney had at the time he advised the issuance of the complaint, if the jury finds that he did so advise.

"The Court: Sustain the objection. This man is a speed cop, is he?

"Mr. Rollinson: He is an inspector. There was no objection to sustain."

Then follows another wrangle in which it would appear that the court was rather testy in refusing to allow the witness to explain his position with the vehicle department and several times referred to him derisively as a "speed cop," though there was no evidence to this effect. Appellant's attorney offered to prove that the officer was an inspector with the duty of investigating the fraudulent issue of certificates of ownership, but this the court would not permit. Before the offer of proof was made, counsel asked to approach the bench, but the court said: "I don't care what you offer to prove"; and, "Well make it in the presence of the jury, they have got sense." After more wrangling, the officer finally related the conversation with the deputy district attorney, but no further explanation of his status in the department of vehicles was had. It is our opinion that the witness should have been allowed to state his status, and that repeated reference to him as a "speed cop" by the court and the court's rather rough handling of appellant's attorney was quite enough to communicate to the jury a deep suspicion that the court's sympathies were unfavorable to the defendant in the case. Grouping these incidents, it seems to us that they were very prejudicial to the defendant below, appellant here. In re Melvin's Estate, 85 Cal. App. 691, 259 P. 980, and Berguin v. Pac. Elec. R. Co., 203 Cal. 116, 263 P. 220.

[17, 18] Point IV. *Error in Instructions.*—Appellant complains that his proposed instruction XIX should have been given, but, as it is nowhere in the record, we cannot consider the point. Appellant complains that the following definition as given by the court is erroneous: "Grand theft, so far as it appertains to this case, is the felonious stealing, taking or driving away an automobile, the personal property of another, with the intent then and thereby to permanently dispossess the owners thereof." This contention, we think, must be sustained. Theft as defined by section 484 of the Penal Code is as follows: "Every person who shall feloniously steal, take, carry, lead, or drive away the personal property of another, or who shall fraudulently appropriate property which has been entrusted to him, or shall knowingly and designedly, by any false or fraudulent representation or pretense, defraud any other person of money, labor, or real or personal property, or who causes or procures others to report falsely of his wealth or mercantile character and by thus imposing upon any person, obtains credit and thereby fraudulently gets or obtains possession of money or property or obtains the labor or service of another, is guilty of theft. * * *" The remainder of the section is more in the nature of explanation. Grand theft (Pen. Code, § 487) is theft of property valued over a certain sum or theft of certain enumerated objects, including an automobile. Section 490a, Penal Code, is as follows: "Wherever any law or statute of this state refers to or mentions larceny, embezzlement, or stealing, said law or statute shall hereafter be read and interpreted as if the word 'theft' were substituted therefor." Section 504a of the Penal Code reads as follows: "Every person who shall fraudulently remove, conceal or dispose of any goods, chattels or effects, leased or let to him by any instrument in writing, or any personal property or effects of another in his possession, under a contract of purchase not yet fulfilled, and any person in possession of such goods, chattels, or effects knowing them to be subject to such lease or contract of purchase who shall so remove, conceal or dispose of the same with intent to injure or defraud the lessor or owner thereof, is guilty of embezzlement." (Theft.)

When the facts of the instant case are considered in connection with these provisions, it is obvious that the abbreviated definition of grand theft in the instruction complained of is fatally deficient.

The judgment is reversed.

We concur: WORKS, P. J.; ARCHBALD, Justice pro tem.

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131 Cal.App. 213

MERIGOLD et al. v. GAGNON.

Civ. 7717.

District Court of Appeal, Second District, Division 2, California.

April 14, 1933.

1. **Vendor and purchaser 🔑341(5).**

Assignees of purchaser could not recover as cash, on vendor's breach, sum acknowledged in receipt on agreement to purchase lots, where sum acknowledged represented realty purchaser conveyed to vendor in part consideration of lots purchased.

2. **Vendor and purchaser 🔑341(5).**

Where sum acknowledged in receipt on purchase contract represented realty purchaser conveyed to vendor in part consideration of lots purchased, purchaser could on vendor's breach require no more than reconveyance of such realty, or judgment for reasonable market value, where reconveyance was impossible.

3. **Vendor and purchaser 🔑335.**

Assignees of purchaser could not on vendor's breach recover monthly installment paid on purchase contract, where assignees breached contract by nonpayment of installments.

4. **Vendor and purchaser 🔑341(3).**

Evidence, in action by assignees of purchaser to recover sum acknowledged in receipt on purchase contract, established that vendor did not breach covenants to furnish improvements of graded, graveled, or oiled streets and water to property.

Appeal from Superior Court, Los Angeles County; Walter S. Gates, Judge.

Action by Dorothy O. Merigold and another against Ernest E. Gagnon. From a judgment for defendant, plaintiffs appeal.

Affirmed.

Neal E. Dow, of Los Angeles, for appellants.

Leonard S. Barnes and Victor H. Dixon, both of Los Angeles, for respondent.

WORKS, Presiding Justice.

This is an action for the recovery of money. Defendant had judgment, and plaintiffs appeal.

I. B. Rankin entered into a contract with Gagnon whereby the former agreed to buy, and the latter to sell, certain lots of real property. The deal was in part really an exchange, for Rankin conveyed to Gagnon certain real property in part consideration for the lots he agreed to "buy." Rankin conveyed, by a paper termed an assignment, all his "rights, title and interest" in the lots to the Merigolds, and in the document the parties requested Gagnon to enter into a contract to sell the lots to the Merigolds. This new agreement was executed, and the Merigolds were thus substituted for Rankin as buyers of the lots. The agreement acknowledged the receipt of the sum of $3,735 "cash, or property exchange credited, upon the execution of this agreement," as part payment for the lots. The Merigolds agreed to pay, in addition, installments of $50 the month until a certain total sum had been paid to Gagnon. They paid one monthly installment and no more. The action was commenced for the recovery of $3,785, that being the total of the $3,735 and the one installment of $50. The trial court found that the Merigolds had paid only the latter amount, and they contend that the finding was not supported by the evidence.

[1, 2] We think the finding was not only sustained by the evidence but that the court could not have found otherwise. The $3,735, as the evidence disclosed without dispute, represented the land conveyed to Gagnon by Rankin when the contract of sale between them was executed. Under these circumstances the amount named could not be recovered by the Merigolds as cash, upon a breach of their contract by Gagnon, nor could it have so been recovered by Rankin, upon a breach of his original contract by Gagnon. Rankin could have required nothing more than a reconveyance of the land which was originally his, or if a reconveyance were impossible, a judgment for the reasonable market value of the land at the time he conveyed it to Gagnon. All this is settled by Blahnik v. Small Farms Co., 181 Cal. 380, 184 P. 661. We think the Merigolds are in no better position as to this matter under their agreement with Gagnon than Rankin would have occupied under his contract with that individual. Notwithstanding this situation, the Merigolds prayed only a money judgment; and not only so, but they offered no evidence as to the value of the Rankin land at the time it was conveyed to Gagnon, nor at any time. As we have already observed, the finding of the trial court was actually demanded by the state of the evidence.

[3] But the Merigolds were not even entitled to recover the $50 installment paid by them. They breached their agreement to buy when they ceased payment of the monthly installments. They contend that this cessation was justified for the reason that Gagnon had already broken the agreement by a failure to perform covenants which he had agreed to perform. The Merigolds, in making this contention, present two provisions of the agreement. One of these read: "Improvements to consist of streets graded, graveled, or oiled, water to the property." The other ran: "The seller further agrees to furnish, or cause to be furnished, water to the property and receive compensation from the property owners in proportion to the quantity used for domestic and irrigation purposes. * * *"

The first of these clauses was so general that it would have been most difficult for the Merigolds to prove that it had not been complied with. Surely, it was so uncertain in its terms that it could not have been enforced if this were a suit for specific performance. Be that as it may, however, evidence of several witnesses was produced by Gagnon to the effect that all the streets in the tract containing the lots were graded, graveled, or oiled.

[4] As to the second of the clauses, the Merigolds were never in need of water for their lots for either domestic or irrigation uses. They erected no buildings upon them nor did they plant them to any kind of trees or crops. The lots were mere vacant land. The Merigolds contend that they required water for the purpose of conducting building operations upon the lots, but no such use was contemplated by the agreement. Water for such a purpose would be devoted to neither a domestic nor an irrigation use. Further, a witness testified that he had a water supply near at hand, sufficient to supply needful water to his own land and to the Gagnon tract as well, that Gagnon had arranged with him to supply water to the tract until Gagnon could develop a water supply of his own, and that water could have been furnished by him to the Merigold lots at any time upon twenty-four hours' notice.

Judgment affirmed.

We concur: CRAIG, J.; ARCHBALD, Justice pro tem.

131 Cal.App. 56

PEOPLE v. FIELDS.

Cr. 2356.

District Court of Appeal, Second District, Division 2, California.

April 6, 1933.

1. Criminal law 🔑1001.

Under statute, in revoking probation, court has broad discretion (Pen. Code, § 1203).

2. Criminal law 🔑1001.

Statutory hearing with reference to revocation of probation need not be had under fixed rules of trial for offense committed (Pen. Code, § 1203).

3. Criminal law 🔑1158(1).

Revocation of probation on evidence reasonably showing that probationer was unworthy of probation will not be disturbed on appeal (Pen. Code, § 1203).

Appeal from Superior Court, Los Angeles County; Elliot Craig, Judge.

Max Fields having pleaded guilty of possession of a still was granted probation which was later revoked, whereupon he was adjudged guilty and sentenced, and he appeals.

Affirmed.

Nathan O. Freedman and A. Wm. Christlieb, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John W. Maltman, Deputy Atty. Gen., for the People.

STEPHENS, Justice.

The appellant had pleaded guilty to the offense of possession of a still, a felony, had been granted probation, was given a hearing after appearing on a bench warrant, and his probation was revoked. He was thereupon duly adjudged guilty and sentenced. His appeal here is upon the points that in revoking the probation the court acted arbitrarily and in excess of and contrary to accepted principles of judicial discretion, and that the facts elicited at the hearing were insufficient.

The facts are not with appellant. The court inquired exhaustively into whether or not the probationer had been frequenting gambling places and as to whether or not he had driven a man to San Francisco under very suspicious circumstances. The man had been shot in the leg and was under police suspicion of having been involved in a murder.

[1, 2] The best that can be said of the evidence so far as appellant is concerned is that it was conflicting. Under section 1203, Penal Code, the discretion of the court to revoke an order of probation is very broad. The hearing therein provided for is not required to be had under the fixed rules of a trial for an offense committed. The probationer stands before the court guilty of having committed an offense against the state. He has been granted an extraordinary relief from suffering the penalty of his offense because the court believed he would remould himself into a good citizen.

[3] The court having revoked the order of probation upon evidence that could reasonably be taken as showing the probationer unworthy of the relief that had been granted him, as was done in this case, such order will not be disturbed upon appeal.

The judgment is affirmed.

We concur: CRAIG, Acting P. J.; ARCHBALD, Justice pro tem.

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131 Cal.App. 226

WILLIAMSON v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY.

Civ. 9011.

District Court of Appeal, Second District, Division 2, California.

April 14, 1933.

Rehearing Denied May 12, 1933.

Mandamus 🔑57(1).

Writ of mandate, to compel trial court's correction of transcript as filed, should be denied where error, if any, would be as apparent from present transcript as with proposed addition (Code Civ. Proc. § 953a).

Petition by Alfred Williamson for writ of mandate against the Superior Court in and for Los Angeles County.

Writ denied.

L. J. Faust, of Los Angeles, for petitioner.

ARCHBALD, Justice pro tem.

Petitioner was tried before a jury and convicted on two counts of forgery. At his request the trial court ordered a reporter's transcript made of the proceedings and the evidence. Petitioner objected to the transcript as filed, claiming that it was incorrect in certain specified particulars, the most important of which was in relation to what transpired when one of the jurors returned to the courtroom after being excused in order to go into the judge's chambers to answer a telephone call. The petition shows that the trial court heard the objections and made certain corrections in the transcript. We are asked by petitioner to compel such court to make a certain correction suggested by him in the objections which he filed and which were heard and determined by the court.

It would seem from an examination of the correction desired with the transcript as it now appears, as shown by the petition, that the court itself made a statement of what occurred which gives a better picture than the suggested correction.

Under section 953a of the Code of Civil Procedure, the trial court is the one to examine such a transcript, and it is its duty to see that the same is a "full, true and fair transcript of the proceedings had at the trial, the testimony offered or taken," etc. The petition before us shows that the trial judge used his judgment in performing that duty, after considering the objections made by petitioner, and it does not show any abuse of such discretion. Nor does it appear from the petition that any substantial right of petitioner would be served by making the desired amendment. If any error was committed by the court, it would seem to be as apparent from the reporter's transcript in its present condition as with the addition of the matter suggested. Under such circumstances the writ should not be granted. Holland v. Superior Court, 169 Cal. 361, 365, 146 P. 878.

Writ denied.

We concur: WORKS, P. J.; STEPHENS J.

131 Cal.App. 185

W. JAY SAYLOR, Limited, v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

Civ. 8952.

District Court of Appeal, Second District, Division 1, California.

April 13, 1933.

Hearing Denied by Supreme Court June 12, 1933.

Appeal and error ⟹460(2).

Plaintiff, who recovered money judgment and procured order requiring defendant to file new appeal bond because one given had become insufficient, was entitled to have execution issue, notwithstanding appeal, without stay bond, from such order (Code Civ. Proc. §§ 942–945, 949, 954).

Writ of Mandate to Superior Court, Los Angeles County; Lester Wm. Roth, Judge.

Petition by W. Jay Saylor, Limited, for writ of mandate to be directed to The Superior Court of the State of California, in and for the County of Los Angeles, to compel the issuance of a writ of execution.

Peremptory writ granted.

George W. Manierre and Frank A. Pettibone, both of Los Angeles, for petitioner.

Everett W. Mattoon, Co. Counsel, of Los Angeles, Beach Vasey, Deputy Co. Counsel, of Long Beach, and Loyd Wright and Charles E. Millikan, both of Los Angeles, for respondents.

CONREY, Presiding Justice.

An appeal from a judgment or order directing the payment of money does not stay execution of the judgment or order unless a written undertaking be executed as required by section 942 of the Code of Civil Procedure. By section 954, Code of Civil Procedure, it is further provided that, "when it is made to appear to the satisfaction of the court or a judge thereof, from which the appeal was taken, that a surety or sureties upon an appeal bond from any cause has or have become insufficient, and the bond or undertaking inadequate as security for the payment of the judgment appealed from," the court may order the giving of a new bond, etc. An appeal may be taken from a superior court, from a final judgment in an action, and from various orders specified in section 963, Code of Civil Procedure, including "any special order made after final judgment." It is further provided by section 949, Code of Civil Procedure, that in cases not provided for in sections 942, 943, 944, and 945, the perfecting of an appeal stays proceedings in the court below upon the judgment or order appealed from; subject to certain discretionary powers and exceptional conditions which are without application to the present proceeding.

The petitioner herein was plaintiff in an action in the Superior Court against one Farmer. A money judgment was entered in favor of the plaintiff. The defendant appealed therefrom and caused to be filed an undertaking to stay execution of the judgment. A corporation known as Benjamin Franklin Bond & Indemnity Corporation was sole surety on the undertaking. Thereafter such proceedings were had that the Superior Court found and determined that the surety had become insufficient, whereupon it was ordered that the defendant be required to file a new undertaking. From this order the defendant gave notice of appeal without filing any further stay bond. Thereupon the Superior Court made an ex parte order that execution "upon the aforesaid order and judgment is hereby stayed," and the execution which the clerk had issued upon the judgment was recalled. Pursuant to notice duly given, the plaintiff made the appropriate motion for an order for the issuance of a new execution unless the defendant should forthwith file a new stay bond. This motion was denied, and the clerk also has refused to issue the demanded execution.

The foregoing facts as shown by the petition for writ of mandate are not denied. There is thus presented the question whether or not, upon the facts thus shown, petitioner is entitled to the writ of mandate commanding the issuance of an execution to enforce the judgment.

The argument in support of the position taken by respondents herein rests upon the assumption that enforcement of the judgment against defendant in the action wou'd be a proceeding upon the order which is the subject of the second appeal. If this contention of respondent be sustained, it will follow that whenever the surety upon an appeal bond is found to be insolvent, an appellant may nevertheless perpetuate the stay pending appeal from the judgment merely by appealing from any order requiring a new bond. Under such an interpretation of the law, he could obtain the benefits of a stay by means of a worthless bond, simply by giving a notice of appeal from the order requiring him to give a better one. We think that this was neither the purpose nor the effect of the statute. The execution when issued will be a step in the enforcement of the judgment. It will not be a proceeding upon the order, although possibly the validity of the execution and of the proceedings thereunder might be affected by the result of the appeal from the order. The plaintiff has the right to take that chance. We therefore are of the opinion that, notwithstanding the fact that there is an appeal from the order, the plaintiff is entitled to the demanded execution for enforcement of the judgment.

Let the peremptory writ issue.

We concur: HOUSER, J.; YORK, J.

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131 Cal.App. 144

FIELD v. HUGHES et al.

Civ. 4772.

District Court of Appeal, Third District, California.

April 10, 1933.

Rehearing Denied May 10, 1933.

1. Appeal and error 🔑786.

Appeal presenting issue whether minor may disaffirm judgment rendered against him, and whether he waived right to disaffirm by permitting judgment to be rendered without informing court of minority, would not be dismissed as frivolous.

2. Infants 🔑115.

Whether minor waived right to disaffirm judgment by permitting judgment to be rendered against him without notifying trial court of minority was question of fact to be determined by record.

3. Infants 🔑78(1).

In action for damages against minor, he must appear by general guardian or by guardian ad litem (Code Civ. Proc. § 372).

4. Infants 🔑87.

Judgment rendered against minor without appearance by guardian is merely voidable.

5. Infants 🔑58(1).

Contract of minor, except for necessaries or for obligation incurred by direct authority of statute, may be disaffirmed by him (Civ. Code, § 35).

6. Infants 🔑87.

Judgment procured against minor without appointment of guardian as provided by statute may be disaffirmed (Civ. Code, § 35).

Appeal from Superior Court, Sacramento County; J. R. Hughes, Judge.

Action by Ralph H. Field against Eugene P. Hughes and Wayne Smythe, a minor. Judgment was rendered for plaintiff, and from an order denying the motion of J. L. Hopkins, who was appointed guardian ad litem subsequent to entry of judgment, for dismissal of judgment as to the minor, the minor defendant appeals, and plaintiff moves to dismiss the appeal.

Motion to dismiss the appeal denied.

See, also (Cal. App.) 16 P.(2d) 160.

Butler, Van Dyke, Desmond & Harris, of Sacramento, Humphrey, Searls, Doyle & MacMillan, of San Francisco, and Thomas B. Leeper, of Sacramento, for appellant.

A. B. Reynolds, Geo. E. McCutchen, and Ralph H. Lewis, all of Sacramento, for respondent.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

The respondent has moved to dismiss the appeal in this case under the provisions of rule V, subdivision 3, of Rules of the Supreme Court and District Courts of Appeal, on the ground that the appeal is frivolous and was taken for the sole purpose of delay.

Wayne Smythe, the appellant, was a minor, twenty years of age. He owned an automobile which was insured by the Farmers' Automobile Interinsurance Exchange, a corporation. On November 3, 1930, this machine was loaned to the codefendant, Eugene P. Hughes. While Hughes was operating the car in Sacramento a collision occurred between this automobile and a machine which was being driven by the respondent, Ralph H. Field. Smythe was not then present. Field sustained personal injuries. Suit for damages was instituted against both Hughes and Smythe. No guardian was appointed to represent the minor in that suit. The attorneys for the insurance company appeared and answered in his behalf. The cause was tried by the superior court of Sacramento county. A joint judgment for the sum of $3,100 was rendered against both defendants on August 17, 1931. The court found that the machine was being operated by the defendant Hughes at the time of the accident "with the permission of the defendant Wayne Smythe, the said owner." Judgment was rendered against Smythe pursuant to the provisions of section 1714¼ of the Civil Code on the ground that the machine was being operated at the time of the accident with the consent of the owner thereof. This judgment has not been satisfied.

Subsequent to the entry of judgment in this case, J. L. Hopkins was appointed guardian ad litem of the said minor Wayne Smythe, on March 29, 1932. On the last-mentioned date, the guardian gave notice to the judgment creditor of the disaffirmance of the judgment by the minor. Upon notice and proceedings duly had, the minor, through his guardian ad litem, moved that court to dismiss the judgment as to the minor on the ground of his disaffirmance thereof. This motion was supported by affidavits of respective parties. The motion was denied. From the order of court denying the motion to dismiss the judgment as to the minor, an appeal was perfected. That appeal is pending and undetermined in this court.

[1, 2] The appeal in this case does not appear to be frivolous. It presents the real issue as to whether a minor may disaffirm a judgment which has been rendered against him. It is contended by the respondent on this motion to dismiss the appeal that the minor waived his right to disaffirm the judgment. The question of this asserted waiver is one of fact which must be determined by the record.

[3-6] In an action for damages against a minor, he must appear by general guardian or by guardian ad litem as provided by section 372 of the Code of Civil Procedure. A judgment which is rendered against a minor, without the appearance by guardian, is not void, but merely voidable. Childs v. Lanterman, 103 Cal. 387, 37 P. 382, 42 Am. St. Rep. 121. The contract of a minor, except for necessaries furnished to him or his family, or for an obligation incurred by direct authority of statute, may be disaffirmed by him. Section 35, Civ. Code. A judgment procured against a minor without the appointment of a guardian as provided by statute may be disaffirmed by him. 14 Cal. Jur. 165, § 52; Gouanillou v. Industrial Acc. Comm., 184 Cal. 418, 193 P. 937, 938; Neilson v. Walker, 105 Cal. App. 23, 286 P. 1091. In the Gouanillou Case, supra, the court said: "The right of a minor to disaffirm an adjudication of his rights by a judicial tribunal obtained in a proceeding in which he has not been duly represented as provided by law continues until barred by laches after the minor has attained the age of majority; the right is not dependent upon statute, but is a general rule of law enforced as a necessary incident to the status of minority. Joyce v. Joyce, 5 Cal. 161; Johnston v. Southern Pac. Co., 150 Cal. 535, 89 P. 348 [11 Ann. Cas. 841]; 22 Cyc. 641, 699." See, also, 31 C. J. 1121, § 266.

The respondent contends that the minor's right to disaffirm the judgment was waived by permitting the judgment to be rendered against him without having notified the trial court of his minority. In support of this assertion, the case of King v. Wilson, 116 Cal. App. 191, 2 P.(2d) 833, is cited as authority. That case is not authority for the assertion that the right to disaffirm may be thus waived. In the King Case, supra, a minor did recover judgment for injuries sustained in an automobile casualty without appearing by guardian. On appeal from that judgment, for the first time, it was claimed the judgment was void on account of the minority of the judgment creditor. The minor did not claim her right to disaffirm the judgment. Upon the contrary she was strenuously asserting her right to sustain the judgment. All that the court decided in that case respecting the claim of appellant is that the failure of a minor to appear in a suit without a guardian is not jurisdictional, and the judgment is therefore not void, but merely voidable. This principle is not questioned in the present case. But the appellant in this case does claim that the minor duly disaffirmed the judgment and that he was therefore entitled to have the judgment dismissed as to him. This the trial court refused to do. From the order denying the motion to dismiss the judgment against the minor, this appeal was taken. The appeal, therefore, appears to present a valid issue.

The respondent also relies upon the case of People v. Luzovich (Cal. App.) 16 P.(2d) 144, 145, to support his contention that the right to disaffirm the judgment was waived. This case is likewise distinguishable from the case at bar. That is a criminal case in which the defendant was convicted of manslaughter for the killing of his father. He was tried in the superior court. On appeal for the first time it was contended the defendant should have been tried in the juvenile court because he was under eighteen years of age. The court said: "It is not a jurisdictional requirement that a minor under eighteen years of age shall be tried in the juvenile court. That privilege is waived by failure to call the age of the minor to the attention of the court."

The question of jurisdiction of the court was the only problem there involved. There was no question of a right to disaffirm a judgment. The right of a minor to disaffirm a judgment under certain circumstances is granted by the provisions of section 35 of the Civil Code. Numerous authorities support this right of a minor to disaffirm a judgment.

The motion to dismiss the appeal is denied.

We concur: PULLEN, P. J.; PLUMMER, J.

131 Cal.App. 197

VAGIM v. HASLETT WAREHOUSE CO.

Civ. 789.

District Court of Appeal, Fourth District, California.

April 13, 1933.

Rehearing Denied May 11, 1933.

Hearing Denied by Supreme Court June 12, 1933.

1. Warehousemen 🔑34(2).

In bailor's action against warehouseman for conversion of prunes, wherein warehouseman's answer denied bailor's title or any right of possession, demand was unnecessary.

2. Warehousemen 🔑25(8).

Warehousemen's statute respecting cases where some one other than depositor claims goods *held* inapplicable, where there was no evidence that any person other than bailor claimed prunes allegedly converted by warehouseman (St. 1909, p. 440, § 18).

3. Warehousemen 🔑34(9).

In action for conversion of prunes, whether relationship of bailor and bailee existed between plaintiff and defendant warehouseman *held* for jury.

4. Trover and conversion 🔑3.

Foundation for action of conversion rests upon unwarranted interference with dominion over property, not upon knowledge or intent of defendant.

5. Warehousemen 🔑34(5).

Where one who has stored goods with warehouseman makes proof of demand and refusal, prima facie case of conversion is made out.

6. Warehousemen 🔑34(5).

On proof that plaintiff stored goods with warehouseman, and of demand and refusal, burden is on warehouseman to account for property; otherwise he is deemed to have converted goods.

7. Warehousemen 🔑34(7).

In bailor's action against warehouseman for conversion of prunes, evidence sustained verdict for bailor.

Appeal from Superior Court, Tulare County; Frank Lamberson, Judge.

Action by J. C. Vagim against Haslett Warehouse Company. From a judgment for plaintiff, defendant appeals.

Affirmed.

Williamson & Wallace, of San Francisco, and Bradley & Bradley, of Visalia, for appellant.

Iener W. Nielsen, of Fresno, and J. A. Chase, of Visalia, for respondent.

CAMPBELL, Justice pro tem.

This is an action in trover to recover damages for the conversion of certain prunes which plaintiff had delivered to defendant's warehouseman for storage in the latter's storehouse in Visalia, Cal. The case was tried before a jury and judgment was returned in favor of plaintiff. Defendant appeals.

The complaint alleges that plaintiff is the owner of certain prunes and entitled to their possession; that he demanded possession thereof from defendant, but that the defendant refused and failed to deliver the prunes; and that the defendant unlawfully converted such personal property to its own use. By its answer appellant denies the respondent's title to the prunes, or any right of possession.

Appellant claims: (1) That it did not permit or commit any act or omission constituting an act of unlawful or tortious dominion over the property claimed by respondent; (2) that the relationship of bailor and bailee did not exist between appellant and respondent; and (3) that appellant's agent had no authority to receive the prunes.

1. The testimony of R. W. Pool, the agent in charge of appellant's warehouse, disposes of most of these contentions. His testimony shows the following facts: That he was employed as a bonded agent of appellant in charge of the warehouse; that he weighed respondent's prunes and put them in bins in the warehouse. Respondent came to the warehouse and he was shown what were purported to be his prunes. He had exclusive charge of the warehouse. Certain of respondent's prunes were placed in two bins. Some time previous to June 9, 1931, "stack cards" were placed against these prunes, showing same as belonging to others than respondent. These "stack cards" were placed on said prunes by the auditor of appellant. Subse-

quently these prunes were shipped from the warehouse by appellant. Mr. Pool, as agent of appellant, kept a record of all prunes coming in and going out of the warehouse, on a daily sheet, which records were made under instructions given by appellant. He forwarded these reports to appellant the latter part of the season. They contained the amount of prunes received every day, the amount put under bond, the ones under warehouse receipts, those which were released each day, and the balance on hand. This record showed the amount of prunes respondent had on hand at the warehouse. These prunes had been delivered by one M. M. Grant for the account of respondent. Appellant had possession of the prunes and Mr. Pool saw Mr. Simas, the auditor of appellant, put tags on some of them which had been referred to as belonging to respondent, and did not inform appellant that they were the prunes of respondent. Mr. Pool kept the records for appellant. These records contained the amount of prunes delivered to appellant by respondent.

There is little conflict in the testimony, and, taken in its entirety, may be summed up as follows: Appellant conducted a warehouse in Visalia known as warehouse No. 93. It held itself out to the public as a warehouseman. Mr. Pool was its agent in charge. It received the prunes of respondent for storage purposes. Its agent kept a record of the amount of prunes delivered by respondent to appellant's warehouse, and these prunes were subsequently converted by appellant to its own use and benefit.

[1] Appellant argues at length that it made no unequivocal denial of respondent's demand for the possession of the prunes which he had delivered to the warehouse. Appellant concedes that prior to the bringing of this action respondent had demanded of the secretary of appellant the prunes which he had delivered to the warehouse, and appellant's secretary acknowledged the same in writing, in the form of a receipt. Appellant also concedes that respondent never received his prunes. By appellant's answer demand was not necessary. Waterhouse-Wilcox Co. v. Betz & Mabrey, 73 Cal. App. 236, 240, 238 P. 763.

[2] Appellant contends that this written receipt did not contain a refusal, qualified or otherwise, and claims the protection of section 18 of the Act of March 19, 1909 (St. 1909, p. 440), relative to warehousemen. This section, however, cannot apply to the instant case, for it provides that "if some one other than the depositor or person claiming under him has a claim to the title or possession of the goods. * * *" There is no evidence in this case that any person other than respondent claimed these prunes. Appellant's auditor placed "stack cards" against the prunes, which appellant or its agent in charge knew belonged to respondent.

[3] 2. The testimony of Mr. Pool disposes of appellant's contention that the relationship of bailor and bailee did not exist between appellant and respondent.

[4-7] 3. Appellant contends that its agent had no authority to receive these prunes, and to substantiate this contention sets forth in its brief a portion of the instruction which it contends its bonded agent should follow. Appellant admits, however, that it received the prunes which were stored in its warehouse by respondent, and that they were subsequently shipped out by appellant to itself and other persons or corporations.

In the case of Poggi v. Scott, 167 Cal. 372, at page 375, 139 P. 815, 816, 51 L. R. A. (N. S.) 925, the court said: "The foundation for the action of conversion rests neither in the knowledge nor the intent of the defendant. It rests upon the unwarranted interference by defendant with the dominion over the property of the plaintiff from which injury to the latter results. Therefore neither good nor bad faith, neither care nor negligence, neither knowledge nor ignorance, are of the gist of the action. 'The plaintiff's right of redress no longer depends upon his showing, in any way, that the defendant did the act in question from wrongful motives, or, generally speaking, even intentionally; and hence the want of such motives, or of intention, is no defense. Nor, indeed, is negligence any necessary part of the case. Here, then, is a class of cases in which the tort consists in the breach of what may be called an absolute duty; the act itself * * * is unlawful and redressable as a tort.' * * * 'Absence of bad faith can never excuse a trespass, though the existence of bad faith may sometimes aggravate it. Every one must be sure of his legal right when he invades the possession of another.'"

In the final analysis we may sum this case up by saying that, when a plaintiff who has stored his goods with a warehouseman makes proof of demand and refusal, a prima facie case of conversion is made out. Upon such proof alone the burden is upon the warehouseman to account for the property. Otherwise he will be deemed to have converted it to his own use. Atwood v. Southern California Ice Co., 63 Cal. App. 343, 218 P. 283. The trial court fairly and fully instructed the jury on all questions of law arising in this case, and the verdict of the jury is fully sustained by the evidence.

The judgment is affirmed.

We concur: BARNARD, P. J.; MARKS, J.

130 Cal.App. 766

WILLIS v. SUPERIOR COURT OF CALIFORNIA IN AND FOR MENDOCINO COUNTY et al.

Civ. 4902.

District Court of Appeal, Third District, California.

April 3, 1933.

Hearing Denied by Supreme Court June 1, 1933.

1. **Costs 🔑132(5).**

Affidavit of minor plaintiff that she was without funds and only person interested in prosecution of action, supported by affidavit of father and guardian ad litem averring that he had no money over $25, required court to grant leave to prosecute action in forma pauperis.

2. **Costs 🔑132(5).**

Conclusions in father's affidavit as to unsuccessful efforts to procure advances from friends *held* not to prevent minor plaintiff from prosecuting action in forma pauperis, where poverty was otherwise shown.

3. **Costs 🔑132(6).**

Affidavit of merits is unnecessary on motion for leave to prosecute action in forma pauperis where action is at issue on merits.

4. **Costs 🔑132(6).**

Filing of pauper's oath by attorney *held* unnecessary on client's application to prosecute action in forma pauperis, where attorney waived any interest theretofore acquired in judgment.

Proceedings by Allo Willis, by A. B. Willis, her guardian ad litem, for a writ of mandate against the Superior Court of California in and for Mendocino County, Hilliard Comstock, Judge, and another.

Writ granted.

See, also, 214 Cal. 603, 7 P.(2d) 303.

Wayne P. Burke, of Ukiah, for petitioner.

Mannon & Brazier, of Ukiah, for respondents.

Mr. Presiding Justice PULLEN delivered the opinion of the Court.

The petitioner, Allo Willis, a minor, by her guardian ad litem, commenced an action in the Superior Court of Mendocino county for personal injuries sustained by her while a passenger in the automobile of the defendant named.

Thereafter petitioner sought leave of the court to further prosecute the action in forma pauperis. From an order denying permission to so prosecute, petitioner, by this writ of mandate, seeks to gain such right. That courts of this state have the power to remit the payment of fees is well established. Martin v. Superior Court, 176 Cal. 289, 168 P. 135, L. R. A. 1918B, 313; Wait v. Superior Court, 35 Cal. App. 330, 169 P. 916; Hammond v. Superior Court, 37 Cal. App. 506, 174 P. 69. In fact, such right is not disputed by the respondents herein, but they base their objection to the granting of the request in this instance in that petitioner herein has not made a sufficient showing of her inability to entitle her to such an order.

[1] The application to the trial court being based entirely upon affidavits, let us examine the facts so presented upon behalf of petitioner in support of the motion.

Allo Willis, the petitioner, sets forth in her affidavit that she is a minor, and that she has no money, property, assets, credit, means, or ability with which to pay the legal fees or charges necessary to further prosecute the action, and by reason of her poverty will be unable to proceed unless permitted to do so in forma pauperis. She also declares that she is the only one interested in the successful prosecution of the action, and no part or interest in any judgment which may be obtained in this proceeding is owned by any one other than herself.

A. B. Willis, in a supporting affidavit, deposes that he is the father of petitioner and her guardian ad litem. That petitioner is less than fifteen years of age and does not own or possess any assets of any kind or character other than the cause of action sued upon. Affiant further avers that he has no money, property, credit, or other means with which to prosecute the action, and is not possessed of any amount in excess of $25; that he has paid all costs of prosecuting this action to date from his own funds; that such funds have been reduced to less than $25, and all of said sum is now necessary to provide food and clothing for his wife and two minor children, who are wholly dependant upon him; furthermore, that he had made every effort to induce friends to advance the sum necessary to pay the legal charges of prosecuting the action, but has failed to induce any one to do so.

[2] While it is true that certain conclusions are set forth in the affidavit of the guardian ad litem, particularly as to the efforts made by him as to the specific efforts he may have made to induce friends to advance the necessary sums, or whom he has approached in an endeavor to obtain such financial assistance, but in the light of the requirements laid down in the leading case of Martin v. Superior Court, supra, there is still sufficient in the affidavit to show his financial inability to assume the costs. As is stated in the case of Fils v. Iberia, etc., Co., 145 La. 544, 82 So. 697, 700, "because friends, or sympathetic or charitable persons, are willing to come to his assistance, rather than

see him deprived of legal recourse, detracts in no way from his poverty within the intendment of the forma pauperis act." (Citing cases).

[3] As a part of the affidavit of petitioner, and also of the guardian ad litem, is an affidavit of merits, but this is not essential where, as here, the action has been brought and is at issue on its merits, and the court can, from an examination of the pleading, determine for itself whether or not a substantial issue is raised.

[4] Wayne P. Burke, the attorney of record for petitioner, avers that he owns no interest in the cause of action, and waives any and all rights which he may have theretofore acquired in any judgment which petitioner might recover in the action, and that he is willing to act as the attorney for the petitioner, but is not willing to advance the legal charges for petitioner to prosecute the action.

It has been held in several states where, as in California, there are no statutes against champerty, that an attorney who represents a client and has an agreement with the client whereby his fee for services is contingent upon the success of the suit, that the attorney's interest in the suit was such that he should be required to give security for costs, or in case he should not do so, should be required to file a pauper's oath as well as the client. U. S. ex rel. T. L. Randolph v. J. W. Ross, District Judge (C. C. A.) 298 F. 64, 33 A. L. R. 728.

That situation is not before us, for we have a waiver by the attorney of any interest he might have theretofore acquired in the action, and inasmuch as his client is a minor, any fee that might be agreed upon must be approved by the court before payment. We do not, therefore, believe that the attorney, under the facts here, must do more than state his unwillingness to become surety for the costs.

In the case of Majors v. Superior Court, 181 Cal. 270, 184 P. 18, 22, 6 A. L. R. 1274, the court said, in passing upon a similar application: "We wish most emphatically to declare our conviction that such discretion should be used with the utmost care, to the end that unworthy persons who are neither indigent nor possessed of substantial rights may not enjoy this privilege." However, weighed even by that strict rule of construction, we must hold that the affidavit and petition of plaintiff and the affidavits in support thereof sufficiently establish the fact that petitioner falls within the scope and intent of the privilege accorded paupers.

Let the writ issue.

We concur: PLUMMER, J.; R. L. THOMPSON, J.

131 Cal.App. 126

NELSON et al. v. NELSON et al.

Civ. 4746.

District Court of Appeal, Third District, California.

April 8, 1933.

Rehearing Denied May 8, 1933.

1. Executors and administrators 🔑391.

Decedent's children and heirs had valid claim against administratrix for liquidated damages under statute then existing for administratrix' fraudulent sale of homestead (Code Civ. Proc. § 1572).

> The facts disclosed that the sale was fictitious and illegal, and that administratrix conspired to fraudulently acquire title to the property for herself after making such fictitious sale at less than its appraised value.

2. Release 🔑17(1).

That one heir deceived other heirs, for whom he acted as agent, regarding release of heirs' interests in decedent's property executed by heirs, would not invalidate release as defense in subsequent suit for liquidated damages against administratrix for fraudulent sale of decedent's realty, in absence of fraud by administratrix in procuring release (Code Civ. Proc. § 1572).

3. Attorney and client 🔑104.

Knowledge of attorney for decedent's heirs of fraudulent probate sale of decedent's realty by administratrix *held* imputable to heirs (Civ. Code, §§ 18, 19, 2332).

4. Estoppel 🔑98(1).

Knowledge of attorney for decedent's heirs of fraudulent sale of decedent's realty by administratrix being imputable to heirs, heirs were estopped from repudiating release of interests in decedent's property executed by them (Civ. Code, §§ 18, 19; Code Civ. Proc. § 1572).

5. Estoppel 🔑98(1).

Knowledge of one heir, who acted as agent for other heirs, concerning administratrix' fraud in sale of decedent's realty, *held* imputable to heirs (Code Civ. Proc. § 1572; Civ. Code, §§ 18, 19, 2332).

6. Release 🔑30.

Release of interests in decedent's estate executed by heirs *held* to waive heirs' claim to liquidated damages for administratrix' fraudulent sale of decedent's realty (Code Civ. Proc. § 1572).

> The instrument involved recited that decedent's children and heirs "do waive, relinquish and disclaim any and all interest in and to the property comprising such estate as the same is to date listed * * *. And in particular * * * all interest in and to the moneys or proper-

ties now in the hands of the administratrix of said estate as originating from or being a part of the aforesaid estate."

7. Evidence 🔑**419(20), 458.**

Oral evidence concerning circumstances under which written release of interest in decedent's estate was executed by heirs *held* admissible to show consideration therefor and to determine application of terms of instrument (Civ. Code, § 1647; Code Civ. Proc. § 1860).

8. Release 🔑**12(3).**

Release of interest in decedent's estate, executed by his heirs to satisfy judgment against one of heirs and third person, *held* supported by adequate consideration.

Appeal from Superior Court, Los Angeles County; Warren V. Tryon, Judge.

Action by Frank Nelson and others against Andrea Nelson and others. From an adverse judgment, plaintiffs appeal.

Affirmed.

Elton W. Stanley and R. D. McLaughlin, both of Los Angeles, for appellants.

Meserve, Mumper, Hughes & Robertson, Earl A. Everett, and Austin & Helmick, all of Los Angeles, for respondents.

Mr. Justice R. L. THOMPSON delivered the opinion of the court.

The plaintiffs brought suit against the administratrix of their father's estate, under the provisions of section 1572 of the Code of Civil Procedure, as it then existed, to recover liquidated damages for the fraudulent sale of a dwelling house belonging to the estate. The court held that the plaintiffs' claim was waived by a subsequent execution of a disclaimer of all interest in the property of the estate. From the judgment, which was accordingly rendered against the plaintiffs, they have appealed.

Thomas E. Nelson died intestate, leaving surviving him his widow, Andrea Nelson, and four children. These children are the appellants herein. Among other properties which were possessed by the deceased at the time of his death, was a dwelling house at No. 1222 Third avenue in Los Angeles, which is involved in this suit. This residence was the separate property of the deceased. Andrea Nelson was his second wife and the stepmother of the appellants. Upon proceedings duly had, she was appointed and qualified as administratrix of the estate of Thomas E. Nelson. The dwelling house was originally appraised at a valuation of $17,500. It was subsequently reappraised for the purpose of sale at $12,500. Upon probate proceedings the administratrix purported to sell the property to a neighbor by the name of Ellen C. Mullia for $11,250. That sale was confirmed by the probate court. In a subsequent settlement of the accounts of the administratrix, she was charged with that sum as the proceeds of said sale.

It appears to be conceded by respective parties that the sale was fictitious and illegal and that the administratrix conspired to fraudulently acquire title to the property for herself. Both the judge of the probate court and the attorney for the estate were ignorant of this fraud at the time the sale was confirmed. In the probate proceedings the plaintiffs were represented by their attorney, Albert Launer. In consultation with their attorney and in the entire probate proceedings the plaintiffs were represented by Edgar M. Nelson as their agent. In a separate suit a joint and several judgment of $4,000 had been rendered against Edgar M. Nelson and one Scouller, which was unpaid.

After confirmation of the sale of the dwelling house in the probate proceeding, the attorney Launer became cognizant of the fraud on the part of the administratrix. He discussed the fraudulent character of the sale with other attorneys who represented the creditors of the estate, and with some of the plaintiffs, including Edgar M. Nelson. They discussed the advisability of bringing suit against the administratrix under the provisions of section 1572 of the Code of Civil Procedure for liquidated damages resulting from the illegal sale. Methods of securing competent evidence to prove the fraudulent conspiracy were considered. It was suggested they might secure evidence from Mrs. Mullia, the purported purchaser of the property, who lived on Third avenue adjacent to the dwelling house which is involved in this suit. There is no evidence she was ever interviewed by the attorney or any of the interested parties. She testified that no one ever inquired of her concerning the transaction. After ascertaining facts from which the attorneys became convinced the sale of real property was fraudulent, no subsequent investigation of the transaction appears to have been conducted. The illegal transaction and the contemplated suit for fraud were often discussed throughout a period of about a year, between some of the appellants and their attorney. Mr. Launer testified in that regard: "I discussed it afterwards with him (Edgar M. Nelson) in my office at Fullerton, at various times. I discussed it on one occasion with Frank Nelson and I believe, on another occasion, Mrs. Dupuy came in." In the meantime an enforcement of the payment of the $4,000 judgment against Edgar M. Nelson and Mr. Scouller was threatened. Edgar told his attorney, Launer, a proposition had been made to him by Clement L. Shinn, a lawyer who represented Gleason, the purchaser and holder of the assigned $4,000 judgment above mentioned, that this judgment would be satisfied on condition that the appellants would execute a waiver of their claim against the administratrix, Andrea Nelson, on account of the alleged fraudulent sale of real property. Mr. Launer testified regarding this document: "I discussed the matter of the disclaimer on several occasions during May and June and up to the signing of it in 1928, with Edgar Nelson. * * * I advised against the signing of the instrument, telling Edgar Nelson that it was extortion. * * * Ed Nelson stated to me, 'I am morally obligated to Scouller, and must save his home.' I told him to go ahead and use the disclaimer if he wanted to, but that I regretted seeing him use it." The attorney said that he thereupon prepared the proposed waiver which was signed by Edgar M. Nelson in his presence. Edgar took the document to his brothers and sister and procured their signatures thereto. They testified they were not informed of the nature or purpose of this document. The court found that no fraud or deceit was exercised in procuring this instrument. Upon satisfaction of the $4,000 judgment, this waiver of claim, which is termed a "disclaimer," was delivered to Mr. Shinn for the benefit of Andrea Nelson. It was tendered as a defense to the present suit for liquidated damages which was subsequently commenced by the appellants. The document was held to be a complete release and waiver of all claim to damages in the present suit. The instrument is in the following language:

"Disclaimer.

"The undersigned being the children of Thomas E. Nelson, deceased, being the lawful heirs of and to any of the estate of said Thomas E. Nelson, deceased, do waive, relinquish and disclaim any and all interest in and to the property comprising such estate as the same is to date listed and being probated in the probate proceeding pending before the Superior Court of the State of California, in and for the County of Los Angeles and in particular we and each of us do relinquish and release and disclaim any and all interest in and to the moneys or properties now in the hands of the administratrix of said estate as originating from or being a part of the aforesaid estate.

"Dated, this 21 day of July, 1928.
"Edgar M. Nelson
"Frank A. Nelson
"Hjalmar N. Nelson
"Evelyn Dupuy"

The court adopted findings to the effect that the probate sale of real property belonging to the estate of Thomas E. Nelson, deceased, was fictitious and fraudulent on the part of the administratrix; that on March 4, 1927, the appellants and their attorney, Albert Launer, obtained information from which they became convinced the sale of real property was illegal and voidable; that subsequently, on July 21, 1928, for a valuable consideration, with full knowledge of the character and effect of the instrument, the appellants executed and delivered, for the benefit of the administratrix, Andrea Nelson, a complete disaffirmance and waiver of their claim to all property of the estate of their father and to damages on account of the alleged fraudulent sale of property belonging thereto; that this waiver constitutes a complete defense to the present action for liquidated damages; and that the plaintiffs should therefore take nothing by this suit. Judgment was thereupon rendered in favor of the defendants. From this judgment the plaintiffs have appealed.

It is contended by the appellants the findings and judgment are not supported by the evidence; that the disclaimer is a mere waiver of claim to property belonging to the estate of Thomas E. Nelson, deceased, and does not constitute a waiver to liquidated damages for the fraudulent sale of real property belonging thereto; that the purported waiver was signed by the plaintiffs without knowledge of its character or the purpose for which it was to be used; that it is invalid and void; and that the court erred in permitting the introduction of oral evidence to prove that the plaintiffs intended by the terms of this disclaimer to waive their claim to liquidated damages on account of the fraudulent sale of the property of said estate.

[1] The evidence is adequate to support the finding of the court to the effect that Andrea Nelson, as the administratrix of the estate of Thomas E. Nelson, did fraudulently sell, in the course of administration, the dwelling house at No. 1222 Third avenue in Los Angeles belonging to the estate of her deceased husband, and that the plaintiffs had an interest therein. It follows that the plaintiffs who possessed an estate of inheritance therein had a valid claim against the administratrix for liquidated damages on account of said fraudulent sale. Section 1572 of the Code of Civil Procedure, which was the law of this state until it was repealed by the legislature in 1931, then provided: "Any executor or administrator who fraudulently sells any real estate of a decedent contrary to or otherwise than under the provisions of this chapter, is liable in double the value of the land sold, as liquidated damages, to be recovered in an action by the person having an estate of inheritance therein."

[2] The evidence shows that more than a year prior to the execution of the waiver of claim, the attorney for plaintiffs who represented them in the probate proceeding, was possessed of facts satisfying him that the administratrix was guilty of fraud in the pretended sale of the homestead; that he repeatedly discussed this matter with Edgar

M. Nelson and with one or more of the other plaintiffs. The evidence conclusively shows that plaintiffs' attorney was possessed of sufficient proof of fraud with relation to the probate sale to place a prudent person on inquiry regarding the nature of the transaction, and that no adequate investigation was made, notwithstanding the fact that the purported purchaser of the property, Ellen C. Mullia, resided near the property and might have been easily interviewed. The evidence also satisfactorily shows that Edgar M. Nelson acted as the agent for his brothers and sister in the transaction of procuring the execution of the release. They signed the release with at least imputed knowledge of the entire transaction, and may not now complain of the result. Indeed, it was prepared by their attorney at Edgar's request for the selfish purpose of satisfying the $4,000 judgment against himself and to protect his friend Scouller. If Edgar deceived his brothers and sister regarding this release, he may be liable to them for damages in a proper proceeding. Since he appeared as their agent in this transaction, and the respondents were guilty of no fraud in procuring the release, his deceit would not invalidate the instrument as a defense to the present suit for liquidated damages. There is sufficient evidence to support the finding of the court that, "It is not true that said Andrea Nelson obtained said disclaimer through any fraud, misrepresentation or deceit on her part."

[3, 4] Moreover, the knowledge on the part of their attorney of this fraudulent probate sale will also be imputed to the appellants and bind them in the present case. It must be assumed they deliberately released the administratrix from liability for her fraud, with full knowledge of the entire transaction on their part. They are, therefore, estopped from repudiating the release in the present action.

Notice of the existence of fraud may be either actual or constructive. Section 18, Civ. Code; 26 C. J. 1136, § 56. Section 19 of the Civil Code provides that: "Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, has constructive notice of the fact itself in all cases in which, by prosecuting such inquiry, he might have learned such fact."

The agency of both Edgar and their attorney is sufficiently established so as to bind the appellants by the terms of their release of liability of the administratrix for fraud in the sale of the property belonging to their father's estate. There can be no doubt the attorney Launer was the agent of the heirs whom he represented in the probate proceedings requiring him to communicate to them any information which he possessed affecting their interest in the property in which they had an estate of inheritance. As their agent, his knowledge of the fraud would be imputed to them. In 3 California Jurisprudence 611, § 25, it is said in this regard: "By application of the general rule that the knowledge of an agent is imputed to his principal. there follows the special doctrine that the knowledge of an attorney is imputed to his client. This rule rests on the presumption that the attorney will discharge his duty to his principal by communicating all facts connected with the subject matter of his agency. As against third persons, however, this presumption is conclusive, although the attorney has in fact not communicated his information to his client."

The foregoing text is supported by many applicable California authorities. The court says in the case of Atkinson v. Foote, 44 Cal. App. 149, 165, 186 P. 831, 838: "An attorney at law, when acting as such for his client, is an agent, and the rule that notice to an agent is constructive notice to the principal is applicable to an attorney or counsel when acting for another in a particular matter or generally in the affairs of the latter. Watson v. Sutro, 86 Cal. 500, 517, 24 P. 172, 25 P. 64."

In approval of the preceding principle imputing knowledge of an attorney to his client in matters affecting the subject of his employment, section 2332 of the Civil Code provides: "As against a principal, both principal and agent are deemed to have notice of whatever either has notice of, and ought, in good faith and the exercise of ordinary care and diligence, to communicate to the other."

In the case of Bogart v. George K. Porter Company, 193 Cal. 197, 209, 223 P. 959, 964, 31 A. L. R. 1045, knowledge on the part of an attorney of the adoption of a resolution of a corporation imposing a liability was imputed to his client in a suit upon a promissory note so as to bind her. The court there declares: "He was acting as Mrs. Bogart's attorney; * * * as such attorney he was in charge * * * of all proceedings; * * * he acquired full knowledge of the existence of the resolution. * * * 'Knowledge possessed by an agent while he occupies that relation and is executing the authority conferred upon him, as to matters within the scope of his authority, is notice to his principal.'"

[5] Upon the same principle, the knowledge of Edgar M. Nelson, concerning the existence of the administratrix' fraud in the sale of the home property, will be imputed to the other heirs. He acted as their agent in procuring not only the release but also in the affairs of the estate. He procured their signatures to various documents which were filed in the probate proceedings. In behalf of the heirs, he usually conferred with their attorney regarding the affairs of the estate.

We must therefore assume the appellants were possessed of, at least, constructive notice of the administratrix' fraud, together with knowledge of the purpose and effect of the release which they signed.

[6] The appellants contend the language of the release purports to waive only their interest in such property of the estate as was actually listed at the date of the execution of the disclaimer. Upon the contrary, it is asserted they did not waive their claim to liquidated damages arising by virtue of the fraudulent sale of property. We think a reasonable interpretation of the document does not bear this construction. The instrument provides that the appellants, as the children and heirs of Thomas E. Nelson, deceased, "do waive, relinquish and disclaim any and all interest in and to the property comprising such estate *as the same is to date listed.* * * * And in particular * * * (as to) all interest in and to the moneys or properties now in the hands of the administratrix of said estate as originating from or being a part of the aforesaid estate." A reasonable construction of this language impels the conclusion that the plaintiffs intended to thereby waive their claims to all of their interest in property which had been listed as belonging to the estate during the probate proceedings prior to the date of that instrument, which was July 21, 1928. It is conceded that the dwelling house, at No. 1222 Third avenue in Los Angeles, was theretofore listed and appraised as property of the estate. The theory of a fraudulent sale would leave the inference that the sale was void and that the property still belongs to the estate. This, however, is not asserted. When the heirs further specifically waived "all interest in and to the moneys * * * as originating from or being a part of the aforesaid estate," it appears clear they had in mind the very proceeds of the sale of real property which is involved in this suit. There is no evidence that any other property of the estate was sold by the administratrix during the probate proceedings. If there is any ambiguity regarding the application of this language that uncertainty was removed by the frank and unequivocal testimony of their attorney, Albert Launer. He recited circumstances and the essence of conferences with Edgar M. Nelson and at least one of the other heirs, which leaves no doubt they intended by the terms of this release to waive their claim for liquidated damages on account of the fraudulent sale of real property by the administratrix. From the testimony of the attorney it is impossible to escape from this conclusion.

[7] But the appellants insist it was error for the court to permit the introduction of oral evidence to establish the intent of the parties with respect to the disclaimer. The circumstances surrounding the execution of this instrument were admitted in evidence without objection. We are of the opinion this evidence, concerning the surrounding circumstances under which the instrument was executed, was properly admitted to show the consideration for which the release was executed and to determine the application of the terms of the instrument.

The competency of oral evidence to ascertain the intention of the parties in executing a written instrument is upheld by the text which is found in 6 California Jurisprudence, 294, § 180, in the following language: "The rule that the intention of parties is to be ascertained from the writing alone, where a contract is reduced to writing, is subject to other rules of interpretation. A court is not only to take a contract by all its corners, but it is to be placed in the seats of the parties when it was made. In other words, a contract is to be construed in the light and with the knowledge of surrounding circumstances. Section 1647 of the Civil Code provides that, 'A contract may be explained by reference to the circumstances under which it was made and the matter to which it relates.'"

A host of California authorities supports the foregoing declaration of law. There appears to be no doubt this principle is applicable to the facts of the present case. Section 1860 of the Code of Civil Procedure announces the same principle when it declares that: "For the proper construction of an instrument, the circumstances under which it was made, including the situation of the subject of the instrument, and of the parties to it, may also be shown, so that the judge be placed in the position of those whose language he is to interpret."

[8] It will be observed the written disclaimer fails to recite the consideration for which the document was executed. Oral evidence was necessary to ascertain the consideration for which it was given, so as to determine its validity. It appears that one of the heirs, Edgar M. Nelson, had a selfish motive in procuring the release. He and his friend, Scouller, were thereby relieved from the obligation of the $4,000 judgment. This furnishes adequate consideration for the execution of the instrument. In support of the competency of oral evidence to show the consideration for which a written instrument is executed, the court said in the case of Merced Oil Mining Co. v. Patterson, 153 Cal. 624, 628, 96 P. 90, 92: "As parol evidence is always received to show the true consideration of a contract, this part of the consideration may rest upon an oral agreement of the parties, and need not, therefore, be embodied in the deed."

This principle is too well established to require further authority.

The judgment is affirmed.

We concur: PULLEN, P. J.; PLUMMER, J.

131 Cal.App. 95

AITKEN v. SOUTHWEST FINANCE CORPORATION OF CALIFORNIA.

Civ. 4747.

District Court of Appeal, Third District, California.

April 7, 1933.

1. Usury 🔑130.

Purchaser who agreed to pay $4,400 mortgage against steam shovel as part of purchase price of steam shovel and other property cannot complain of usuriousness of transaction between mortgagor and mortgagee (Usury Law [St. 1919, p. lxxxiii]).

2. Usury 🔑130.

Chattel mortgagee's exaction, as condition of forbearance to foreclose, of payment of other notes held by him of corporation whose property had been purchased by mortgagor *held* not usurious, where mortgagor had assumed corporation's liabilities and would receive credit for payment on purchase price (Usury Law [St. 1919, p. lxxxiii]).

3. Pleading 🔑8(2).

Conclusion of pleader that notes had no value cannot be considered as against specific allegation of fact showing full value to pleader who assumed corporation's indebtedness, and upon payment of notes would receive credit on purchase price.

4. Usury 🔑6.

Purpose of Usury Law was to protect an indigent or oppressed debtor, and law applies to extension and forbearance as well as to original loan (Usury Law [St. 1919, p. lxxxiii]).

5. Usury 🔑6.

Usury laws were not intended as means to promote fraud (Usury Law [St. 1919, p. lxxxiii]).

6. Pleading 🔑34(4).

On demurrer, complaint must be construed most strongly against plaintiff.

7. Pleading 🔑192(2), 225(1).

Court must consider special demurrer for uncertainty, unintelligibility, and ambiguity, and, if well taken, sustain demurrer with leave to amend.

8. Pleading 🔑229.

Fair presumption exists that no clear cause of action can be stated where after three attempts complaint remains uncertain.

9. Appeal and error 🔑236(2).

Failure to permit amendment is not abuse of discretion, where record discloses no request therefor.

10. Pleading 🔑229.

Denying leave to amend *held* not abuse of discretion, where, after three attempts, complaint remained demurrable for uncertainty, unintelligibility, and ambiguity.

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Action by Frank W. Aitken against the Southwest Finance Corporation of California. From judgment of dismissal, plaintiff appeals.

Affirmed.

Black, Hammack & Black, of Los Angeles (Carey McWilliams, of Los Angeles, of counsel), for appellant.

Aitken & Aitken, of San Francisco, for respondent.

PARKER, Justice pro tem., delivered the opinion of the court.

The court below sustained defendant's demurrer to plaintiff's second amended complaint, without leave to amend, and thereafter entered a judgment of dismissal. Plaintiff appeals, and the sole question is as to the sufficiency of the complaint.

Preliminarily it may be noted that the demurrer was both general and special; it may be further noted that no serious contention is made on the point that the court did not permit plaintiff to further amend.

Appellant states in his brief that the action was brought for the recovery of interest and penalties under the Usury Law (St. 1919, p. lxxxiii); recovery of money paid under duress; recovery of damages for fraud. We note this statement merely as indicative of appellant's own idea of his cause of action.

We will summarize and analyze the pleading before us, and in so doing will employ the less confusing form of narrative. The complaint was filed December 15, 1928. A certain corporation called the Rock Company was in existence during all of the year 1926, and during all of April of that year Mr. Davison was the vice president and a director of said corporation.

On April 9, 1926, plaintiff agreed with the Rock Company to purchase all of its property for the sum of $100,000. The terms of purchase contemplated installment payments covering a period of years. As a part of the purchase price plaintiff was to pay certain liabilities of the company, after deduction of any proper offsets then known or thereafter discovered. The property purchased included a gasoline shovel. As a part of the transaction it was agreed that the Rock Company would obtain for its own benefit, a loan of not more than $4,400, and give its note therefor payable in not less than 10 equal monthly installments, with interest at 8 per cent. per annum, and that said company would give a chattel mortgage on said shovel as security for the payment of the note. It was agreed that plaintiff would take title to said shovel subject to said mortgage, and pay said sum of principal and interest secured thereby.

It is here that defendant first comes into the pleading. Davison, vice president of the Rock Company as aforesaid, applied to defendant for the mortgage loan. This mortgage transaction was consummated. The Rock Company executed a note for $4,400, payable to Davison, and executed the chattel mortgage securing said note. The note was indorsed over to defendant and the chattel mortgage assigned to defendant.

Plaintiff is informed and believes that the agreement between defendant and the Rock Company was and is that defendant advance to Rock Company only $4,000, and that therefore the note and mortgage evidencing a promise to pay back $4,400, with interest at 8 per cent. per annum, are tainted with usury.

The note and mortgage were executed in contemplation of the sale of the shovel to plaintiff and with the knowledge of all parties, including defendant, that the payments to be made on the note were to be made by plaintiff only. Defendant has full knowledge of the situation and of plaintiff's agreement of purchase and the terms thereof.

The defendant actually loaned to said company the sum of $2,000 up to July 12, 1926. On April 30, 1926, plaintiff, under his agreement of purchase, received from the Rock Company, a bill of sale of the shovel, and ever since said time plaintiff has been the owner thereof subject to the lien of said chattel mortgage.

At the time of the agreement there were listed among the liabilities of the Rock Company certain notes executed by the company to Fewel-Webb Company, a corporation, in the sum of $7,242.74 with interest, on which notes the Rock Company was then indebted in a sum not exceeding $6,000. Prior to June 26, 1926, these notes had been assigned and indorsed by payee corporation to defendant, and indorsed and guaranteed by certain named stockholders of the said corporation, and thereafter defendant was the owner of the notes.

On or about June 26, 1926, the defendant notified plaintiff and the Rock Company that default had been made in the payments under the note secured by chattel mortgage (hereinbefore mentioned as being secured by the shovel), and defendant elected to declare the entire amount of said note due and payable immediately, as per the terms of the note, providing for an accelerated due date. No default had been made in any payment required by said note as defendant had in its possession the sum of $2,000, which it was then holding for the account of said Rock Company, and which was applicable on the note.

Thereupon and thereafter defendant threatened to foreclose said mortgage at once, by summary sale of the shovel. Through this threat of sale, and as a condition of forbearance from foreclosure and by agreeing to accept further payments, the defendant compelled plaintiff to agree to purchase the Fewel-Webb notes hereinbefore mentioned, and compelled plaintiff to agree to purchase from defendant another note made by Fewel-Webb Company, in favor of defendant, on which latter note neither the Rock Company nor plaintiff were parties or at all liable.

On July 12, 1926, plaintiff entered into an agreement with defendant, called the note purchase contract, by the terms of which plaintiff agreed to purchase said notes for the sum of $8,013, to be paid in monthly installments. That on this date plaintiff paid to defendant the sum of $2,000 as the first payment on account of said purchase, and defendant advanced to the Rock Company the $2,000 balance due on the loan secured by the chattel mortgage on the shovel.

Upon the making of the note purchase contract, defendant agreed to forbear foreclosure of the chattel mortgage on condition that the payments required by said note purchase agreement were made promptly as they became due.

Plaintiff's agreement to purchase the notes was a part of the transaction by which defendant pretended to relieve plaintiff from the claimed default and agreed to forbear foreclosure. The notes of Rock Company to Fewel-Webb Company were executed under an agreement with the payee by the terms of which the amount of said notes was subject to an adjustment so that the Rock Company's liability would not exceed $5,900. That on July 12, 1926, the date of the note purchase contract, the Rock Company claimed offsets against the payee in a sum in excess of $6,000. Plaintiff was not at any time a stockholder in the Rock Company, nor was he a party to the notes. Plaintiff is informed and believes that defendant knew these facts, and knew that plaintiff was under no liability with respect to the notes.

That the notes were of a reasonable value of not over $6,000, if of any value at all, though plaintiff's information and belief is that the notes were of no value at all, and in this connection plaintiff states that these notes were of no value to plaintiff except for future use as an offset or credit in his agreement with the Rock Company, whereby he assumed liability for the company's debts, the discharge of which would be credited against the purchase price; however, plaintiff has information and belief that the Rock Company had no liability at all on said notes, and therefore no offset could accrue.

The notes, according to plaintiff's information and belief, were of no value to any other person or for any other person. All of the makers and indorsers were wholly insolvent. The Fewel-Webb Company in assigning the notes had given a creditor's preference to defendant in fraud of said Fewel-Webb's creditors.

Defendant knew the value of the notes and knew that said notes had no value, yet required plaintiff to purchase them for the purpose and with the intent to receive and take from plaintiff an additional bonus or payment on the mortgage loan in an amount exceeding the amount allowed by the Usury Law, and thereby evade said law.

Plaintiff would not have bought the notes save to protect against the foreclosure, and he was compelled to enter into the note purchase agreement to protect himself against such a proceeding, due to the fact that plaintiff was unable to pay off the mortgage debt.

Plaintiff has paid to defendant and caused to be paid on account of principal and interest the sum of $9,400. Plaintiff is informed and believes that the amount of $9,212.14 thus paid has been applied as follows: $1,700.60 on account of principal of mortgage note; $6,334.51 on account of principal of note purchase contract; $605.21 on account of interest on mortgage note; $571.79 on account of interest of note purchase agreement.

The sum paid on the notes is in excess of the reasonable value of said notes, and that the entire sum paid thereon was paid on notes of absolutely no value.

Within a year past plaintiff paid to defendant $523.93 as interest on mortgage note purchase contract, and the further sum of $325.73 as payment of principal on note purchase contract.

The plaintiff claims the interest payments in said mortgage note is and was usurious.

On January 24, 1928, plaintiff paid the sum of $950 on account of the mortgage note and note purchase contract, of which $247.03 was applied as interest on mortgage note for a period of nine months.

On March 2, 1928, plaintiff paid the sum of $374.19 on account of mortgage note and note purchase contract, of which $25 was applied as interest on mortgage note.

Plaintiff seeks judgment for three times the total of said interest payments, and claims that by the application of the sums heretofore paid the entire obligation will be discharged.

Defendant threatens to foreclose the mortgage unless restrained, and will sell the shovel at auction to the irreparable loss and damage of plaintiff. An accounting is necessary. In the note purchase contract it was agreed that defendant should retain title and possession of the notes, and it was also provided that any payments made by the makers of said notes would be held by defendant and credited on the note purchase contract. Plaintiff does not know if any payments have been made, and an accounting is necessary to ascertain such fact.

The defendant, fully advised of the worthlessness of the notes sold, compelled plaintiff to purchase with the intent to exact the amount of $8,013 for its forbearance in foreclosing the chattel mortgage.

The original agreement between plaintiff and the Rock Company involved the purchase of a rock, sand, and gravel deposit with the equipment. That the shovel was necessary to operate the plant, and if that was gone plaintiff had no money with which to buy another, and the business would end, and plaintiff suffer great loss. The only way plaintiff could prevent the foreclosure was by agreeing to any proposition offered him by defendant.

Defendant represented to plaintiff that the Fewel-Webb Company, payee and indorser, as well as the other indorsers of the purchased notes, were responsible, which representation was untrue and known by defendant to be untrue, and made for the purpose of inducing plaintiff to purchase the notes. No part of the claim of plaintiff has been paid.

The prayer of plaintiff is that the note and mortgage transaction be declared usurious; that defendant be required to account; and that injunction issue against the sale of the shovel. That defendant be required to account, and that plaintiff have judgment as provided in the Usury Act. Incidentally plaintiff asks $25,000 exemplary damages.

We have thus detailed the complaint for the reason that excerpts taken therefrom might not sufficiently disclose the nature of the pleading. We have omitted, however, the epithets usually abundant in similar cases; naturally there is a generous sprinkling of "wrongfully," "maliciously," "fraudulently," and kindred adjectives and adverbs.

We agree with the judgment of the court below. The complaint does not state a cause of action in favor of plaintiff and against defendant. A fair reading of the complaint will center the controversy around the chattel mortgage transaction in the first instance.

[1] It is clear that plaintiff's agreement provided that he should buy the shovel subject to a chattel mortgage for $4,400 and that this amount should be credited as against the purchase price. In other words, his agreement was to pay $100,000 for the entire property; he takes the shovel subject to a $4,400 chattel mortgage, and his debt to the Rock Company is thereby reduced by that amount. In no way does he suffer, even though he does pay off the mortgage loan.

The rule is stated in 27 Ruling Case Law, 288, as follows: "A vendee who as a part of the purchase price assumes and agrees to pay a mortgage on the property sold is estopped from asserting that the obligation secured thereby is usurious. He is not borrowing money * * * is not a needy debtor oppressed by demands difficult to meet and which harass him beyond the stage where prudence and sound judgment guide his conduct. On the contrary he has an amount of money to invest with a surplus he desires to use. He is perfectly free."

Abundant authority supports the rule: Matthews v. Ormerd, 140 Cal. 578, 74 P. 136; Esposti v. Rivers Brothers, Inc., 207 Cal. 570, 279 P. 423; Zimmerman v. Boyd, 97 Cal. App. 406, 275 P. 509; Ames v. Occidental Life Insurance Co., 210 Cal. 271, 291 P. 182.

In Lee v. Stiger, 30 N. J. Eq. 610, the court says: "The reason of the rule is obvious. The statute against usury is designed to give protection to the borrower against the greed of the lender, and not to afford any mere adventurer who may happen to slip into the seat of the borrower, a right to speculate on a violation of law which has done him no harm, and caused him no loss."

[2] The subsequent transactions involving the so-called note purchase contract add but little to the cause of action attempted to be stated. These notes were liabilities of the Rock Company, and if paid by plaintiff would offset his obligation under the original purchase plan. It may be noted that the original contract of purchase is not attacked in any way, and no relief sought thereunder. This complaint concedes this value in the notes though incidentally claiming some "adjustments" due to fix the complete liability of the maker.

The notes in the hands of defendant represented a liability which plaintiff had assumed. Plaintiff was specifically liable to defendant on the chattel mortgage loan, and the security therefor was in his possession. Nothing unjust or inequitable results from defendant insisting or urging a liquidation of the notes as a condition of forbearance.

The balance of the chattel mortgage loan retained by defendant was for the use and benefit of the Rock Company, and could not be applied to discharge the mortgage debt of plaintiff. The complaint would advance the argument that if A has a chattel mortgage on the goods of B in the amount of $4,000, and in truth and in fact A has advanced but $2,000 thereon, then the balance of $2,000 could be applied to cancel the $2,000 advanced. Not a sound contention. Appellant argues that the requirement and demand of defendant that plaintiff purchase the notes was within the Usury Act, inasmuch as it exacted an exorbitant price as a condition of extending time.

[3] The first answer would be that to plaintiff the notes were of their face value as medium of offset on the original purchase price. The mere conclusion of the pleader that the notes had no value cannot be considered as against a specific allegation of fact showing full value to the one seeking relief.

Under the original contract of purchase, plaintiff assumed the liabilities of the Rock Company, liquidation of which would be credited on the purchase price. Therefore, if defendant exacted a discharge of the Rock Company's notes held by defendant, it did no more than enforce a lawful demand. There can be nothing of usury in such an act. Whatever may have been the necessities of plaintiff, they were created by his own contract free from fraud or duress.

We know of no rule of law which compels a creditor to forbear enforcement of one unpaid debt merely because the same debtor is obligated to him upon another account. We might concede the law to be that a contract for the extension or renewal of a valid obligation at an illegal rate of interest is usurious in as far as such renewal or extension is concerned, 39 Cyc. 993, or, as stated in Cobb v. Morgan, 83 N. C. 211, where the payee of a note, which was good as it originated, makes a special contract, for a usurious rate, afterward, to forbear enforcing payment, this is a special contract of forbearance which is usurious.

[4, 5] Plaintiff was in no sense a party to the mortgage loan. The purchase contract authorized the Rock Company to borrow $4,400 for its own benefit and mortgage the shovel that plaintiff was to purchase and hold subject to such mortgage. It seems clear that if under these circumstances the shovel had been destroyed, the plaintiff would have had no liability excepting as, perhaps, he might assume as an offset against the purchase price as per the agreement between himself and Rock Company. Recognizing the intent of the laws relating to usury, it can readily be seen that the purpose thereof was to protect an indigent or oppressed debtor, and that such laws could and do have application on extensions and forbearance as well as on the original loan. But the usury laws were never intended as means to promote fraud or as a cloak for the schemer.

[6] Plaintiff here sets up that he purchased for $9,000 notes worth nothing to secure an extension on a $4,000 loan. In other words, he gave $9,000 to keep from paying $4,000, which latter amount was secured by property worth not less than $10,000. But his same complaint sets up that he received or would receive a credit on his own liabilities for the full amount paid for the notes. The notes, if taken during the period of negotiability, were not subject to latent claims of the maker, and, reading the complaint most strongly against the pleader, we assume such to be the case.

Likewise it appears that the plaintiff was in possession, under a contract of sale, of all the property of the Rock Company, which contract of sale, covering all of the assets of the said Rock Company, left the latter insolvent. Plaintiff was using the shovel, which was therefore constantly diminishing the value of the security. Defendant's demands against the Rock Company could be satisfied only out of the company's assets, which plaintiff held under a liability to liquidate the said demands at least in as far as the sale price would allow. Under these circumstances there was nothing usurious or oppressive in defendant demanding some security or assurance as to the payment on the unsecured notes before agreeing to forbearance.

At no stage of the proceedings, to repeat, did the relationship of borrower and lender exist between the parties. And in concluding this phase of the case we may note that the duress or hardship alleged by plaintiff as to his compulsion in agreeing to purchase the notes is "that he could not prudently refuse."

[7] Defendant had additional grounds of demurrer; namely, uncertainty, unintelligibility, and ambiguity. There were some fourteen specifications thereof. Without again analyzing the complaint, we find the specifications to have been well taken. As these are made grounds of demurrer, a trial court must consider them, and, if well taken, sustain the demurrer. The rule is that where a demurrer is sustained on these special grounds, the court should allow leave to amend.

[8] Yet after three attempts, and the pleading remains uncertain, it is a fair presumption that no clear cause of action can be stated. Consolidated Con. Co. v. McConnell, 40 Cal. App. 446, 180 P. 842.

[9] The record before us discloses no request for leave to amend, so therefore no abuse of discretion is presented. Morrison v. Land, 169 Cal. 590, 147 P. 259.

Just as an instance of uncertainty the allegations of the complaint are that plaintiff assumed "certain liabilities." Defendant was entitled to know whether the notes sold were among the liabilities assumed. And further, the allegations that if the notes sold had "any value at all," it would be by means of plaintiff's claim of set-off on the purchase.

And so on throughout a voluminous complaint we find jumbling of facts; one paragraph qualifying and challenging another to the end that the action of the trial court could not have been otherwise on the special demurrer.

The original complaint was filed in December, 1928; the second amended complaint in March of 1930, and the matter had been argued and reargued on motions and on demurrer.

The appellant, in reference to the special demurrer, seems to ignore the merit thereof, but contents himself with the statement that, regardless of the correctness of the trial court's holding, the court was not justified in sustaining the demurrer on those grounds without leave to amend. This is not an arbitrary rule. Where, as here, many allegations are set forth on the pleader's information and belief only, there must come a time when both the court and defendant may insist upon certainty sufficient to demand reply and frame an issue.

[10] When the uncertainty, etc., is three times pointed out and is of such a character as would leave any issue joined one of pure conjecture, the abuse of discretion is not apparent in denying leave to amend.

We are of the opinion that the complaint was subject to both general and special demurrer, and therefore the judgment is affirmed.

We concur: PLUMMER, Acting P. J.; R. L. THOMPSON, J.

TRAVELERS' INS. CO. OF HARTFORD, CONN., v. FANCHER et al. *

Civ. 8595.

District Court of Appeal, First District,
Division 1, California.
April 8, 1933.

Hearing Granted by Supreme Court May 29, 1933.

1. Husband and wife 🔑249.

Where premiums of policy issued on life of husband after coverture are paid entirely from community funds, policy becomes community asset.

2. Insurance 🔑586.

Designation of beneficiary in life policy initiates in beneficiary's favor an inchoate gift of policy proceeds, which, if not revoked by insured prior to death, vests in beneficiary at time of insured's death.

3. Husband and wife 🔑265.

Husband may not make gift of entire community property without wife's written consent.

4. Husband and wife 🔑265.

If husband makes gift of entire community property without wife's written consent, entire gift is not a nullity, but is subject only to wife's right to have it revoked as to half to which she would be entitled upon his death, and as to remaining half, gift is valid.

🔑For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

*For subsequent opinion see 26 P.2d 482.

5. Husband and wife ⚷273(1).

One-half of proceeds of policy issued on life of husband who died intestate, premiums for which were paid out of community assets, *held* payable to widow in her own right and not as administratrix; other half being payable to children who were named as beneficiaries (Civ. Code, § 1401, as amended by St. 1923, p. 29, § 1).

> Civ. Code, § 1401, as amended by St. 1923, p. 29, § 1, provides that upon the death of either husband or wife, one half of the community property belongs to the surviving spouse; the other half is subject to the testamentary disposition of the decedent and, in the absence thereof, goes to the surviving spouse.

Appeal from Superior Court, Alameda County; Frank M. Ogden, Judge.

Action in interpleader to determine title to proceeds of life insurance policies, by the Travelers' Insurance Company of Hartford, Connecticut, against Dorothy H. Fancher, individually and as administratrix of the estate of Charles R. Fancher, deceased, and others. From the judgment, named defendant appeals.

Judgment modified and, as modified, affirmed.

John S. De Lancey, of Oakland, for appellant.

Probasco & McClean, of Oakland, for respondents.

L. R. Weinmann and W. E. Licking, both of Oakland, amici curiæ for respondents.

KNIGHT, Justice.

Charles R. Fancher and appellant were married during the year 1918, and lived together thereafter until June 25, 1931, at which time Fancher died intestate, leaving surviving him as heirs at law appellant and two minor children, aged ten and twelve years, respectively. During the marriage and between April, 1925, and April, 1929, inclusive, on Fancher's application, the plaintiff insurance company issued to him five policies of life insurance, aggregating $48,000, wherein he designated the children as beneficiaries. All of the premiums were paid out of community assets, and for that reason upon Fancher's death conflicting claims arose between appellant and the guardian of the children as to the proceeds of said policies; each claiming the full amount thereof. Thereupon the insurance company instituted this action in interpleader to have the rights of the respective claimants judicially determined. In deciding the matter the trial court followed the decision rendered in New York Life Ins. Co. v. Bank of Italy, 60 Cal. App. 602, 214 P. 61, holding that inasmuch as the policies were paid for out of community funds they constituted community assets, and that therefore the widow was entitled to one-half of the proceeds thereof as her share of said community assets, and that the children were entitled to the remaining half as beneficiaries named in said policies. The widow has appealed, contending that the rule of the New York Life Ins. Co. Case, supra, awarding the widow only half the proceeds of the policy was in effect nullified by the amendment of 1923 to section 1401 of the Civil Code (which, in 1931, with slight changes, was superseded by section 201 of the Probate Code); and that under the provisions of said amended section she is entitled to the entire proceeds of the policies regardless of the fact that the children were named therein as beneficiaries. We are unable to sustain such contention.

[1-4] As shown by a number of later cases, among them being Union Mutual Life Ins. Co. v. Broderick, 196 Cal. 497, 238 P. 1034, and Blethen v. Pacific Mutual Life Ins. Co., 198 Cal. 91, 243 P. 431, the doctrine of the New York Life Ins. Co. Case, supra, is based on the following legal propositions: First, where premiums of an insurance policy issued on the life of the husband after coverture are paid entirely from community funds, the policy becomes a community asset. Second, the designation of a beneficiary in a policy of life insurance initiates in favor of the beneficiary an inchoate gift of the proceeds of the policy, which, if not revoked by the insured prior to his death, vests in the beneficiary at the time of his death. Third, the husband may not make a gift of the entire community property without the written consent of the wife; but if he attempts so to do, in contravention of the wife's rights (as in the case of a life insurance policy, by naming a third party as beneficiary) the entire gift is not a nullity; it is subject only to the wife's right to have it revoked as to the half to which she would be entitled upon his death; and as to the remaining half, the gift is valid and immune from attack by the surviving wife or by those who under the law of succession would inherit the husband's share in case he made no disposition thereof up to the time of his death. Spreckels v. Spreckels, 172 Cal. 775, 158 P. 537, and Dargie v. Patterson, 176 Cal. 714, 169 P. 360.

[5] Section 1401 of the Civil Code, as amended in 1923 (St. 1923, p. 29, § 1), relied upon by appellant, read as follows: "Upon the death of either husband or wife, one-half of the community property belongs to the surviving spouse; the other half is subject to the testamentary disposition of the decedent, and in the absence thereof goes to the surviving spouse. * * *" As appears from the decisions construing said amended section,

two changes were brought about thereby: First, the wife was given the right, equal with that of the husband, to make testamentary disposition of the one-half of the community property to which she would be entitled if she survived the husband, a right which she did not before possess; and, secondly, it changed the rule of inheritance by substituting the surviving wife for the husband's descendants as successor to his half of the community property in case he made no disposition thereof up to the time of his death. Estate of Phillips, 203 Cal. 106, 263 P. 1017, 1019; McKay v. Lauriston, 204 Cal. 557, 269 P. 519; Siberell v. Siberell, 214 Cal. 767, 7 P.(2d) 1003. It is with this latter change that we are here concerned, and with respect thereto the Supreme Court in the Estate of Phillips, supra, said: "It is clear that said section 1401, as amended in 1923, in so far as it provides that the wife in case of the death of her husband intestate shall inherit the half of the community property which was subject to his testamentary disposition, is a statute of descent and succession, or a rule of inheritance." And in amplification of the foregoing statement the court goes on to point out that under the law of succession, as it stood prior to the amendment of 1923, the husband's half of the community property remaining undisposed of at the time of his death, went to his descendants, and not to his surviving wife; and that under the law of succession as changed by the amendment of 1923, the husband's share of the community property remaining undisposed of at the time of his death goes to his surviving wife and not to his descendants. Nowhere, however, as appellant seems to contend, does the amended Code section purport to vest in the wife, during the lifetime of the husband, any additional ownership in his share of the community property, nor give to her any right of control thereover. It will be seen, therefore, that the enactment of said amended section in no way affected the power of the husband, as it theretofore existed under the doctrine of the Spreckels and Dargie Cases, supra, to make a valid gift of his share of the community property to take effect upon his death. In other words, the fact that by virtue of said amended section the surviving wife is substituted for the husband's descendants as inheriting heir to his share of the community property remaining undisposed of at the time of his death places her in no better position to assail the validity of the husband's gift of his share of the community property, after his death, than his descendants would have been in, under the rule of the Spreckels and Dargie Cases, if such substitution had not been made. Moreover, it is evident that if appellant's theory of the law were adopted, a husband would be precluded entirely from making any provision for his children out of his share of the community property, by way of life insurance, unless his wife consented thereto, or unless in addition to designating his children as beneficiaries in the policy, he confirmed the inchoate gift thus made to them by executing a will to that effect. We do not believe that such was intended to be the law.

Appellant's position in this matter doubtless finds support in the last sentence of section 24 of the treatise on community property in the 1930 supplement to California Jurisprudence; also in a single paragraph in the decision in Modern Woodmen of America v. Gray, 113 Cal. App. 729, 299 P. 754, which apparently was based on the comment made in California Jurisprudence. In this regard the author of the treatise says: "The widow, therefore, under the rule of succession prior to 1923 would take at least one-half of such proceeds notwithstanding the special contract with the insurance company (citing Civ. Code, §§ 1401, 1402). Since 1923, if the reasoning in New York Life Ins. Co. v. Bank of Italy is to prevail, she should receive all of such proceeds." Section 24 of said treatise. The "reasoning" of the New York Life Ins. Co. Case upon which the author bases the foregoing conclusion is not particularized in the treatise; nor is any authority cited in support of the conclusion except California Law Review, wherein the same author severely criticised the decision in the New York Life Ins. Co. Case, supra. Whether or not such criticism was justified is wholly unimportant at this time, however, because by judicial process the doctrine of the New York Life Ins. Co. Case, supra, has long since become the well settled law of this state. The Supreme Court denied a hearing of the appeal before that court; and as indicated, since then the decision has been cited and quoted approvingly in a number of cases, the last one being Dixon Lumber Co. v. Peacock (Cal. Sup.) 19 P.(2d) 233, 234, wherein the court said: "It has been determined that an insurance policy in legal contemplation is property and that the proceeds of a policy, the premiums on which have been paid from the community, are community property. New York Life Ins. Co. v. Bank of Italy, 60 Cal. App. 602, 214 P. 61; Blethen v. Pacific Mutual Life Ins. Co., 198 Cal. 91, 243 P. 431. It has also been held while the insured may have the right, by contract with the company, to change the beneficiary in such a policy without the wife's consent where she is originally named as such, yet any such change without her consent and without a valuable consideration is voidable as to her, as she may maintain an action after his death to recover her one-half of the community. New York Life Ins. Co. v. Bank of Italy, supra, and Blethen v. Pacific Mutual Life Ins. Co., supra." Furthermore, a careful analysis of the decision in the New York Life Ins. Co. Case fails to disclose any reasoning which in our opinion warrants the conclusion that since 1923 the surviving wife is entitled to all the proceeds of a life insurance policy issued and paid for under the circumstances present in that case. Consequently we are unable to subscribe to such conclusion, or to follow the dictum to that effect in the case of Modern Woodmen of America v. Gray, supra.

The form of judgment entered in the present case, however, requires modification. Pursuant to stipulation of appellant's counsel and in accordance with the prayer of appellant's answer, the trial court awarded appellant's half of the proceeds of said policies to her as administratrix, etc.; whereas, under the authorities above cited she is doubtless entitled to the same in her own right, without qualification, as her share of the community assets. Therefore, to that extent the judgment is modified, and as thus modified it will stand affirmed, respondents to recover their costs of appeal.

We concur: TYLER, P. J.; CASHIN, J.